STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of BRADLEY K. SILVA, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; GARY RODRIGUES; HERBERT R. TAKAHASHI; and CLIFFORD UWAINE, Respondents.	CASE NO. CU-01-129 ORDER NO. 1442 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

On January 24, 1997, Complainant BRADLEY K. SILVA (SILVA), by and through his representative, filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; GARY RODRIGUES; HERBERT R. TAKAHASHI; and CLIFFORD UWAINE (collectively UPW or UNION) with the Hawaii Labor Relations Board (Board). Complainant alleges that on January 8, 1997, he received the November/December 1996 issue of Malama Pono, the UPW's newsletter, which contained an article referring to Complainant. Complainant further alleges that the article reveals Complainant's job performance rating to UPW's membership and therefore constitutes a violation of §§ 89-16.5 and 89-13(b)(4), Hawaii Revised Statutes (HRS). Complainant further contends that his right to privacy and the right to have those rights protected by the UNION were violated. Additionally, Complainant specifically refers to Case No. CU-01-120 and Case No. CU-01-122 which he

previously filed against Respondents when UPW published the same, allegedly private, information statewide in the November/December 1995 issue of Malama Pono.

On February 4, 1997, Respondents filed an answer to the complaint and a motion to dismiss and/or for summary judgment with the Board. Thereafter, on February 5, 1997, Respondents filed an amended memorandum in support of their motion to dismiss and/or for summary judgment. In their motion, Respondents contend that the instant complaint is virtually identical to a complaint filed by SILVA on March 20, 1996 which was dismissed by the Board on September 30, 1996. Respondents further contend that SILVA did not appeal from the dismissal of the previous complaint and a final judgment was entered in that matter. Thus, Respondents argue that the complaint should be dismissed under the doctrine of res judicata and for failure to state a claim for relief. In the alternative, Respondents seek summary judgment in their favor because they contend there are no genuine issues of material fact in dispute and Respondents are entitled to judgment as a matter of law.

On February 11, 1997, SILVA filed a memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment with the Board. SILVA argued that § 17.03 of the Unit 01 collective bargaining agreement requires the destruction of derogatory material from the employees' personnel file after two years. In this case, SILVA contends that Respondents disclosed derogatory material from his personnel file which was obtained by subpoena during an arbitration. SILVA further contends that he was

never notified that his personnel file was being obtained in order to afford him the right to object.

On March 20, 1997, the Board conducted a hearing on the motion to dismiss and/or for summary judgment in Hilo, Hawaii. All parties were represented and had full opportunity to present evidence and argument to the Board. Also on that date, SILVA filed a second memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment with the Board. SILVA submitted a letter from the Office of Information Practices, dated March 12, 1997, concerning whether a government employee's job performance rating is a public record.

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

FINDINGS OF FACT

BRADLEY K. SILVA is an employee, within the meaning of § 89-2, HRS, of the County of Hawaii. SILVA's position is included in Unit 01 and he is a member of the UPW.

The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, is the exclusive representative, as defined in § 89-2, HRS, of employees of the County of Hawaii who are included in Unit 01.

GARY RODRIGUES is the State Director of the UPW.

HERBERT R. TAKAHASHI, Esq., is the attorney who represented the UPW in Case Nos. CE-01-204 and CU-01-122 before the Board. TAKAHASHI also represented the UPW in the arbitration of a class grievance filed against the County of Hawaii involving a hiring freeze imposed by the employer.

CLIFFORD UWAINE, is the editor for Malama Pono, the UPW's newsletter.

The Malama Pono is the UPW newsletter which is disseminated statewide to UPW members. The November/December 1995 edition of the newsletter contained an article entitled, "Bradley Silva and Lance Manliauis (sic) Cases of Yamashiro's Political Favoritism." The article states, inter alia, that on November 12, 1993, SILVA was evaluated as "less than satisfactory" by the parks maintenance division, County of Hawaii.

On March 20, 1996, SILVA, by and through his representative, filed a prohibited practice complaint against the above-named Respondents with the Board in Case No. CU-01-122. SILVA alleged that the UPW disclosed the fact that he had an unsatisfactory rating as a Laborer II in its November/December 1995 edition of Malama Pono. SILVA contended that § 89-16.5, HRS, prohibits the UPW from disclosing this information from his personnel files. SILVA further contended that UPW should have protected his rights as a UNION member and should have brought charges against the County of Hawaii (County) if the UNION believed that the County made such information public.

On April 4, 1996, the Board consolidated Case No. CU-01-122 with Case No. CU-01-120 which was filed by Stephen K. Yamashiro, Mayor, County of Hawaii, against the same Respondents raising the same issues.

On September 30, 1996, the Board issued Order No. 1369 in the consolidated cases, which dismissed the complaints for failure to state a claim for relief. In its order, the Board considered

the applicability of § 89-16.5, HRS, to the fact situation and concluded that the provision was not applicable since the information was obtained pursuant to a subpoena in a grievance arbitration. Thus, the Board concluded that § 89-16.5, HRS, was not applicable and was not violated by the Respondents in those cases.[1]

Subsequently, the 1995 article on SILVA was reprinted in the November/December 1996 issue of Malama Pono, in an article entitled "Political Favoritism by Yamashiro." Except for some editorial changes, the content of the article is virtually identical to the article printed in the November/December 1995 issue.

On January 24, 1997, Complainant filed this prohibited practice complaint against Respondents contending that the UPW's republication of the same information violated §§ 89-16.5 and 89-13(b)(4), HRS.

DISCUSSION

The UPW contends that SILVA is barred from relitigating issues which he previously had the opportunity to raise in the prior case based upon the doctrines of res judicata and collateral estoppel. In addition, UPW argues that the complaint fails to state a claim for relief under Chapter 89, HRS, because the UNION has a right to distribute newsletters on employment subjects as an

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[1]Mayor Yamashiro appealed the Board's order to the Circuit Court in Civil No. 96-515. The Third Circuit Court dismissed the appeal for lack of standing. Mayor Yamashiro appealed the Circuit Court's order to the Hawaii Supreme Court where the matter is pending.

exercise of protected free speech which is not subject to regulation by the Board.

After reviewing the record and the arguments presented, the Board finds that this complaint is barred by the doctrine of collateral estoppel.

Res judicata and collateral estoppel are well-established judicial doctrines which preclude the relitigation of claims or issues which have been decided or might have been litigated in a prior case between the same parties or privies. In Ellis v. Crockett, 51 Haw. 45, 55-56 (1969), the Hawaii Supreme Court discussed the doctrines of res judicata and collateral estoppel. In defining "res judicata" and "collateral estoppel," the Hawaii Supreme Court stated:

> The doctrine of res judicata basically provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided." In re Bishop Estate, 36 Haw. 403, 416 (1943).
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> Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. Yuen v. London Guarantee and Accident Co., 40 Haw. 213, 223 (1953); Henderson v. Pence, 50 Haw. 162, 163, 434 P.2d 309, 310 (1967). Collateral estoppel also precludes relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue. See Bernhardt v. Bank of America Nat'l Trust and Savings Ass'n., 19 Cal.2d 807, 122 P.2d 892

> (1942); Homeowners Federal Savings and Loan v. Northeast Fire & Marine Ins. Co., Mass. 238 N.E.2d 55 (1968). [footnote omitted.]
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> The policy reasons underlying both res judicata and collateral estoppel are several. The public interest staunchly permits every litigant to have an opportunity to try his case on the merits; but it also requires that he be limited to one such opportunity. Furthermore, public reliance upon judicial pronouncements requires that what has been finally determined by competent tribunals shall be accepted as undeniable legal truth. Its legal efficacy is not to be undermined. Also, these doctrines tend "to eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent results." Developments in the Law-Res Judicata, 65 Harv. L. Rev. 818, 820 (1952).

See also, Gomes v. Tyau, 57 Haw, 163, 167-68, 451 P.2d at 822 (1976).

The courts have held that res judicata and collateral estoppel apply to matters litigated before an administrative agency. David Santos v. State of Hawaii, 64 Haw. 648, 653 (1982); United States v. Utah Constr. Co., 384 U.S. 394, 421-22 (1966); International Wire v. Local 38, International Brotherhood of Electrical Workers, 475 F.2d 1078 (6th Cir. 1973); Texaco, Inc. v. Operative Plasterers & Cement Masons International, Local 685, 472 F.2d 594 (5th Cir. 1973); Paramount Transport Systems v. Chauffeurs, Teamsters & Helpers, Local 150, 436 F.2d 1064 (9th Cir. 1971); and Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969).

In determining whether res judicata and collateral estoppel are applicable, a three-part test must be applied. The pertinent questions are: 1) Was the issue decided in the prior adjudication identical with the one presented in the action in

question? 2) Was there a final judgment on the merits? and 3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Morneau v. Stark Enterprises, Ltd., supra, 56 Haw. 420, 424, 539 P.2d 472 (1975).

In the instant case, the Board finds that the issues raised are identical to the ones raised in Case Nos. CU-01-120 and CU-01-122. Although the complaints arise from a republication of Complainant's job performance rating in a different edition of the UNION's newsletter and therefore arise from different claims, Complainant again contends that the UNION violated § 89-16.5, HRS, which is a statutory violation under § 89-13(b)(4), HRS, when it published Complainant's unsatisfactory job performance rating. Complainant specifically recognizes in his complaint that the information which was republished was the same information from the previous case. In addition, Complainant also brings the instant charges against the same Respondents in the previous cases.

In the previous cases, the Board held that § 89-16.5, HRS, was not applicable to the facts presented because the information was obtained by the UNION pursuant to a subpoena issued during an arbitration rather than during the investigation or processing of the grievance. If applicable, § 89-16.5, HRS, would prevent further disclosure of the information even to the Arbitrator. The Board reasoned that this would be an absurd construction of the statute and concluded that the complaint failed to state a claim for relief under § 89-16.5, HRS.

The Board finds that Complainant had a full and fair opportunity to litigate the issues involved in the previous cases

and failed to appeal the dismissal of his previous complaint. Thus, there has been a final judgment on the merits between the same parties on the issues presented to the Board. Therefore, the Board concludes that the instant complaint is barred by the doctrine of collateral estoppel as to claims already litigated and claims which could have been litigated in the previous action before the Board. Accordingly, the Board hereby grants the Respondent's motion to dismiss the instant complaint.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaint under §§ 89-5(b)(4) and 89-14, HRS.

Collateral estoppel precludes the relitigation of issues and claims previously decided in prior actions involving the same parties or their privies. The Board finds that the instant complaint is barred by the doctrine of collateral estoppel.

ORDER

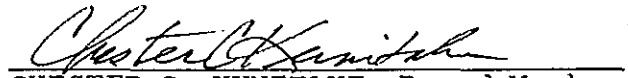
The complaint is hereby dismissed.

DATED: Honolulu, Hawaii, April 14, 1997.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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