

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-01-301
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	DECISION NO. 406
LOCAL 646, AFL-CIO,	)	
	)	FINDINGS OF FACT, CONCLU-
Complainant,	)	SIONS OF LAW, AND ORDER
	)	
and	)	
	)	
BENJAMIN J. CAYETANO, Governor,	)	
State of Hawaii, et al.,	)	
	)	
Respondents.	)	

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In the Matter of	)	CASE NO. CE-10-302
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	
	)	
Complainant,	)	
	)	
and	)	
	)	
BENJAMIN J. CAYETANO, Governor,	)	
State of Hawaii, et al.,	)	
	)	
Respondents.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 17, 1996, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint on behalf of bargaining unit 01 members against BENJAMIN J. CAYETANO, Governor, State of Hawaii; JAMES TAKUSHI, Director, Department of Human Resources Development (DHRD) of Hawaii; DR. KENNETH MORTIMER, President, University of Hawaii, State of Hawaii; GEORGE IRANON, Director, Department of Public

Safety, State of Hawaii; KAZU HAYASHIDA, Director, Department of Transportation, State of Hawaii; HERMAN AIZAWA, Superintendent, Department of Education, State of Hawaii; LAWRENCE MIIKE, M.D., Director, Department of Health, State of Hawaii; EARL ANZAI, Director, Department of Budget and Finance, State of Hawaii; MARGERY BRONSTER, ESQ., Attorney General, State of Hawaii; SAM CALLEJO, Comptroller, Department of Accounting and General Services, State of Hawaii; DR. SUSAN MEYERS CHANDLER, Director, Department of Human Services, State of Hawaii; RAY KAMIKAWA, Director, Department of Taxation, State of Hawaii; JAMES NAKATANI, Chairperson, Department of Agriculture, State of Hawaii; MAJOR GENERAL EDWARD RICHARDSON, Adjutant General, Department of Defense, State of Hawaii; KALI WATSON, Director, Department of Hawaiian Home Lands, State of Hawaii; and MICHAEL WILSON, Chairperson, Department of Land and Natural Resources, State of Hawaii (collectively Employer or Respondents) with the Hawaii Labor Relations Board (Board) in Case No. CE-01-301. Complainant alleged that the Respondents refused and/or failed to provide the UPW with relevant and necessary information as requested in its March 13, 1996 letter. Thus, Complainant contends that Respondents wilfully violated § 15.09 of the Unit 01 agreement which constitutes a violation of § 89-16, Hawaii Revised Statutes (HRS) and prohibited practices under §§ 89-13(a)(1), (7), and (8), HRS.

On the same day, the UPW filed a similar complaint with the Board in Case No. CE-10-302 against the same Respondents on behalf of bargaining unit 10 members alleging violations of the bargaining unit 10 agreement and §§ 89-13(a)(1), (7), and (8), HRS.

The Board consolidated the cases for disposition pursuant to the UPW's motion in Order No. 1332, dated May 16, 1996.

On June 12, 1996, Respondents, by and through their counsel, filed a motion to dismiss the complaints with the Board contending that the Hawaii Government Employees Association, the University of Hawaii Professional Assembly, the Hawaii State Teachers Association, the Hawaii Fire Fighters Association, and the State of Hawaii Organization of Police Officers are indispensable parties to the present action. Respondents contended that the complaint should be dismissed because the Union failed to join the other unions in the complaint. In addition, Respondents contended that they were willing to provide the information in a summary fashion without disclosing the names of employees but the UPW requested the actual documents reflecting disciplinary actions which would adversely affect the privacy rights of the employees. Respondents also alleged that the information sought was not relevant or needed to process or investigate a specific grievance.

On June 14, 1996, the UPW filed a memorandum in opposition to the Respondents' motion to dismiss the complaint. The UPW contended that the Union had six pending discharge cases at the time of its request and the Employer did not challenge the relevance or materiality of its request.

In Order No. 1543, dated October 23, 1997, the Board denied Respondents' motion to dismiss the complaint finding, inter alia, that the other unions were not indispensable parties to the instant complaint.

The Board conducted hearings on the complaint on November 7, 1997, January 20, 1998, and January 27, 1998. On



January 20, 1998, the UPW filed a motion to amend its complaint to add a violation of § 89-13(a)(5), HRS, to its claim. The Board granted the UPW's motion to amend its complaint. The parties were afforded full opportunity to present evidence and argument to the Board. The parties filed written briefs with the Board on March 8, 1998.

In Order No. 1773, dated September 16, 1999, the Board directed the Respondents to submit a proposed order to the Board reflecting the Board's ruling in the case. Respondents filed their proposed order with the Board on December 15, 1999. On December 21, 1999, Complainant filed its objections to Respondents' proposed order with the Board.

Based upon thorough review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.<sup>1</sup>

#### FINDINGS OF FACT

The UPW is the exclusive bargaining representative, as defined in § 89-2, HRS, of employees in bargaining units 01 and 10.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and is an employer as defined in § 89-2, HRS.

Respondents JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii; DR. KENNETH MORTIMER, President, University of Hawaii, State of Hawaii; GEORGE IRANON, Director, Department of Public Safety, State of Hawaii;

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<sup>1</sup>After considering Complainant's objections to the proposed order submitted by Respondents, the Board has adopted those proposed findings of fact and conclusions of law which support its decision in this case and has modified the proposed order submitted by Respondents accordingly.

KAZU HAYASHIDA, Director, Department of Transportation, State of Hawaii; HERMAN AIZAWA, Superintendent, Department of Education, State of Hawaii; LAWRENCE MIIKE, M.D., Director, Department of Health, State of Hawaii; EARL ANZAI, Director, Department of Budget and Finance, State of Hawaii; MARGERY BRONSTER, ESQ., Attorney General, State of Hawaii; SAM CALLEJO, Comptroller, Department of Accounting and General Services, State of Hawaii; DR. SUSAN MEYERS CHANDLER, Director, Department of Human Services, State of Hawaii; RAY KAMIKAWA, Director, Department of Taxation, State of Hawaii; JAMES NAKATANI, Chairperson, Department of Agriculture, State of Hawaii; MAJOR GENERAL EDWARD RICHARDSON, Adjutant General, Department of Defense, State of Hawaii; KALI WATSON, Director, Department of Hawaiian Home Lands, State of Hawaii; and MICHAEL WILSON, Chairperson, Department of Land and Natural Resources, State of Hawaii, are department heads and employers within the meaning of § 89-2, HRS.

The UPW and the State of Hawaii are parties to multi-employer collective bargaining agreements covering nonsupervisory employees in blue-collar positions included in bargaining unit 01 and institutional, health and correctional workers of the State of Hawaii who are included in bargaining unit 10, respectively.

At all times relevant herein, the terms and provisions of the Units 01 and 10 collective bargaining agreements were in effect and binding on the parties.

By letters dated December 29, 1995, Gary W. Rodrigues (Rodrigues), UPW State Director, requested each State department head to provide copies of personnel action forms, SF-5 forms, for

all employees identified on a list previously provided to the UPW.

The letter states:

Pursuant to Section 15.09, we hereby request that you provide a true and accurate copy of the SF-5 forms of all employees who have been identified in the enclosed list provided by Mr. Young recently in connection with HLRB's order.

Enclosed is a copy of the document Mr. Young transmitted.

Please provide the information within the time frame set forth in Section 15.09.

Failure to act promptly will result in appropriate enforcement. Thank you.

The request cited § 15.09 of the Units 01 and 10 contracts as authority for the request.

Section 15.09 of the Units 01 and 10 contracts provides as follows:

Any information in the possession of the Employer which is needed by the grieving party to investigate and process a grievance, shall be photocopied and given to the grieving party within five (5) working days of the grieving party's request for such information, provided that the Employer shall have the option to (a) photocopy and give the material requested to the grieving party within the 5-working day period, or (b) make the material requested available to the grieving party within the 5-working day period for the purpose of photocopying or review by the grieving party for three (3) working days on the condition that the grieving party agrees to sign out and be fully responsible for the material until it is returned.

By letter dated January 4, 1996, the Employer responded to Rodrigues' letter stating, in part:

Your December 29, 1995 request for information was received the afternoon of January 2, 1995. Our response is provided below:



#### **Section 15.09**

This section of the Unit 01 Agreement refers to information regarding a grieving party. Since the grieving party has not been identified, we are unable to provide the information you are referencing.

#### **Enclosed List**

The "enclosed list" you referenced was not enclosed. We presume that you are referring to the computer printed list Mr. Young transmitted on December 18, 1995. If this is the case, then we need written authorization from employees or their exclusive representative(s) whose positions are not assigned to Units 01 and 10, before copies of their records are provided.

#### **Copies of Forms 5**

The Department of Human Resources Development does not retain copies of Forms 5. They are maintained at each department's personnel office in the employees' official personnel file. The retrieval and copying of some 4,000 plus actions is burdensome and costly. As provided in the collective bargaining agreement we are making the requested material available to you for review at the respective departments. We suggest that you designate an individual in your organization with whom we can work to: (1) identify the specific records you are interested in and (2) schedule the date(s) and time(s) with each department so you would be able to review the employees' official personnel files and copy the Forms 5 for suspension and dismissal actions.

Thereafter, by letter dated March 13, 1996, Rodrigues sent a request for information stating, in part:

As the exclusive bargaining agent for unit 1 and unit 10 employees, the United Public Workers, AFSCME, Local 646, AFL-CIO hereby requests relevant and necessary information in connection with pending grievances relating to the discharge and other disciplinary actions undertaken by State of Hawaii.

In accordance with Section 15.09 of the unit 1 and unit 10 agreements we hereby request that you provide a true and accurate copy of SF-5 forms and all letters of disciplinary actions taken from 1/1/75 to the present against employees of your department. The Department

of Human Resources Development has provided us a partial listing of affected "employees" in connection with proceedings now pending before HLRB in case number CE-10-272, DHRD has asked us to make the specific request for information on a departmental basis.

Section 15.09 requires that the information be provided within five working days of the request.

If you fail to transmit the requested information we will be compelled to file prohibited practices for violations of HRS Sections 89-16, 89-13(a)(7), and 89-13(a)(8).

Enclosed is a listing of current pending disciplinary cases and a copy of the listing of departmental employees who have been suspended or discharged according to DHRD records.

By letter dated March 19, 1996, the DHRD Director responded to Rodrigues stating:

We are responding on behalf of all state departments and agencies which received your March 13, 1996, letter requesting derogatory materials and SF-5's reflecting disciplinary actions taken since 1975, pursuant to Section 15.09 of the Units 01 and 10 agreements.

We have already provided you a computer printed list identifying employees who were the subject of disciplinary actions since 1975. These employees may request the review and expungement of materials related to the disciplinary actions identified on the computer printed list pursuant to the provisions of Section 17.03 of the contract and Section 14-11-6 of the personnel rules, as applicable.

We also reiterate our January 4, 1996 (copy attached) offer to make the requested material available to you or your designated representative for review at the respective departments. Copying arrangements can be worked out with each department and depending on the amount to be copied we may be able to provide some reproduction resources.



Your staff may contact each of the personnel offices directly to arrange the time and place for the document review.

By letter dated April 1, 1996, UPW's counsel informed Respondents' counsel that since the State is the employer and prior disciplinary actions are relevant to pending cases regardless of bargaining unit the Union believed that the request for information applied to all prior cases regardless of bargaining units. In addition, the UPW contended that § 89-16.5, HRS,<sup>2</sup> did not require the UPW to obtain written authorizations from employees in order to have access to records.

Respondents did not provide the information requested by the Union nor permit access to the information as represented by TAKUSHI. The UPW representatives contacted the various departmental personnel offices but no SF-5 forms or disciplinary letters for non-UPW employees were made available for copying. Rodrigues admitted that no department refused to provide his business agents access to the UPW employees' records.

#### DISCUSSION

The UPW contends that the Respondents refused to provide the information requested by the Union and therefore violated §§ 89-13(a)(1), (5), (7), and (8), HRS, which provide as follows:

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<sup>2</sup>Section 89-16.5, HRS, provides as follows:

**Access to personal records by an employee organization.** Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained.

**Prohibited practices; evidence of bad faith.** (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

\* \* \*

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

\* \* \*

- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement; . . .

The Union contends that Respondents are required, under the applicable contract provision as well as the statutory duty to bargain in good faith to provide the information requested by the Union in order to investigate and process its grievances. The UPW contends that at the time the information was requested, there were 135 pending grievances over disciplinary actions. The Union also contends that the information requested is necessary and relevant because in recent arbitrations the records of prior disciplinary actions were provided by the employer and were instrumental in establishing that the disciplinary actions were not supported by just cause. The Union argues that the Employer did not object to the relevance of the information but rather required the Union to obtain the authorization of affected employees. The Union further contends that the Employer's behavior is especially egregious because four years of disciplinary information of a similar nature was provided to a newspaper upon its request.

The Employer contends that § 89-16.5, HRS, does not authorize the UPW access to all personal and personnel records of employees from different bargaining units. The Employer also contends that pursuant to both § 89-16.5, HRS and § 15.09 of the applicable contract, access to the information requested by the Union is contingent upon whether the information requested is relevant or needed to process or investigate a grievance. In any event, the Employer argues that it chose to make the material available to the Union rather than provide copies of the requested material. The Employer also contends that on December 29, 1995, the UPW requested SF-5 forms of all employees identified in a list and was not limited to disciplinary actions. Thereafter, on March 13, 1995, the UPW requested each State department to produce SF-5 forms and all letters of disciplinary actions taken from 1/1/75 to the present against employees of the department. The Employer thus contends that the Union's requests for information were overly broad and that the Employer did not commit prohibited practices as alleged by the Union.

Section 15.09 of the contract "provides for a grievance procedure 'discovery process.'" Department of Transportation, State of Hawaii, Grievance of Wanda Wong (Tsukiyama, 7/23/85). The language of § 15.09 "is intended at least partly to fulfill the function of subpoena duces tecum." UPW v. Department of Transportation, State of Hawaii, Grievance of Larry Alao (Conklin, 5/9/83).

If § 15.09 is a form of discovery, then like all discovery, relevance is required under Rule 26(b) of both the Hawaii Rules of Civil Procedure and the Federal Rules of Civil



Procedure. "A general limitation on the right of discovery is that the information sought must be relevant to the subject matter involved in the pending action." Lothspeich v. Sam Fong, 6 Haw.App. 118, 122, 711 P.2d 1310 (1985). Relevance is required under the collective bargaining agreements as well. Virginia Sanderson, 3 HPERB 25 (1982) and see Matter of HGEA, Order No. 1374, (October 17, 1996).

The Union contends that the Employer never raised the issue of relevance and argues that the information requested is necessary to process grievances involving disciplinary actions. The Union contends that it must be able to have prior disciplinary records to assess, on a rational basis, whether there has been disparate treatment of disciplined grievant bargaining unit members and whether such disparate treatment warrants proceeding to arbitration.

In this case, the Employer did not contest the issue of relevance. Rather the Employer agreed to provide the Union with access to the information pursuant to § 15.09 of the collective bargaining agreement. Even if the Employer did not specifically challenge the breadth of the UPW's information request in this instance, the Employer contends and the Board agrees that it may consider the scope of the Union's request in determining whether the Employer committed the prohibited practices alleged here. In this case, the Board finds that notwithstanding the pending grievances arising from disciplinary actions, the UPW's blanket requests for SF-5 forms and disciplinary letters for employees dating back 25 years to January 1, 1975 in each department is overly broad in scope and not related to the specific grievances

being investigated or processed. While the Board appreciates the Union's argument that past disciplinary actions proved to be significant in recent arbitrations to establish disparate treatment, there must be some nexus or factual connection with either the type of misconduct involved and the degree of discipline imposed. Here, the Board finds that the UPW's blanket request for forms and disciplinary letters in personnel files dating back 20-25 years for unspecified misconduct was too broad and the Employer did not commit a prohibited practice by not complying with the Union's request.

With respect to the issue of whether the Union needs to obtain prior authorization from non-bargaining unit members to access their personal records, § 89-16.5, HRS, only requires notification to the affected employee. Moreover, nothing in the legislative history of that provision suggests that prior permission is required or that access is limited to only the Union members' records.

#### CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to §§ 89-5, 89-13, and 89-14, HRS.

An employer commits a prohibited practice in violation of § 89-13(a)(1), HRS, by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89, HRS.

An employer commits a prohibited practice in violation of § 89-13(a)(5), HRS, when it refuses to bargain in good faith with the exclusive representative as required in § 89-9, HRS.

An employer commits a prohibited practice complaint in violation of §§ 89-13(a)(7) and (8), HRS, when it refuses to comply with any provision of Chapter 89 or violates the terms of the collective bargaining agreement, respectively.

The Union failed to prove that the Employer interfered with or restrained the rights of bargaining units 01 and 10 employees; refused to bargain in good faith as required by § 89-9, HRS; refused to comply with a provision of Chapter 89, HRS, and violated any term of the applicable collective bargaining agreement when the Union's request for information was overly broad and was not reasonably related to the facts of any specific grievance.

ORDER

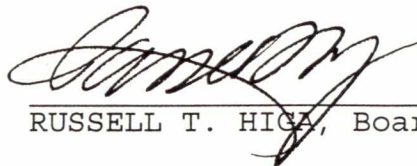
The prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, March 17, 2000.

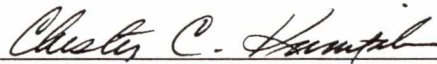
HAWAII LABOR RELATIONS BOARD



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