

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

|                                  |   |                             |
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| In the Matter of                 | ) | CASE NO. CE-09-205          |
|                                  | ) |                             |
| HAWAII GOVERNMENT EMPLOYEES      | ) | ORDER NO. 1154              |
| ASSOCIATION, AFSCME LOCAL 152,   | ) |                             |
| AFL-CIO,                         | ) | ORDER GRANTING RESPONDENTS' |
|                                  | ) | MOTION FOR SUMMARY JUDGMENT |
| Complainant,                     | ) |                             |
|                                  | ) |                             |
| and                              | ) |                             |
|                                  | ) |                             |
| JOHN D. WAIHEE, III, Governor,   | ) |                             |
| State of Hawaii and SONIA        | ) |                             |
| BUMANGLAG-FREITAS, Department of | ) |                             |
| Health, State of Hawaii,         | ) |                             |
|                                  | ) |                             |
| Respondents.                     | ) |                             |

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ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

On January 24, 1994, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA), by and through its attorney, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents JOHN D. WAIHEE, III, Governor, State of Hawaii and SONIA BUMANGLAG-FREITAS, Department of Health, State of Hawaii (collectively Employer).

The HGEA alleges that Nurse Rebecca Clark (Nurse Clark), a bargaining unit 09 employee, was discharged from employment without proper cause. The HGEA further alleges that it sought information from the Employer during the grievance process but was denied the information. The HGEA therefore alleges that the Employer refused to bargain in good faith and violated provisions

of the applicable collective bargaining agreement in violation of §§ 89-13(a)(5) and 89-13(a)(8), Hawaii Revised Statutes (HRS).

On February 24, 1994, the Board conducted a prehearing conference on the instant prohibited practice complaint. At the prehearing conference, counsel for the HGEA and counsel for the Employer agreed to submit cross motions for summary judgment to resolve this matter since there is no factual dispute, but rather issues of law.

On May 31, 1994, the HGEA filed a Motion for Summary Order with the Board. The HGEA argued that § 89-13(a)(5), HRS, requires public employers such as the Employer to disclose information relevant to the investigation and processing of grievances. In addition, the HGEA argued that § 89-13(a)(8), HRS, requires the Employer to honor its contractual obligation to disclose information necessary to the investigation and processing of grievances.

Also on May 31, 1994, the Employer filed Respondents' Motion to Dismiss or, in the Alternative, for Summary Judgment. In its memorandum in support of its motion, the Employer argued that (1) the HGEA failed to exhaust its administrative remedies through the grievance and arbitration process; (2) the information requested by the HGEA is not relevant to Nurse Clark's arbitration; (3) the Employer has not refused to bargain in good faith with the HGEA regarding relevant matters; and (4) the information requested by the HGEA is not subject to discovery pursuant to statute.

On June 14, 1994, the Employer filed Respondents' Answering Memorandum to Complainant's Motion for Summary Order.

On July 1, 1994, the HGEA filed a Memorandum in Opposition to Respondents' Motion to Dismiss, or in the Alternative, for Summary Judgment.

On October 20, 1994, the Board heard oral arguments on the HGEA's Motion for Summary Order and the Employer's Motion to Dismiss or, in the Alternative, for Summary Judgment.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

Complainant HGEA is the exclusive representative, as defined in § 89-2, HRS, of employees included in bargaining unit 09 (registered professional nurses).

Respondent Employer was at all relevant times the public employer, as defined in § 89-2, HRS, of registered professional nurses included in bargaining unit 09.

The HGEA and the Employer were at all relevant times parties to a collective bargaining agreement covering employees in bargaining unit 09, including Nurse Clark.

On May 14, 1992, the HGEA filed a Step 1 grievance on behalf of Nurse Clark regarding her termination from her RPN III position in the Obstetrics Unit at Hilo Hospital. See Exhibit 1 attached to Memorandum in Support of Respondents' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 31, 1994 (Rs' Memo).

By letter dated July 6, 1992, Fred D. Horwitz, Acting Deputy Director for Community Hospitals, denied the HGEA's Step 1 grievance and informed the HGEA that "[a]s stated in the letter of dismissal to [Nurse Clark], she was dismissed from her position at

Hilo Hospital because she stole drugs from Hilo Hospital and because she misused her authority as an employee and Registered Professional Nurse in obtaining the drugs from the Hospital inventory." See Exhibit 2 attached to Rs' Memo.

By letter dated July 17, 1992, the HGEA filed a Step 2 grievance on behalf of Nurse Clark. See Exhibit 3 attached to Rs' Memo.

By letter dated August 17, 1992, Calvin T. Masaki, Deputy Director, Department of Health, denied the HGEA's Step 2 grievance. See Exhibit 4 attached to Rs' Memo.

By letter dated August 26, 1992, the HGEA filed a Step 3 grievance on behalf of Nurse Clark. See Exhibit 5 attached to Rs' Memo.

By letter dated September 24, 1992, Sharon Y. Miyashiro, Director of the Department of Personnel Services, denied the HGEA's Step 3 grievance. See Exhibit 6 attached to Rs' Memo.

By letter dated September 30, 1992, the HGEA filed a notice of its intent to arbitrate Nurse Clark's grievance. See Exhibit 7 attached to Rs' Memo.

By letter dated December 14, 1992, the HGEA requested, inter alia, information from the Employer regarding the "identification of other Registered Professional Nurses who have been suspected of using and/or removing drugs from the State Hospitals (Community Hospital Division) since the negotiation of the current collective bargaining Agreement (7/1/1989)." See Exhibit 9 attached to Rs' Memo.

By letter dated January 11, 1993, the Employer informed the HGEA that "there are no other registered professional nurses who are under suspicion, or have been suspected, of 'using and/or removing drugs' from the community hospitals during the time period mentioned." See Exhibit 13 attached to Rs' Memo.

By letter dated October 8, 1993, the HGEA requested that the Employer disclose information regarding individuals employed by, related to, or having privileges with Department of Health (DOH) facilities, including but not limited to physicians who have admitting or treating privileges, who have been deemed by the DOH to have improperly obtained medication or stolen property from DOH facilities between 1990 and 1993, along with the penalties or sanctions imposed. See Exhibit 10 attached to Rs' Memo; see also Exhibit A attached to Motion for Summary Order, filed on May 31, 1994 (C's Motion).

By letter dated October 26, 1993, the Employer objected to the HGEA's request for information regarding physicians who have privileges at DOH facilities on the basis that physicians are not DOH employees and are "not subject to discipline in the same manner or sense" as Nurse Clark. See Exhibit 15 attached to Rs' Memo; see also Exhibit B attached to C's Motion.

By letter dated October 28, 1993, the HGEA reiterated its demand for the requested information and informed the Employer that:

the information regarding the admitting privileges at DOH facilities is necessary for the investigation of and processing of [Nurse Clark's] grievance inasmuch as the DOH has the power to revoke or rescind said privileges to physicians if the DOH discovers that said

physicians are abusing their privileges at said DOH facilities by, inter alia, illegally obtaining or wrongfully obtaining prescription medication such as controlled substances or other kinds of prescription medication, for the purposes of engaging in substance abuse or transferring it to another person for substance abuse purposes.

See Exhibit 11 attached to Rs' Memo; see also Exhibit C attached to C's Motion.

By letter dated November 4, 1993, the Employer reiterated its contention that "physicians who have privileges at DOH hospitals are not employees of DOH" and the subject of hospital privileges is not an employment matter. See Exhibit 16 attached to Rs' Memo; see also Exhibit D attached to C's Motion.

By letter dated December 3, 1993, the HGEA reasserted its demand to the Employer for information regarding physicians and physicians' privileges at state hospitals. See Exhibit 12 attached to Rs' Memo.

Rule 56 of the Hawaii Rules of Civil Procedure (HRCP) provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.

The HGEA contends that the Employer violated §§ 89-13(a)(5) and 89-13(a)(8), HRS, by failing to provide the HGEA with information relevant to the investigation and processing of Nurse Clark's grievance.

Section 89-13(a), HRS, sets forth prohibited practices of a public employer or its designated representative and provides in relevant part:

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

\* \* \*

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

\* \* \*

(8) Violate the terms of a collective bargaining agreement . . . .

In addition, Article 14, paragraph A, of the Unit 09 collective bargaining agreement provides in relevant part:

Any relevant information specifically identified by the grievant or the Union in the possession of the Employer needed by the grievant or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days.

The Board has previously held that an employer's failure to provide information relevant to a grievance filed by a union is violative of the employer's duty to bargain in good faith and constitutes a prohibited practice. See SHOPO and Sanderson v. Fasi, 3 HPERB 25 (1982). In Sanderson, the Board found that the employer wilfully violated § 89-13(a)(5), HRS, and the terms of a settlement agreement when it repeatedly refused to provide the union with information relevant to the processing of a grievance. Id. at 36.

Here, the Employer contends, inter alia, that the information sought by the HGEA regarding physicians who have privileges at DOH facilities is not relevant to Nurse Clark's arbitration, and therefore, need not be provided to the HGEA.

With regard to this contention, the Board is guided by the scope and limits of discovery set forth in Rule 26(b), HRCF, which provides in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

Based upon the memoranda of the parties and the argument of counsel, a Board majority concludes that there is no genuine issue as to any material fact and the Employer is entitled to summary judgment as a matter of law. The Board majority finds that information regarding physicians who have privileges at state hospitals does not appear reasonably calculated to lead to the discovery of admissible evidence and therefore is not relevant to Nurse Clark's arbitration.

While the HGEA contends that the information requested is needed to establish a disparate treatment defense, see Transcript of proceedings on October 20, 1994 (Tr.), p. 35, the undisputed facts indicate that physicians with hospital privileges are not employees of the Employer. Physicians are not subject to the same terms and conditions of employment as an employee, such as Nurse Clark, who is covered by a collective bargaining agreement. Thus, even if the information regarding physicians were provided to the



HGEA, the information would have no bearing on the Employer's treatment of its employee.

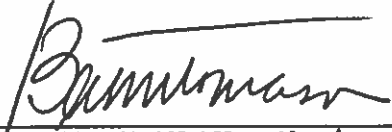
Accordingly, the Board majority finds that the HGEA failed to establish that the Employer committed a prohibited practice by refusing to provide the HGEA with information regarding physicians who have privileges at DOH facilities.

ORDER

The Employer's motion to dismiss or, in the alternative, for summary judgment is hereby granted. The HGEA's motion for summary order is hereby denied.

DATED: Honolulu, Hawaii, February 23, 1995.

HAWAII LABOR RELATIONS BOARD

  
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BERT M. TOMASU, Chairperson

  
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RUSSELL T. HIGA, Board Member

DISSENTING OPINION

I dissent from the Board majority's order granting the Employer's motion for summary judgment. In my opinion, the HGEA should be given broad discretion and wide latitude to pursue information it regards as relevant to the processing of a grievance, especially in a discharge case such as the one before the Board. I agree with the HGEA that the information requested regarding physicians and physicians' privileges may lead to the discovery of admissible evidence. Therefore, I would require the

Employer to produce the information requested and grant the HGEA's motion for summary order.

Sandra H. Ebesu  
SANDRA H. EBESU, Board Member

Copies sent to:

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