

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-13-166
)	
HAWAII GOVERNMENT EMPLOYEES)	DECISION NO. 401
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	FINDINGS OF FACT, CON-
)	CLUSIONS OF LAW, AND
Complainant,)	ORDER
)	
and)	
)	
JOHN WAIHEE, Governor of the)	
State of Hawaii and DEPARTMENT)	
OF LAND AND NATURAL RESOURCES,)	
State of Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On June 24, 1992, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union), filed a prohibited practice complaint against JOHN WAIHEE, Governor of the State of Hawaii and the DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR), State of Hawaii, with the Hawaii Labor Relations Board (Board). HGEA alleges that DLNR violated Sections 89-13(a)(1), (7), and (8), Hawaii Revised Statutes (HRS), by refusing to provide information relevant to the discipline of employee Kathleen Lassiter (Lassiter).

After a number of conferences with the Board and unsuccessful attempts to settle the matter on February 11, 1994, the parties agreed to submit the case to the Board on stipulated facts and memorandums of law to be filed by March 31, 1994.

Stipulated facts and memorandums of law by each party were filed on March 31, 1994.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 13 as set forth in Section 89-6, HRS.

JOHN WAIHEE and the DLNR were at all times relevant herein, the public employer or representative of the public employer as defined in Section 89-2, HRS.

Lassiter is employed by the DLNR as the coordinator of the Wailoa Center, Hilo, Hawaii and is a member of bargaining unit 13. As coordinator, Lassiter was in charge and responsible for all activities at the Wailoa Center.

The Wailoa Center is a State facility operated by the DLNR. One of its functions is to present art shows and exhibits.

Since November 2, 1987 Lassiter was supervised by and reported directly to Charles Supe (Supe), District Park Superintendent, Hawaii Parks Section, Resources Management Branch, State Parks Division of the DLNR.

Prior to April 1990, the "Wailoa Center Policies and Procedures" provided that money transactions be handled as follows:

MONEY TRANSACTIONS

1. Unless cleared by DLNR Board action in accordance with Title 13, Chapter 145, Section 66, no commercial activities are permitted on the premises. Commercial

activities include all aspects of buying and selling.

- a. When an approved commercial permit is in effect and money is collected at the center the permittee will collect all monies and will be guided by any and all conditions of the permit.
- b. No State park employee or volunteer will receive and/or handle any monies for any organization or individual who has a valid commercial permit to sell his work at the Wailoa Center.
- c. If any monies are due to the Wailoa Center, those monies will be deposited into a DLNR (State Parks) bank account and will be subject to audit any time. All expenses and deposits will be entered on a ledger.

After April 1990, the policy relating to money transactions remained identical except for a change to the rules cited in the policy. Chapter 146 of Title 13, rather than Chapter 145 is cited.

Between 1988 and 1990, Supe became aware of a number of incidents which led him to believe that DLNR rules regarding commercial activities and handling of monies at the Wailoa Center were being violated. The latest incident involved, "The First Annual Hawaii Island Arts Show" (Arts Show), sponsored by the Center and the Japanese Chamber of Commerce (JCC) and held at the Wailoa Center from July 11 to August 15, 1990.

On July 11, 1990, Supe and Lassiter had a telephone conversation regarding the Arts Show during which Lassiter informed Supe that an artist would be going to Supe's office to file a complaint and request an entry fee refund since his art piece was not selected to be displayed at the show. Lassiter further

informed Supe that refunds were not allowed because entry fees were non-refundable pursuant to the disclosure on the Arts Show application forms. Supe asked Lassiter why artists would be going to the Wailoa Center for refunds when the JCC collected the entry fees and requested that Lassiter refer the artist to the JCC.

On July 13, 1990, Supe met with Lassiter and during the course of the meeting Lassiter told Supe that a \$20.00 fee was assessed against artists who desired to exhibit their art work at the Arts Show and that all applications and fees were collected by a representative of the JCC and no Wailoa Center personnel were involved in the collection of monies.

Between July 12 and September 25, 1990, Supe conducted his own informal investigation regarding operations of the Wailoa Center. The investigation included a telephone conversation with a representative of the JCC wherein Supe asked the representative if Lassiter collected the entry fees for the Arts Show and was informed that Lassiter handled all matters for the JCC. Further, on August 29, 1990, Supe recovered from the office of the Wailoa Center, 96 checks each made payable to the Wailoa Center, in the amount of \$20.00 and dated early July 1990. He also recovered six receipts documenting the purchase of various art works.

On November 5, 1990, William W. Paty (Paty), Chairperson of the Board of Land and Natural Resources wrote to Attorney General Warren Price, requesting that the Attorney General's office investigate the propriety of the Arts Show monies collected at the Wailoa Center.

Beginning in February, 1991, Attorney General investigators met and interviewed various persons, including Lassiter, as part of the investigation. On June 24, 1991, the Attorney General's office issued a report on its investigative findings to Paty.

On July 15, 1991, Ralston H. Nagata (Nagata), the State Parks Administrator of the DLNR sent a certified letter to Lassiter, informing her, inter alia, that certain violations of the DLNR administrative rules had been committed and that a meeting would be held on July 23, 1991 to discuss the findings with Lassiter. The meeting was attended by Lassiter, Ralph Boyea, Lassiter's Union representative, Nagata and Supe. Lassiter was informed by Nagata that the meeting was disciplinary in nature and that Lassiter would not be allowed to review the Attorney General's June 24, 1991 report because relevant information had already been provided to her in the July 16, 1991 letter.

By a memorandum dated August 29, 1991 Nagata informed Lassiter that the Attorney General's investigation did not discover any activity to pursue through legal means but the DLNR concluded that:

1. You improperly collected monies at a State Park facility, specifically regarding the collection of entry fees at the July, 1990 'The First Annual Hawaii Art Show';
2. You allowed unauthorized commercial use and promotional activities to be conducted at a State Park facility relative to the aforementioned event;
3. You failed to comply with our supervisor's instructions regarding collection of monies and restrictions on commercial activities.

The DLNR suspended Lassiter without pay, from September 16 to 18, 1991.

On September 25, 1991, Boyea, on Lassiter's behalf, filed a grievance against the DLNR, alleging that the August 29, 1991 disciplinary action was a violation of the bargaining unit 13 collective bargaining agreement (contract). A second grievance was filed on September 26, 1991 alleging a violation of the contract based upon the DLNR's refusal of a request to provide Lassiter with information regarding the investigation and the grievance.

A third grievance was filed on October 9, 1991 alleging that the DLNR's job performance evaluation of Lassiter for the period of July 1, 1990 to June 30, 1991 violated the contract.

On October 11, 1991, a fourth grievance was filed on behalf of Lassiter alleging that the DLNR improperly exposed Lassiter's Notification of Personnel Action form indicating that Lassiter was suspended for three days in violation of the contract.

Starting on February 26, 1991 and continuing through the period of the filing of the grievances, Boyea made numerous requests for information from the DLNR, including requests for a copy of the Attorney General's investigative report.

On September 27, 1991 Paty wrote to Kathleen Callaghan, Director of the Office of Information Practices (OIP) requesting an opinion regarding the confidentiality of investigative reports (J. Ex. 36). The request referenced Boyea's September 12, 1991 letter requesting information (J. Ex. 33) and requested guidance in identifying the documents which required disclosure.

By memorandum dated October 18, 1991, Hugh Jones (Jones), staff attorney for the OIP, responded to Paty's request by indicating that Section 89-16.5, HRS, reads in pertinent part:

Exclusive representatives shall be allowed access to an employee's personnel records which are relevant to the investigation of a grievance.

Jones further stated that if the records requested are within the scope of Section 89-16.5, HRS, the resolution of the matter is not within the scope of OIP's statutory authority under Section 92F-42, HRS. He advised Paty to request an Attorney General opinion as to whether or not Section 89-16.5, HRS, is applicable to Boyea's request. If the Attorney General determines that Section 89-16.5 is inapplicable to the request, the resolution of Boyea's request must be made with reference to the Uniform Information Practices Act (Modified), Chapter 92F, HRS, and the OIP would have authority to provide an advisory opinion regarding the request.

On March 20, 1992, Boyea wrote to Nagata regarding the grievances filed on September 25, 1991, September 26, 1991, October 9, 1991 and October 11, 1991, and requested the status on the DLNR's request for an opinion regarding the release of the Attorney General's June 24, 1991 investigative report (J. Ex. 53). By letter dated April 22, 1991, Nagata responded to Boyea and informed him that the DLNR would not release the investigative report (J. Ex. 54).

On June 24, 1991, the HGEA filed the instant complaint.

On August 14, 1992, the Respondents provided Complainant with a copy of the June 24, 1991 Attorney General's investigative

report, less portions deemed to contain confidential information (J. Ex. 57).

Subsequently, the parties reached an agreement whereby the Respondent agreed to provide the Board with copies of documents relevant to the grievances and as to those documents deemed confidential, a list identifying each document by its name, date, author, addressee and reason for claiming privilege. The Board would review the documents, in camera, and make a determination of whether or not the documents were privileged (J. Ex. 59).

Pursuant to the agreement, on September 28, 1992 the Respondents provided HGEA with 34 documents which were not previously provided on the basis of privilege. On January 22, 1993, the Respondent's counsel provided the seven documents not provided, identified as Exhibits A to G, to the Board. On March 9, 1993, the parties appeared before the Board and agreed to submit stipulated facts and submit the matter to the Board for determination.

DISCUSSION

The issue in this case is whether the seven documents withheld from the HGEA are privileged and need not be released. The documents are:

1. Exhibit A. Draft memorandum from Nagata to Lassiter regarding list of artists for the Art Show.
2. Exhibit B. Memorandum dated November 5, 1990 from Paty to Attorney General Warren Price requesting an investigation of the operations of Wailoa Center.

3. Exhibit C. Memorandum dated April 17, 1991 from Paty to Price.

4. Exhibit D. Memorandum dated April 17, 1991 from Lawrence Goya, Supervisory Deputy Attorney General, Criminal Justice Division to Johnson H. Wong, Supervisory Attorney General, Land/Transportation Division.

5. Exhibit E. Memorandum dated June 24, 1991 from Goya to Paty regarding the outcome of the Attorney General's investigation.

6. Exhibit F. Memorandum dated November 14, 1991 from Paty to Price requesting an opinion regarding confidentiality of investigative reports.

7. Exhibit G. Letter dated January 21, 1992 from Deputy Attorney General Francis Paul Keeno responding to Paty's request (item 6 above).

According to the stipulated facts submitted to the Board, Exhibit A was withheld by the Employer on the basis that the draft memorandum was finalized in the form of an August 23, 1990 memorandum to Lassiter from Nagata which is in the possession of the HGEA (Stip. No. 31). All of the other documents were withheld on the basis of the attorney-client privilege.

EXHIBIT A

Neither party discusses in their respective memorandums of law the propriety of withholding Document 1 from the HGEA on the basis that it is a draft of a document which in its final form has been provided. Therefore, the Board finds that it is relevant to the grievances and should be provided to the HGEA.

EXHIBITS F AND G

Exhibit F is a request from Paty to the Attorney General requesting a legal opinion and Exhibit G is the opinion in response to the request. The documents are clearly covered by the attorney-client privilege and need not be disclosed.

EXHIBITS B, C, D, AND E

These exhibits all relate to the request from Paty to the Attorney General to conduct an investigation. As to these documents, the Board agrees with the Respondents that an attorney-client relationship existed and that the documents fall within the attorney-client privilege. In addition, Exhibits C and D are essentially inquiry and transmittal memorandums and have no relevance to the grievances. Therefore, the Board finds that Exhibits B, C, and D need not be disclosed.

However, with respect to Exhibit E, the Board concludes that the entire document should be disclosed to the HGEA. Nagata's July 16, 1991 letter to Lassiter (Exhibit 30 attached to the stipulated facts) disclosed a portion of the report from the Attorney General, i.e. , that approximately \$2,950 in entry fees was collected during an art show. Further, Nagata's August 29, 1991 letter to Lassiter (Exhibit 31 attached to the stipulated facts) further revealed that the report "did not discover any activity to pursue through legal means" and that as a result the matter is being dealt with administratively. Finally, in an attempt to settle the dispute, virtually the entire report was voluntarily disclosed to the HGEA. These disclosures effectively waived the privilege under Chapter 626, HRS, Rule 511 of the Hawaii

Rules of Evidence which provides that if voluntary disclosure is made of any significant part of the privileged matter, the privilege is waived.

CONCLUSIONS OF LAW

The Board has jurisdiction of this complaint pursuant to Sections 89-5 and 89-14, HRS.

Exhibit A is relevant to the grievances filed and there is no basis for the Respondents to withhold the document from the HGEA.

Exhibits B, C, D, F and G are covered by the attorney-client privilege and need not be disclosed to the HGEA.


The attorney-client privilege has been waived as to Exhibit E and the entire document should be disclosed to the HGEA.

ORDER

The Respondents shall disclose Exhibit A and the entire contents of Exhibit E to the HGEA.

DATED: Honolulu, Hawaii, September 20, 1999.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO
and JOHN WAIHEE, Governor, State of Hawaii and DEPARTMENT OF LAND
AND NATURAL RESOURCES, State of Hawaii
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