

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NOS.:	CE-02-156a
	)		CE-03-156b
HAWAII GOVERNMENT EMPLOYEES	)		CE-04-156c
ASSOCIATION, AFSCME, LOCAL 152,	)		CE-08-156d
AFL-CIO,	)		CE-09-156e
	)		CE-13-156f
Complainant,	)		
	)	ORDER NO. 1098	
and	)		
	)	ORDER GRANTING IN PART, AND	
BOARD OF REGENTS, University	)	DENYING IN PART, RESPONDENTS'	
of Hawaii and JOHN WAIHEE,	)	MOTION TO DISMISS	
Governor, State of Hawaii,	)		
	)		
Respondents.	)		
_____	)		

ORDER GRANTING IN PART, AND DENYING IN PART,  
RESPONDENTS' MOTION TO DISMISS

On March 12, 1991, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents BOARD OF REGENTS, University of Hawaii (BOR) and JOHN WAIHEE, Governor, State of Hawaii (WAIHEE) (collectively Employer).

HGEA alleged that on or about January 3, 1991, the BOR, by its agent, then University of Hawaii (UH) President Albert Simone, announced that the BOR would disclose the names of employees accused of or disciplined for allegedly engaging in sexual harassment, as well as the nature of the charges. HGEA alleged that the Employer, by the BOR's actions, unilaterally breached the collective bargaining agreements then in effect covering employees in bargaining units 02, 03, 04, 08, 09 and 13,

on grounds that each of said agreements contained a provision requiring the Employer to keep all disciplinary matters, whether verbal or written, confidential and private. HGEA further alleged that the subject of discipline of employees is a negotiable matter and that the Employer failed to negotiate over the new disclosure policy. Consequently, HGEA alleged that the Employer violated §§ 89-13(a)(5) and 89-13(a)(8), Hawaii Revised Statutes (HRS).

Based upon a thorough review of the record, the Board finds that the instant case arose under the following circumstances.

On February 26, 1990, the Office of Information Practices (OIP) issued Opinion No. 90-12 which concluded that under the Uniform Information Practices Act (Modified) (UIPA), Chapter 92F, HRS, UH "must disclose the fact that a 'formal' charge or complaint has been filed, the name of the agency employee against whom that complaint has been lodged, and disciplinary action taken in response to the formal charge, if any." OIP Opinion No. 90-12, p. 2. Thereafter, on March 5, 1990, President Simone, requested a further clarification of OIP Opinion No. 90-12 from then Attorney General Warren Price, III.

By letter dated December 28, 1990, the Attorney General informed President Simone that there was no clear error in the OIP Opinion. President Simone's additional questions were forwarded to the OIP for determination of corollary issues.

On December 31, 1990, the OIP issued a second opinion, Opinion No. 90-39, which advised that UH may not enter into an agreement which prohibits the disclosure of a formal charge or

complaint. The opinion also determined that § 89-19, HRS, did not take precedence over the UIPA. The opinion concluded that the names of faculty members against whom formal charges have been filed, and any discipline imposed, must be disclosed.

Based upon the two opinion letters from the OIP and the letter from the Attorney General, President Simone concluded that Chapter 92F, HRS, required the disclosure of the information specified by the OIP. President Simone further concluded that since the release of information was compelled by Chapter 92F, HRS, there was nothing to negotiate between the parties.

On or about January 3, 1991, President Simone announced that the Employer would comply with the provisions of Chapter 92F, HRS, as interpreted by the OIP, and would release the specified information on or about January 11, 1993. President Simone also sent written notices to UH employees who had formal sexual harassment charges filed against them, providing them with an opportunity to seek judicial relief prior to public disclosure.

Thereafter, HGEA filed a Complaint and Motion for Temporary Restraining Order in the Circuit Court of the First Circuit, State of Hawaii, in Hawaii Government Employees' Association, AFSCME Local 152, AFL-CIO vs. University of Hawaii, et al., Civil No. 91-0074-01. Following a hearing on said motion, Circuit Court Judge Philip T. Chun issued a temporary restraining order which prevented the Employer from releasing information concerning sexual harassment complaints involving UH employees.

Subsequently, HGEA filed a motion for preliminary injunction in Civil No. 91-0074-01. Circuit Court Judge Marie N.

Milks held a hearing on the motion on January 25, 1991. On February 7, 1991, Judge Milks entered and filed an order granting HGEA's motion for preliminary injunction. In its order, the Court, pending final judgment, enjoined UH and President Simone from publicly disclosing the names of any member of HGEA formally charged or disciplined under UH's sexual harassment policy.

In the instant case, on May 26, 1992, HGEA filed a motion for summary judgment on grounds that the Employer violated §§ 89-13(a)(5) and 89-13(a)(8), HRS, by unilaterally rescinding and changing material terms and provisions in the aforementioned collective bargaining agreements without first bargaining and reaching agreement with HGEA regarding the changes and rescissions. HGEA argued that pursuant to Board Order No. 869, Order Granting Motion for Partial Summary Judgment, issued on March 23, 1992 in Case No. CE-07-152, University of Hawaii Professional Assembly (UHPA) and Board of Regents, University of Hawaii (the UHPA case), the Employer violated § 89-13(a)(5), HRS, by unilaterally changing the terms and conditions of employment of UH employees represented by HGEA without first bargaining over the changes. In addition, HGEA argued that the Employer violated § 89-13(a)(8), HRS, by breaching the privacy and confidentiality provisions concerning disciplinary actions provided for in the HGEA collective bargaining agreements.

On June 19, 1992, the Employer filed a memorandum in opposition to HGEA's motion for summary judgment. The Employer contended that no violation of §§ 89-13(a)(5) and 89-13(a)(8), HRS, occurred because release of certain information concerning sexual

harassment complaints filed against UH employees was required pursuant to Chapter 92F, HRS, as interpreted by the OIP. Specifically, the Employer argued that Chapter 92F, HRS, as interpreted by OIP, superseded the "confidentiality" provisions of the various collective bargaining agreements at issue. Moreover, the Employer argued that the provisions of the various collective bargaining agreements differ and that confidentiality as to disciplinary actions is limited.

On July 10, 1992, HGEA filed a reply to the Employer's memorandum in opposition to HGEA's motion for summary judgment. Thereafter, on July 14, 1992, the Board held a hearing on HGEA's motion for summary judgment.

On July 31, 1992, HGEA filed a supplemental memorandum in support of its motion for summary judgment. In its supplemental memorandum, HGEA addressed the Employer's "wilfulness" arguments which were raised at the July 14, 1992 hearing. Also, on July 31, 1992, the Employer filed a supplemental memorandum in opposition to HGEA's motion for summary judgment.

Subsequently, on August 4, 1993, HGEA filed a motion to consolidate the instant complaint with the UHPA case which was also pending before the Board. HGEA contended that the allegations in both cases arose from the same unilateral implementation of the policy regarding disclosure of the names of employees accused of sexual harassment. HGEA's motion was also supported by an affidavit from UHPA's counsel. On August 11, 1993, the Employer filed a statement of no position concerning HGEA's motion to consolidate the two cases.

Thereafter, on September 28, 1993, the Employer filed a motion to dismiss the instant complaint with prejudice. The Employer asserted that the complaint is moot because there is no actual controversy for the Board to consider. Specifically, the Employer argued that HGEA's complaint should be dismissed because Act 191, Session Laws of Hawaii 1993, renders HGEA's complaint moot. In addition, the Employer indicated that as a result of the Governor's approval of Act 191, HGEA's Circuit Court case was in the process of being settled.

On October 19, 1993, HGEA filed a memorandum in opposition to the Employer's motion to dismiss. HGEA argued that neither Act 191 nor the settlement agreement in principle between HGEA and the Employer renders the complaint moot. Moreover, HGEA argued that if this matter is dismissed on the basis of mootness, the dismissal should be without prejudice.

On October 22, 1993, HGEA filed a motion to amend the instant complaint to add a provision which requests the Board to issue a declaratory ruling concerning the applicability of Chapter 89, HRS. Thereafter, on November 15, 1993, the Employer filed a memorandum in opposition to HGEA's motion to amend its complaint.

On November 16, 1993, the Employer filed a reply to HGEA's memorandum in opposition to the Employer's motion to dismiss. On November 22, 1993, the Board held a hearing on the motion to dismiss.

At the outset, the Board hereby denies HGEA's motion to consolidate the instant complaint with the UHPA case. Although both cases involve substantially the same issues, the cases involve

different contracts and different exclusive representatives. Therefore, the Board finds that consolidation of the cases would not be conducive to the proper dispatch of business and the ends of justice.

With respect to the Employer's motion to dismiss, the Board makes the following findings.

Complainant HGEA is the certified exclusive representative of employees in bargaining units 02 (Supervisory employees in blue collar positions); 03 (Nonsupervisory employees in white collar positions); 04 (Supervisory employees in white collar positions); 08 (Personnel of the University of Hawaii and the community college system, other than faculty); 09 (Registered professional nurses); and 13 (Professional and scientific employees, other than registered professional nurses).

Respondent WAIHEE is the Governor of the State of Hawaii and a public employer, within the meaning of § 89-2, HRS, of certain employees in bargaining units 02, 03, 04, 09 and 13.

Respondent BOR is a public employer, within the meaning of § 89-2, HRS, of certain employees in bargaining unit 08.

HGEA and WAIHEE were at all relevant times parties to collective bargaining agreements covering employees in bargaining units 02, 03, 04, 09 and 13.

HGEA and BOR were at all relevant times parties to a collective bargaining agreement covering employees in bargaining unit 08.

The Units 02, 03, 04 and 13 collective bargaining agreements provide that "[d]isciplinary action taken against any

Employee in writing shall be considered confidential" and "[w]hen an Employee is orally reprimanded, it shall be done privately."

Article 15 of the Unit 08 collective bargaining agreement provides that "[n]otice of disciplinary action taken against any Employee shall be in writing and confidential" and "[w]hen an Employee is orally reprimanded it shall be done privately."

The Unit 09 collective bargaining agreement does not specifically contain a confidentiality provision. However, Article 3 of the Unit 09 collective bargaining agreement provides:

[e]xcept as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and civil service rules and regulations and statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.

Based upon a thorough review of the record, the Board finds that the law upon which the instant complaint is premised has changed substantially and therefore, the instant complaint is moot. Consequently, with respect to this basis of the Employer's motion to dismiss, the Board hereby dismisses the instant complaint.

Specifically, at the time the instant complaint was filed, § 92F-14(b)(4), Hawaii Revised Statutes (HRS), provided as follows:

**§92F-14 Clearly unwarranted invasion of personal privacy.**

\* \* \*

(b) The following are examples of information in which the individual has a significant privacy interest:

\* \* \*



- (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken . . . .  
(Emphasis added.)

Subsequently, Act 191, Session Laws of Hawaii 1993, amended § 92F-14(b)(4), HRS, to read as follows:

**§92F-14 Clearly unwarranted invasion of personal privacy.**

\* \* \*

(b) The following are examples of information in which the individual has a significant privacy interest:

\* \* \*

- (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

- (i) The name of the employee;
- (ii) The nature of the employment related misconduct;
- (iii) The agency's summary of the allegations of misconduct;
- (iv) Findings of fact and conclusions of law; and
- (v) The disciplinary action taken by the agency; when the following has occurred:

the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; . . . .  
(Emphasis added.)

The Board finds that the Employer's actions in announcing its intent to release specified information to the public relating to sexual harassment complaints filed against certain UH employees was based on the OIP's interpretation of § 92F-14(b)(4), HRS, prior to the 1993 amendment. OIP's analysis focused on the release of information in connection with "any formal charges" against an employee. This language was subsequently eliminated by Act 191 and replaced with a procedure that provides for the disclosure of certain information in instances of employment misconduct that result in an employee's suspension or discharge. Therefore, it appears that the Employer is no longer compelled to release information concerning sexual harassment complaints filed against UH employees. In this regard, the Employer indicates that it never actually released any information concerning any sexual harassment complaint.

While HGEA contends that the disclosure of disciplinary information at any time would constitute a breach of the subject collective bargaining agreements, there is no evidence to indicate that any UH employee is threatened with the release of such information under Chapter 92F, as amended. Consequently, the Board

finds that no actual case or controversy currently exists with respect to the instant complaint.

Based upon the foregoing, the Board concludes that HGEA's allegation that the Employer violated §§ 89-13(a)(5) and 89-13(a)(8), HRS, is moot. Accordingly, the Board hereby dismisses the instant complaint.

In view of the Board's dismissal of the instant complaint on the basis of mootness, the Board need not address HGEA's motion for summary judgment.

Also in view of the foregoing ruling, the Board in its discretion hereby denies HGEA's motion to amend its complaint, but denies the Employer's request to dismiss the instant case with prejudice so as to allow the parties to raise the issues in this complaint at a later date, if necessary.

ORDER

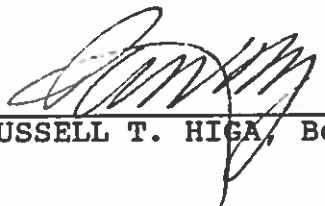
The instant prohibited practice complaint is dismissed without prejudice.

DATED: Honolulu, Hawaii, August 18, 1994.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO  
and BOARD OF REGENTS, University of Hawaii and JOHN WAIHEE,  
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DISMISS

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