STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and CLIFFORD LUM, Manager and Chief Engineer, Board of Water Supply, City and County of Honolulu and KENNETH NAKAMATSU, Director, Department of Human Resources, City and County of Honolulu, Respondents.	CASE NO.: CE-01-657 ORDER NO. 2501 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On February 13, 2008, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint (Complaint) against Respondents CLIFFORD LUM, Manager and Chief Engineer, Board of Water Supply, City and County of Honolulu, and KENNETH NAKAMATSU, Director, Department of Human Resources, City and County of Honolulu (collectively, the City), alleging the City wilfully refused to provide information relevant to the parties' negotiation over temporary assignments to Unit 02 positions. UPW alleged violation of Hawaii Revised Statues (HRS) § 89-13(a)(5), (7), and (8).

On March 3, 2008, UPW filed a Motion for Summary Judgment (Motion), and on March 18, 2008, the City filed its Memorandum in Opposition to Complainant's Motion for Summary Judgment. On March 20, 2008, the Board held a hearing on UPW's Motion, and subsequent to the hearing the City submitted the document in dispute to the Board for in camera review. After careful consideration of the record and arguments presented, and in camera review of the document, the Board concludes that UPW's need for the information outweighs any legitimate privacy interests, with the exception of a union agent's name, and orders the document to be disclosed with such name redacted.

FINDINGS OF FACT

1. UPW was or is at all relevant times an employee organization within the meaning of HRS § 89-2[1] for public employees belonging to collective bargaining Unit 01.

2. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA), was or is at all relevant times an employee organization within the meaning of HRS § 89-2 for public employees belonging to collective bargaining Unit 02.

3. The City was or is at all relevant times a public employer within the meaning of HRS § 89-2 for purposes of this Complaint.[2]

4. Over the past 10 years or so, there have been various arbitrations and/or grievances concerning whether a public employer must select a Unit 01 member to fill a temporary assignment into a Unit 02 position, or whether the public employer must select a Unit 02 member to fill that position. There have been conflicting arbitration decisions on the issue.

5. On October 20, 1997, the State of Hawaii, a public employer within the meaning of HRS § 89-2, filed a Petition for Declaratory Ruling with the Board, seeking clarification of whether, in the exercise of its management rights, the award of a temporary assignment for a Unit 02 position to a

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[1]HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public "employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[2]HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

Unit 01 member without first considering efficiency and determining availability of other lower level Unit 02 employees is consistent with HRS §§ 89-6, 89-9(d), and 89-13.[3] That proceeding was Case Nos.: DR-01-68a and DR-02-68b. The City, UPW, and HGEA were intervenors to that proceeding.

6. On or about April 11, 2007, the Board issued its Order Denying UPW's Motion to Dismiss (Order) in Case Nos.: DR-01-68a and DR-02-68b. In the Order, the Board stated that it will "suspend further proceedings in this case and ORDERS that the parties engage in collective bargaining to attempt to resolve this dispute (emphasis original)."

7. On or about December 20, 2007, UPW learned that HGEA filed a grievance contesting the right of bargaining unit 01 employees to perform temporary assignments with the Board of Water Supply (BWS).

8. Upon learning of the HGEA grievance, UPW submitted a request for information to the BWS to obtain within 7 calendar days a copy of the HGEA grievance and records of temporary assignments to bargaining unit 01 employees that is the subject of the challenge.

9. On or about December 28, 2007, the BWS confirmed that a grievance filed by the HGEA was pending, but declined to provide a copy of the grievance or records of temporary assignments. The BWS referred UPW to the Department of Human Resources in the City and County of Honolulu (Department).

10. On or about January 30, 2008, UPW requested the Department provide a prompt response to the request for information dated December 20, 2007.

11. On or about February 8, 2008, the Department provided in relevant part the following response:

> HGEA has filed a grievance relating to an on-going dispute over temporary assignment and the matter is still pending. HGEA raised concerns over the release of grievance material on an open, pending case; therefore, we respectfully ask that you contact HGEA regarding your request.

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[3]HRS § 89-6 governs appropriate bargaining units; § 89-9(d) governs scope of negotiations and consultation; and § 89-13 governs prohibited practices and evidence of bad faith.

> Records of temporary assignment are available for review at the Board of Water Supply. Please contact Jan Kemp . . . or Karen Tom . . . to schedule an appointment.

12. On or about February 12, 2008, UPW contacted Janice Kemp (Kemp) at the BWS to obtain a copy of the HGEA grievance and the temporary assignments; however, Kemp was not aware of the Department's February 8, 2008, letter.

13. On February 13, 2008, UPW filed the instant Complaint, alleging the City wilfully refused to provide information relevant to the parties' negotiation over temporary assignments to Unit 02 positions, and alleged violation of HRS §§ 89-13(a)(5), (7), and (8).

14. On or about March 10, 2008, UPW received from the City records of temporary assignments for bargaining unit 01 employees to bargaining unit 02 positions in the BWS covering the period of August 15, 2005, to May 31, 2006.

15. On or about March 17, 2008, UPW received from the City records of temporary assignments for bargaining unit 01 employees to bargaining unit 02 positions in the BWS covering the period of May 1, 2004, to December 31, 2004.

16. On March 18, 2008, the City filed its Memorandum in Opposition to UPW's Motion.

17. On March 20, 2008, the Board held a hearing on UPW's Motion.

18. Around the time of the Board's hearing, UPW received the outstanding information regarding temporary assignments of bargaining unit 01 employees to bargaining unit 02 positions in the BWS.

19. At the Board's hearing, UPW clarified that it did not seek the identity of any complaining HGEA members, only the scope of the HGEA grievance.

20. The parties had no objection to the Board viewing the HGEA grievance document in camera.

21. Subsequent to the hearing, the City submitted a copy of the HGEA grievance for the Board's in camera review.

22. On or about March 20, 2008, the Board notified HGEA, inter alia, that:

> UPW requested that the [City] provide a copy of a grievance filed by the [HGEA] concerning temporary assignments. This is to inform you that the Board conducted a hearing on the UPW's motion for summary judgment in this matter this morning and at the conclusion of the hearing, the Board directed the [City] to submit the grievance to the Board for its review in camera.

23. The Board has not received a response from HGEA regarding the Board's March 20, 2008, letter to HGEA.

24. The Board reviewed the grievance document submitted by the City and finds that UPW's need for the document is slight, as the grievance document does not provide much information beyond the general facts already known to UPW. Additionally, the Board finds that any privacy interest in the information is also slight, as the grievance document does not contain personal information pertaining to any employee, and disclosure of the information contained therein should not impact any governmental function or personal privacy interests.

25. The Board also finds that the name of the union agent filing the grievance should be redacted, as the name is not relevant to UPW's stated intent to discover the "scope of the grievance" and may impact, if only slightly, the privacy interests of that union agent.

26. For the reasons discussed above, the Board finds that UPW's need for the grievance document, although slight, outweighs the interests in keeping the document confidential with the exception of the union agent's name.

DISCUSSION AND CONCLUSIONS OF LAW

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

2. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), 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. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624.

3. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under

applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id. 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. Thompson v. AIG Hawaii Ins. Co., Inc., 111 Hawai`i 413, 422-23, 142 P.3d 277, 286-87 (2006).

4. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. GECC Financial Corp., 79 Hawai`i at 521, 904 P.2d at 535.

5. HRS § 89-13(a) provides in relevant part:

> It shall be a prohibited practice for a public employer or its designated representative wilfully to:
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> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; [or]
>
> (8) Violate the terms of a collective bargaining agreement[.]

6. 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 section 89-9.

7. This Board may use parallel federal case law as guidance when interpreting Hawaii labor laws. See Hokama v. University of Hawai`i, 92 Hawa`ii 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).

8. 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).

9. 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) ("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").

10. 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.

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.

13. This Board has looked to Detroit Edison for guidance in past decisions. In Decision No. 130, In the Matter of Manuel Veincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (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.

14. Accordingly, pursuant to the principles articulated in Detroit Edison, this Board's role is to balance UPW's need for the sought-after information for purposes of negotiating pursuant to the Board's Order in Case Nos.: DR-01-68a and DR-02-68b, against the City's legitimate concerns for confidentiality.

15. Additionally, 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).

16. In the present case, the City notified UPW that HGEA "raised concerns over the release of grievance material on an open, pending case" and, taking the facts in the light most favorable to the non-moving party, sought an "accommodation" by asking UPW to contact HGEA regarding its request.

17. However, the accommodation suggested by the City did not result in UPW receiving any information concerning the grievance. It is unclear from the record whether UPW contacted HGEA regarding the grievance.

18. The Board reviewed the grievance document in camera to weigh the UPW's need for information against any legitimate privacy interests. While it appears that UPW's need for the document is slight, as the grievance document does not provide much information beyond the general facts already known to UPW, it also appears that any privacy interest in the information is also slight, as the grievance document does not contain personal information pertaining to any employee, and disclosure of the information contained therein should not impact any governmental function or personal privacy interests. However, the Board finds that the name of the union agent filing the grievance should be redacted, as the name is not relevant to UPW's stated intent to discover the "scope of the grievance" and may impact, if only slightly, the privacy interests of that union agent.

ORDER

For the reasons discussed above, the Board concludes that UPW's need for the grievance document outweighs any legitimate privacy interests, with the exception of the union agent's name, and orders the document to be disclosed with such name redacted. UPW's Motion is therefore granted in accordance with the Board's conclusion.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. CLIFFORD LUM, et al.
CASE NO. CE-01-657
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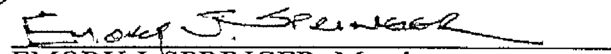
DATED: Honolulu, Hawaii, April 14, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair



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