STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii, Respondent.	CASE NO. CE-07-628 ORDER NO. 2407 ORDER GRANTING, IN PART, RESPONDENT'S EX PARTE MOTION TO SEAL THE HEARING, DOCUMENTS AND TESTIMONY ON PROHIBITED PRACTICE COMPLAINT; GRANTING, IN PART, COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

ORDER GRANTING, IN PART, RESPONDENT'S EX PARTE MOTION TO SEAL THE HEARING, DOCUMENTS AND TESTIMONY ON PROHIBITED PRACTICE COMPLAINT; GRANTING, IN PART, COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

On August 8, 2006, Complainant filed a complaint ("Complaint") against Respondent, alleging Respondent engaged in a prohibited practice by "failing to bargain over procedures affecting discipline and failing to provide information germane to a bargainable topic in violation of [Hawaii Revised Statutes] HRS § 89-13(a)(5)."

On September 22, 2006, Respondent filed its Ex Parte Motion to Seal the Hearing, Documents and Testimony on [Complainant's] Prohibited Practice Complaint. On September 22, 2006, Respondent also filed its Motion to Dismiss or in the Alternative for Summary Judgment. On September 22, 2006, Complainant filed its own Motion for Summary Judgment.

The parties' motions were heard by the Board on October 30, 2006, at 9:30 a.m. in the Board's hearing room; Complainant was represented by David A. Sgan, Esq., and Respondent by Trisha M. Kimura, Esq., Assistant General Counsel.

After careful consideration of the record and the well-presented arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY ("Union") is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees included in Unit 07.

2. Respondent BOARD OF REGENTS, University of Hawaii, is the public employer, as defined in HRS § 89-2, of employees included in Unit 07.

3. The Complaint was filed on August 8, 2006.

4. The Complaint alleges that Respondent engaged in a prohibited practice by failing to bargain over procedures affecting discipline and failing to provide information germane to a bargainable topic in violation of HRS § 89-13(a)(5).

5. On or about October 13, 2005, the Acting Chancellor at Kapiolani Community College ("KCC") notified a lecturer at the school ("Lecturer") that the school had received complaints from students alleging sexual harassment.

6. An investigation was conducted, and ultimately KCC determined that reasonable cause existed to believe that Lecturer's behavior violated the University's policy on sexual harassment. By letter dated February 16, 2006, Lecturer was informed that:

> An infraction as serious as this would normally result in a discharge, however, since your lecturer appointment has already terminated, the College is not able to take discharge action. Instead, you will not be hired again to teach at the College, and this letter will be placed in your personnel file.

7. Lecturer had already separated from employment with Respondent when Respondent's February 16, 2006, letter was issued. Had Lecturer not already separated from employment, Lecturer would have been terminated based upon KCC's conclusions and findings.

8. Neither Lecturer nor Complainant filed a grievance over KCC's determination or findings, although the February 16, 2006 letter advised

that an appeal could be made within twenty working days of the receipt of the decision.

9. By letter dated March 13, 2006, Complainant requested that Respondent send:

> ...all of the records involved in this case. Our attorneys will want to review the full file, including procedures followed, and by whom, any and all witness statements, tapes if any, written reports, if any, and any and all investigative data and memoranda written about this case.

The letter also stated that "the union is now concerned that a need for a review of your procedures, and how you arrive at results to, in essence, convict faculty of violations, is in order."

10. By letter dated May 4, 2006, Respondent responded to the Union's letter by stating in relevant part:

> Your letter requests all of the records in a case involving sexual harassment allegations by students at Kapi`olani College against [Lecturer]. Your request for records relating to the students [sic] allegations against [Lecturer] is denied.

11. Complainant was previously consulted with on Respondent's "Policy on Sexual Harassment Policy and Related Conduct"[1] and "Discrimination Complaint Procedures for Students, Employees, and Applicants for Admission or Employment."[2]

12. There is no evidence that Complainant had the Lecturer's consent, or the consent of the complainants or witnesses in the sexual harassment investigation, for release of the information requested by Complainant.

13. The alleged actions of Lecturer that triggered the sexual harassment complaint and investigation occurred while Lecturer was still an employee of Respondent and member of Complainant Union.

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[1]Exhibit ("Ex.") 3, Respondent Board of Regents, University of Hawai`i's Motion to Dismiss or in the Alternative, Motion for Summary Judgment ("BOR's Motion to Dismiss"); see also Exs. 6 - 9, BOR's Motion to Dismiss.

[2]Ex. 4, BOR's Motion to Dismiss.

14. Complainant is not seeking the disclosure of students' identities, transcripts, disciplinary records, health records, or admissions information.

15. While Complainant clearly requested documents and other records involved in the case in order for Respondent to review the procedures followed, there is no evidence that Complainant requested negotiations over those procedures beyond the records request.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See, Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.

3. "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Thompson v. AIG Hawaii Ins. Co., Inc., 111 Hawai`i 413, 422-23, 142 P.3d 277, 286-87 (2006).

4. Pursuant to HRS § 89-13(a)(5), it is a prohibited practice for a public employer or its designated representative wilfully to refuse to bargain collectively in good faith with the exclusive representative as required in HRS § 89-9.

5. The Board does not have the jurisdiction to enforce HRS Chapter 92F or the Family Educational Rights and Privacy Act ("FERPA").

6. This Board may use parallel federal case law as guidance when interpreting Hawaii labor laws. See, Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999) (although federal law did not

govern the case, the Hawaii Supreme Court consulted federal precedent to guide its interpretation of Hawaii's public employment laws).

7. As a general rule, an employer must provide a union with relevant information necessary for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S.Ct. 565, 567-68 (1967). The failure to provide relevant information may support a finding of a failure to bargain in good faith. See, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753 (1956).

8. However, that general rule is not absolute, and the United States Supreme Court has recognized an exception for information that is confidential in nature. Detroit Edison Co. v. NLRB, 440 U.S. 301, 99 S.Ct. 1123 (1979) ("Detroit Edison") ("a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested").

9. In Detroit Edison, the Court held that the employer did not violate its duty to bargain by conditioning disclosure of an employees' aptitude test on the union obtaining the affected employees' consent. The Court weighed the employer's concern for confidentiality against the union's interest in exploring the employer's criteria for promotion. The Court concluded that the employer's interest in preserving employee confidence in the testing program was well founded, and any possible impairment of the function of the union in processing the grievance of employees was more than justified by the interests served in conditioning disclosure upon the consent of the employees.

10. In Decision No. 130, Case No. CE-11-54, In the Matter of Manuel Veincent, Jr., et al., 2 HPERB 494 (1980), this Board held that tally sheets are relevant and necessary to the grievances which alleged irregularities in the promotion procedure, and did not reach the sensitivity of the psychological tests in Detroit Edison. However, the Board also held that the promotion board member's personal notes, as a reflection of management's thinking and deliberation, were entitled to a shield of confidentiality. Finally, the Board held that the request for personnel files was over-broad and raised the issue of an individual's right to privacy.

11. In Salt River Valley Water Users' Assn. v. NLRB, 769 F.2d 639 (9th Cir. 1985), the Ninth Circuit held that the National Labor Relations Board ("NLRB") did not abuse its discretion in limiting the union's access to the employee's personnel file to all records pertaining to disciplinary actions and performance reviews on which the employer intended to rely in

grievance or arbitration procedures concerning termination of the employee. The Ninth Circuit distinguished the facts of Detroit Edison: the information pertaining to disciplinary actions, unlike aptitude test scores, did not bear on an individual's "basic competence," and, moreover, employment records, unlike aptitude tests, are frequently introduced as evidence in grievance proceedings.

12. Accordingly, pursuant to the principles articulated in Detroit Edison, this Board's role is to balance Complainant's need for the sought-after information for purposes of negotiating the investigation procedure, against Respondent's legitimate concerns for confidentiality.

13. While Respondent identified privacy concerns regarding disclosure of records requested in Complainant's March 13, 2006, letter during these proceedings, Respondent's May 4, 2006, response to Complainant did not articulate those concerns to the Union, nor did Complainant propose any alternative such as partial disclosure or other accommodation. A "party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." Pennsylvania Power and Light Co. and Local 1600, International Brotherhood of Electrical Workers, AFL-CIO, 301 NLRB No. 138, 301 NLRB 1104, 136 L.R.R.M. (BNA) 1225 (1991) ("Pennsylvania Power and Light Co.")

14. This Board does not administer HRS Chapter 92F; however, we look to that chapter's examples of significant privacy interests in balancing Complainant's and Respondent's competing interests. HRS § 92F-14(b)(4) provides, in relevant part:

> (b) The following are examples of information in which the individual has a significant privacy interest:
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> * * *
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> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:
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> * * *
>
> (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; provided that this subparagraph shall not apply to a county police department officer except in a case which results in the discharge of the officer[.]

Accordingly, it appears from HRS § 92F-14(b)(4) that a public employee's privacy interest in employment-related misconduct is reduced where the misconduct results in suspension or discharge and the discipline is upheld following exhaustion of timely-invoked grievance procedures.

15. Applying the principles articulated in Detroit Edison, the Board finds that Respondent's stated need for the records outweighs the reduced privacy interests in the present case. The alleged actions of Lecturer while he was an employee with KCC were serious in nature, and would have led to his discharge had he not already separated from employment when the February 16, 2006, letter was issued. Additionally, Lecturer was notified in the letter that he could appeal the employer's determination and findings; Lecturer and/or Complainant did not file a grievance, and the letter was maintained in Lecturer's personnel file. Thus, Lecturer's privacy interests in the records of his alleged misconduct are diminished. Nevertheless, because Complainant's stated need for the records is to potentially negotiate the investigation procedure, the Board finds that the Lecturer's name or other identifying information is not relevant, and thus the Board orders that any identifying information be redacted prior to submitting any of Lecturer's records to Complainant.

16. The names or other identifying information of the complainants who alleged sexual harassment are also not relevant to Complainant's stated

need for the requested records. Accordingly, the Board orders that their names and any other identifying information be redacted prior to disclosing any of the records to Complainant. See, United States Postal Service and American Postal Workers Union, AFL-CIO, 305 NLRB No. 154, 305 NLRB 997, 139 L.R.R.M. (BNA) 1073 (1991) ("United States Postal Service") (in order to permit independent investigation of incident, employer must disclose the complaints themselves as well as the findings made with respect to the complaints, but not the identity of the employees who lodged them).

17. To the extent Complainant alleges Respondent committed a prohibited practice by "failing to bargain over procedures affecting discipline and failing to provide information" (emphasis added), we grant, in part, Respondent's motion to dismiss or in the alternative for summary judgment to the extent that Complainant has not alleged or presented any facts to support an allegation of any failure of Respondent to bargain, other than the failure to provide information. Accordingly, the Complaint is dismissed as to any allegation of failure to bargain other than the failure to provide information.

18. The Board grants Respondent's motion to seal the hearing, documents, and testimony, in part. To the extent that the names and identifying information of Lecturer and the complainants are not relevant and impact the individuals' privacy interests, such names and any identifying information shall be redacted from the documents and records in this proceeding, and not disclosed to the public or any third party. The motion is denied to the extent that the Board finds sealing the hearing and record - beyond redaction of identifying information - is not necessary.

19. The Board hereby grants in part Complainant's Motion for Summary Judgment. While Respondent identified privacy concerns regarding disclosure of records requested in Complainant's March 13, 2006, letter during these proceedings, Respondent's May 4, 2006, response to Complainant did not articulate those concerns to the Union, nor did Complainant propose any alternative such as partial disclosure or other accommodation. A "party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." See, Pennsylvania Power and Light Co., supra.

20. Respondent shall disclose to Complainant the requested investigation records, with the exception that names and identifying information shall not be disclosed (see, United States Postal Service, discussed above), and personal notes, if any, as a reflection of management's thinking and

deliberation, need not be disclosed (see, In the Matter of Manuel Veincent, Jr., et al., supra); further, Respondent need not disclose information in Lecturer's personnel file other than information relating to the investigation and misconduct at issue here; and further, Respondent need not disclose students' identities, transcripts, disciplinary records, health records, or admission information. Complainant shall utilize any records disclosed pursuant to this Order solely for the stated purpose of collective bargaining, and shall not disclose such records to any third person or anyone not directly involved with the stated purpose.

21. The Board hereby grants in part Respondent's Motion to Dismiss or in the Alternative for Summary Judgment to the extent that the Complaint alleges any failure to bargain other than the failure to provide information.

22. The Board hereby grants in part Respondent's Motion to Seal the Hearing, Documents, and Testimony in Prohibited Practice Complaint to the extent that names and any identifying information shall be redacted from the documents and records in this proceeding, and not disclosed to the public or any third party; the motion is denied to the extent that the Board finds sealing the hearing and record - beyond redaction of identifying information - is not necessary.

23. Any motion or portion of motion not specifically granted herein is hereby denied.

DATED: Honolulu, Hawaii, November 14, 2006.

HAWAII LABOR RELATIONS BOARD

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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