STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and LINDA CROCKETT LINGLE, Mayor, County of Maui, Respondent.	CASE NO. CE-03-253 ORDER NO. 1374 ORDER CONSOLIDATING CASES FOR DISPOSITION; ORDER GRANTING HGEA'S MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER DENYING HGEA'S MOTION TO DISMISS COMPLAINT, IN PART, AND DENYING MOTION, IN PART; NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINTS
In the Matter of LINDA CROCKETT LINGLE, Mayor, County of Maui and COUNTY OF MAUI, Complainants, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO and FRANCIS INO, Respondents.	CASE NO. CU-03-126

ORDER CONSOLIDATING CASES FOR DISPOSITION; ORDER GRANTING HGEA'S MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER DENYING HGEA'S MOTION TO DISMISS COMPLAINT, IN PART, AND DENYING MOTION, IN PART; NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINTS

On July 20, 1996, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152 (HGEA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) in Case No. CE-03-253. Complainant HGEA alleges that on or about June 14, 1994, Respondent LINDA CROCKETT LINGLE (LINGLE, Employer or County)

by her agent Kim Nuyen, wrongfully reprimanded employee FRANCIS INO. Complainant also alleges that thereafter on or about June 29, 1994, the Employer wrongfully terminated INO from employment. Complainant further alleges that on May 18, 1995 and thereafter, the HGEA requested certain information from the Employer, including leave of absence request forms, which were relevant to the processing of INO's grievances. These requests were either denied or the Employer provided the HGEA with censored or redacted records. The HGEA thus contends that the Employer improperly refused to provide the Union with information relevant to the INO grievance and thereby violated §§ 89-13(a)(5) and (8), Hawaii Revised Statutes (HRS).

Complainant HGEA also alleges that the Employer violated §§ 89-13(a)(5) and (8), HRS, by demanding that the arbitrator selected to arbitrate the INO grievance recuse himself because of a conflict in another matter.

On May 21, 1996, Complainants LINGLE and the COUNTY OF MAUI (collectively LINGLE, County or Employer) filed a prohibited practice complaint against the HGEA and FRANCIS INO with the Board in Case No. CU-03-126. The County alleged that on November 16, 1995, the County requested that the HGEA advise the Employer of the Union's refusal to select an arbitrator in a pending grievance. The County further contends that the HGEA has not responded to the County and since that time refused to select an arbitrator. The County contended that the HGEA and INO violated Article 11 of the collective bargaining agreement and § 89-13(b)(5), HRS.

As these complaints involve substantially the same parties and issues, the Board finds that consolidation of the proceedings would be conducive to the proper dispatch of business and the ends of justice and will not unduly delay the proceedings. Pursuant to Administrative Rules § 12-42-8(g)(13), the Board hereby, sua sponte, consolidates the instant complaints and the proceedings thereon for disposition.

On September 22, 1995, the HGEA filed a motion for partial summary judgment on the grounds that the County violated §§ 89-13(a)(5) and (a)(8), HRS, by refusing to disclose documents relevant to the processing and investigation of the INO grievance. The HGEA contends that it requested certain information which was relevant to the investigation and processing of INO's grievance and the Employer, by Raymond Y. Kokubun, Director of Personnel Services, County of Maui, refused to provide the information.

In a supplemental affidavit filed with the Board on October 2, 1995, Complainant HGEA requested the emergency and/or sick leave applications of employees of the Department of Water Supply (DWS) pursuant to the applicable contract provision and § 89-16.5, HRS. The Employer disclosed the leave forms but censored the reason why the leave was requested and other information which would identify the employee. According to the affidavit of HGEA's counsel, the information was redacted by the Employer in compliance with privacy concerns under Chapter 92F, HRS. The HGEA thus contends that the Employer committed prohibited practices by failing to comply with its request for information relevant to the processing or investigation of a grievance.

On October 18, 1995, Respondent LINGLE filed a memorandum in opposition to the HGEA's motion for partial summary judgment with the Board. Respondent LINGLE contends that the Board should not consider the County's alleged refusal to provide the unredacted leave requests since it was not raised in the HGEA's initial motion for partial summary judgment. With respect to the information requested regarding employees who voluntarily terminated their employment pursuant to § 14-14(b)(1), Department of Personnel Services Rules, the County responded that the information was not readily available to the County and that it was unduly burdensome to comply with the HGEA's request. The County contends that it would have to review the files of all employees who separated from service within the last ten years to determine the reasons for termination. With regard to the medical and identifying information on the leave requests, the County further contends that pursuant to an opinion letter from the State Office of Information Practices (OIP), the County is precluded from releasing the medical information of employees who are not parties to the instant grievance.

The Board conducted a hearing on the HGEA's motion for summary judgment on November 9, 1995. All parties had full opportunity to present evidence and argument to the Board. Based upon the record and the arguments presented, the Board makes the following findings of fact and conclusions of law and hereby grants HGEA's motion for partial summary judgment.

HGEA's Motion for Partial Summary Judgment

The HGEA is the exclusive bargaining representative of the employees included in bargaining unit 03 and represents FRANCIS INO in the arbitration of his grievance challenging his reprimand and discharge.

LINDA CROCKETT LINGLE is the Mayor of the County of Maui and is a public employer, as defined in § 89-2, HRS, of employees of the County of Maui included in bargaining unit 03.

FRANCIS INO was, for all times relevant, an employee of the County of Maui who was included in bargaining unit 03.

LINGLE reprimanded FRANCIS INO and later terminated him from employment under Regulation No. 14-14(b)(1) because he had allegedly abandoned his job. The HGEA filed a grievance challenging INO's reprimand and discharge on the grounds that he was disciplined without just and proper cause because of his disability. During the grievance process, by letter dated May 18, 1995, the HGEA, by Maui Division Chief John A. Murakami, requested information relative to INO's forthcoming arbitration hearing. The letter requested, inter alia:

> 3. The names, addresses, telephone numbers, job descriptions, job position numbers, and departments of employees of the county of Maui who have been discharged for terminating their employment with the employer under Regulation 14-14(b)(1) (Abandonment of Job).
>
> 4. All records of the County of Maui government which indicate for at least the last five (5) years, and preferably for the last ten (10) years, which employees were considered to have voluntarily terminated their employment under Regulation No. 14-14(b)(1).

By letter dated June 19, 1995 from Raymond Y. Kokubun, the Employer responded:

> At the present time we are unable to furnish the information requested in Items #3, #4 and #5 of your May 18, 1995 letter as we do not keep records of terminated employees according to the reasons for their termination whether voluntary or involuntary.

According to Lynn Krieg, Personnel Management Specialist, Department of Personnel Services, County of Maui, the County has a list of former employees but the list does not indicate the employees' reasons for termination or resignation. Krieg stated that the County would have to review all of the County's former employees' files to obtain the information the HGEA is seeking and that it would be unduly burdensome.

Murakami stated that within the last five years, less than one dozen employees have been terminated by the Employer and no more than two dozen employees were terminated within the last ten years.

The HGEA and the County of Maui are signatories to a collective bargaining agreement for bargaining unit 03 which contains the following provision in Article 11, Grievance Procedure:

> 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.

In addition, § 89-16.5, HRS, provides as follows:

> 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.

In this case, the HGEA requested information on other employees who were terminated from employment on the same grounds as INO. The HGEA contends that the information was sought pursuant to the foregoing contractual and statutory provisions in order to determine whether INO was treated disparately by the Employer. Kokubun's first response was that such information was unavailable. The County later responded that it was unduly burdensome to review the records of employees who were separated from service for the past ten years to determine whether other employees had been terminated on the same grounds. The County here does not claim that the information requested is irrelevant under the contract or the statute, but contends that the information is unduly burdensome to retrieve.

Based upon the foregoing, the Board finds that there is no dispute as to the relevance of the material sought. The HGEA seeks the information in the processing of INO's grievance to determine whether a case can be made on a disparate treatment theory. The information sought is thus relevant to the investigation of the grievance and the information should have been provided to the HGEA pursuant to its request.

The Board notes that the HGEA requested the information for the past five years, and preferably for ten years. If it was burdensome for the County to produce the records for a ten-year period, the County could have permitted the HGEA with access to the records for the past five years and been in compliance with the

Union's request for information. The Board also notes that the County attached computer sheets of County employees who had terminated their employment over the past five years. The Board further notes that there are codes on sheets which pertain to "Action" which appear to indicate whether the employees separated from service because they resigned, retired or were terminated. Moreover, if it were unduly burdensome for the Employer to go through each employee's file and records to summarize the information for the Union, the Employer could have provided the Union with access to the files and the Union could have reviewed the files and retrieved the information which it sought, subject to the provisions of § 89-16.5, HRS.

With respect to the leave requests, the County contends that the Board should disregard the HGEA's arguments because it was not contained in the HGEA's original motion. The HGEA's motion for partial summary judgment was filed on September 22, 1995 and the supplemental affidavit was filed on October 2, 1995. Respondent's memorandum in opposition to the motion was filed on October 18, 1995 after an extension of time was granted by the Board for good cause shown. The hearing on the motion was held before the Board on November 9, 1995. Given the foregoing sequence of events, the Board finds that the Respondent was not prejudiced by the HGEA's supplemental affidavit as counsel fully addressed the matter in its memorandum. The Board notes that generally under its Administrative Rules § 12-42-8(g), responses to motions are due five days from the service of the motions. Here, Respondent had

ample time to respond and in fact, did respond to the HGEA's affidavit in its memorandum and argument to the Board.

Here, the HGEA sought the leave requests of DWS employees who requested emergency leave and/or sick leave. The Employer provided the leave requests but redacted certain identifying and medical information because of its interpretation of Chapter 92F, HRS, and several opinions rendered by the OIP. The Employer contends that the redacted material is confidential and release of the record constitutes an invasion of the employees' privacy. Again, the Employer does not contend that the redacted material is irrelevant; instead, the Employer contends that the relevance of the individual's medical information is outweighed by the employees' privacy interest regarding their medical conditions. The Employer also contends that the HGEA has failed to notify the employees that it plans to obtain access to information regarding their medical conditions.

Under the provisions of § 89-16.5, HRS, the exclusive representative is entitled to access to personal records of employees other than the grievant in the investigation or processing of a grievance. The exclusive representative is prohibited from further sharing or disclosing the information and must inform the affected employee that the record has been accessed.

According to § 92F, HRS, "personal record" means:

> . . . any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to the individual's education, financial, medical, or employment history, or items that contain or make reference to the

> individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

The Board notes, then, that under § 92-F, HRS, "personal record" includes medical information.

The HGEA contends that the Employer discharged INO for being absent from work without being on approved leave. The HGEA contends that INO applied for emergency leave due to a health and mental condition and the Employer arbitrarily and disparately denied INO such leave while granting leave to other employees in the same or similar circumstances. In this case, the Board finds that the information sought by the HGEA is relevant to the investigation and processing of INO's grievance as the Union seeks to prove that INO was disparately treated.

The Employer contends that a balancing test must be applied to determine whether the relevance of the evidence outweighs the privacy interests of the employees. The Board, however, interprets § 89-16.5, HRS, as requiring access to personal records for exclusive representative investigating or processing a grievance. If the materials are sought during such investigation or processing and under applicable contract provisions, are relevant to the grievance, the Employer must provide the Union with access to the records. In this way, the Union does not stand in the same shoes as a member of the public seeking information under Chapter 92F, HRS, where a balancing test would be applicable to determine whether disclosure should be denied to protect the privacy interests of employees because the information may be further disseminated. By enacting § 89-16.5, HRS, the Legislature

has already determined that access should be provided to the Union to perform its obligations to their members and fully investigate the grievances and that the information cannot be further disclosed.

The Employer in this case refused to disclose the information to the Union thereby violating the rights of the grievant and the Union from properly investigating and processing the subject grievance. The Board has consistently held that the Employer's refusal to disclose information relevant to the processing and investigation of grievances is a refusal to bargain in good faith and a violation of the applicable collective bargaining agreement. Virginia Sanderson, 3 HPERB 25 (1982). The Board finds that there are no genuine issues of material fact and that the HGEA is entitled to judgment on this issue as a matter of law. As the natural consequence of the Employer's actions in this case was the violation of the contract and duty to bargain in good faith, the Board concludes that the Employer wilfully committed prohibited practices in violation of §§ 89-13(a)(5) and (8), HRS, by its refusal to provide the Union with the information requested. Based upon the foregoing, the Board hereby grants HGEA's motion for partial summary judgment.

The Board hereby orders the Employer to cease and desist from refusing to provide the Union access to the information requested in its processing of the INO grievance. The Employer is ordered to forthwith provide the Union with access to the information requested.

HGEA's Motion to Dismiss Prohibited Practice Complaint

On June 14, 1996, the HGEA filed a motion to dismiss the prohibited practice complaint in Case No. CU-03-126. The HGEA contends that the instant complaint is time-barred. The HGEA contends that LINGLE's cause of action accrued on or about November 16, 1995, when the County requested HGEA's counsel to respond to the County's charge that the Union was wrongfully refusing to select an arbitrator in the matter. In addition, the HGEA argues that INO is not a proper party to the complaint because he is not a signatory to the collective bargaining agreement nor in privity of contract with the County.

On July 8, 1996, LINGLE, by and through her counsel, filed a memorandum in opposition to HGEA's motion to dismiss with the Board. LINGLE argued that since November 16, 1995, the Union and Grievant INO have refused to select an arbitrator to resolve the grievance. LINGLE contends that the violation alleged is a continuing violation and that the HGEA is engaging in a practice of delay and procrastination which has prejudiced the County.

The Board conducted a hearing on the HGEA's motion to dismiss on July 15, 1996. Subsequent to the hearing, HGEA's counsel, Charles K.Y. Khim, Esq., filed an affidavit in reply to the County's memorandum in opposition to the HGEA's motion to dismiss with the Board. Khim stated that the County's memorandum in opposition to the HGEA's motion should not be considered by the Board because it was filed late. Moreover, the County's allegations of fact are not supported by affidavit. Khim further argues that the County's cause of action accrued earlier than

previously argued, i.e., in July 1995, when the County alleged that it first learned of HGEA's alleged refusal to arbitrate the matter.

Thereafter, on July 25, 1996, the HGEA filed a supplemental memorandum in support of motion to dismiss prohibited practice complaint with the Board. The HGEA contends that the statute of limitations for bringing a prohibited practice complaint which alleges that the HGEA refused to arbitrate the case commences to run on the date that the refusal to arbitrate is first made. Thus, the HGEA contends that the statute of limitations commenced to run in either July or November 1995, and the instant complaint was filed more than ninety days thereafter and thus should be dismissed.

After considering the arguments presented, the Board denies the HGEA's motion to dismiss the complaint in Case No. CU-03-126 on the grounds that the complaint is time-barred. According to the representations of LINGLE's counsel, numerous attempts were made by the County to select another arbitrator after the County requested Arbitrator Ching to recuse himself. By letter dated November 16, 1995, counsel for the County requested HGEA's counsel to advise him on the Union's refusal to select an arbitrator. HGEA never responded to the County's letter but nevertheless argues that the County's cause of action accrued in November 1995.

Under the circumstances of this case it would be unfair to find that the County's cause of action arose in November 1995 when the County was waiting for a response from the HGEA. While the HGEA relies on Wiegand v. Allstate Insurance Companies,

68 Haw. 117, 706 P.2d 16 (1985), for the proposition that the statute of limitations commences with the initial refusal to arbitrate the dispute, it is unclear under the facts presented that there was a finite refusal to arbitrate and when that refusal occurred. Under these facts, the Board finds that the HGEA's alleged violations are of a continuing nature and are not barred by the applicable ninety-day statute of limitations.

The HGEA further contends in its motion to dismiss the instant complaint that INO is not a proper party because he is not a signatory to the collective bargaining agreement and is not in privity of contract with the Employer. Thus, the HGEA contends that INO cannot be found to have violated the collective bargaining agreement under § 89-13(b)(5), HRS, and should accordingly be dismissed from the complaint.

The Board notes that the County does not contest INO's dismissal from the complaint in its memorandum in opposition to HGEA's motion to dismiss the complaint. The County's arguments instead address the statute of limitations issues. In addition, based upon the Board's review of the complaint and the contract provisions at issue, it appears that the complaint does not state a claim for relief against INO.

Article 11, Grievance Procedure, of the applicable collective bargaining agreement provides, in part:

> H. Step 4. Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 3. Representatives of the parties shall attempt

to select an Arbitrator immediately thereafter.

> If agreement on an Arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawaii Labor Relations Board to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The person whose name remains on the list shall be designated the Arbitrator. No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

The County's allegations in the complaint are directed against the Union and the Union's refusal to select an arbitrator under the foregoing contract provision. Thus, the Board finds that the County failed to present any facts to support a claim that INO violated any obligations under the applicable collective bargaining agreement. Accordingly, the Board hereby dismisses INO as a respondent in Case No. CU-03-126 for failure to state a claim for relief.

Thus, the Board hereby grants in part, and denies, in part, HGEA's motion to dismiss the prohibited practice complaint in Case No. CU-03-126.

Based upon the foregoing, the Board will conduct a hearing on the remaining allegations of the instant complaints on November 4, 1996, at 9:00 a.m. in Kahului, Maui. The parties will be notified by the Board as to the location of the hearing.

DATED: Honolulu, Hawaii, October 17, 1996.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO v. LINDA LINGLE, Mayor, County of Hawaii; CASE NO. CE-03-253 and LINDA CROCKETT LINGLE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO and FRANCIS INO; CASE NO. CU-03-126

ORDER NO. 1374

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Sandra H. Ebesu

SANDRA H. EBESU, Board Member

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