

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-07-741

ORDER NO. 2702

ORDER GRANTING IN PART AND
DENYING IN PART BOR'S MOTION
FOR SUMMARY JUDGMENT, AND
GRANTING SUMMARY JUDGMENT
IN FAVOR OF UHPA

ORDER GRANTING IN PART AND DENYING IN PART
BOR'S MOTION FOR SUMMARY JUDGMENT,
AND GRANTING SUMMARY JUDGMENT IN FAVOR OF UHPA

On December 7, 2009, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) filed a prohibited practice complaint (Complaint) against Respondent BOARD OF REGENTS, University of Hawaii (BOR or Employer), alleging the BOR engaged in a prohibited practices by failing to issue a Step 2 hearing decision within 20 days as required by the Unit 07 collective bargaining agreement (Agreement) and refusing to advance the grievance to arbitration; and failing to provide information requested by the UHPA to investigate the grievance as provided by the Agreement. The Complaint alleges prohibited practices under Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8).

On February 1, 2010, the BOR filed a Motion for Summary Judgment, asserting that the plain meaning of the Agreement prohibits disclosure of the Tenure and Promotion Review Committee (TPRC) members' identities as well as any information from the TPRC relating to the promotion review process; that the Agreement does not permit disclosure of such information; and that the promotion review process in the Agreement provides for multiple levels of review of a faculty member's promotion application.

On February 10, 2010, the UHPA filed its Memorandum in Opposition to [the BOR's] Motion for Summary Judgment, asserting that genuine issues of material fact exist; that the UHPA has a right to request information needed to process a grievance and the Board has jurisdiction to hear the prohibited practice; and that the BOR's conclusory statements do not support a motion for summary judgment.

On March 10, 2010, the Board heard oral arguments on the motion for summary judgment pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order granting in part and denying in part the BOR's Motion for Summary Judgment, and granting summary judgment in favor of the UHPA. The Board holds, in summary, that the BOR was not obligated to provide the identities or other information from the TPRC relating to the promotion review process that is confidential under Article XIV.K of the Agreement; however, the UHPA requested that the BOR discuss alternate methods for the Union to receive information that it deemed necessary for the processing of a grievance, and thus the BOR was obligated to discuss alternate means with the UHPA.

FINDINGS OF FACT

1. The UHPA is an employee organization and the exclusive representative, as defined in HRS § 89-2,¹ of employees included in Unit 07.²
2. Respondent BOARD OF REGENTS, University of Hawaii, is the public employer, as defined in HRS § 89-2,³ of employees included in Unit 07.
3. The UHPA and BOR are parties to the Unit 07 Agreement.
4. On or about October 10, 2008, a tenured faculty member (Faculty Member) at the University of Hawaii, Manoa campus, submitted her application for promotion from Librarian IV to Librarian V. The Library Department Personnel Committee (DPC or LPC) recommended promotion. On December 15, 2008, Interim University Librarian Paula Mochida (Mochida) recommended that the promotion not be granted. In February of 2009, the

¹"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.

²Pursuant to HRS § 89-6, Unit 07 is comprised of faculty of the University of Hawaii and the community college system.

³"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.

TPRC recommended promotion. On February 26, 2009, Faculty Member was notified of a negative recommendation in the promotion application by Chancellor Virginia Hinshaw (Hinshaw or Chancellor).

5. On or about March 18, 2009, a grievance was filed by UHPA on behalf of Faculty Member pursuant to the Agreement's grievance procedure. The grievance alleged that the denial of promotion was discriminatory because it was based on Faculty Member's protected activities relating to the interpretation of the Agreement, and therefore was a breach of the promotion criteria.
6. On May 7, 2009, Faculty Member met with Hinshaw as provided by the Agreement when the Chancellor's recommendation differs from the TPRC.
7. By letter dated May 13, 2009, the Chancellor's designee, Vice Chancellor Peter Quigley (Quigley), rendered a Step 1 decision that denied the grievance, concluding, inter alia, that the allegations in the grievance were not subject to the grievance process; additionally, that Mochida's allegedly anti-union statements were not a factor in Hinshaw's decision to deny the request for promotion, which was based on the promotion documents that Faculty Member had written and Hinshaw's own independent evaluation of whether the dossier met the promotion criteria; that the TPRC found only sufficient evidence that Faculty Member met the minimum of requirements for promotion and did not find that Faculty Member exceeded the minimum requirements; and thus there was no discriminatory effect due to Mochida's review. Quigley nevertheless offered to redact the complained of paragraph of Mochida's Assessment of Recommendations if UHPA and Faculty Member agreed.
8. In a letter dated May 26, 2009, Hinshaw summarized her discussion with the TPRC, with whom she met to discuss her disagreement, in accordance with provisions in the Agreement, and explained her reasons for finding that Faculty Member did not meet the criteria for Librarian V.
9. A Step 2 meeting was held on July 7, 2009, before Vice President Linda Johnsrud (Johnsrud). At this meeting, the UHPA requested the names of the TPRC members so that the UHPA could investigate Hinshaw's statements regarding the TPRC's findings and her meeting with the TPRC.
10. By letter dated July 22, 2009, Johnsrud denied the UHPA's request for names of the TPRC members, and instead offered another statement from Hinshaw.

11. Article XIV.K of the Agreement provides:

The integrity and confidential nature of the promotion evaluation process shall be maintained. Other than for the personal examination of the dossier, meetings as provided for in this Article, and the submission of materials as provided for in the Article, the Applicant shall not otherwise attempt to influence or communicate with persons engaged in the evaluation and review process.

12. On August 10, 2009, the UHPA sent Johnsrud a packet of questionnaires to be distributed to the TPRC members and returned without identifying information, which would then be forwarded to the UHPA.
13. After the September deadline to return the packets, the UHPA contacted Johnsrud and learned that the packets were not distributed. The Employer did not offer an alternative method for obtaining information.
14. On October 15, 2009, Johnsrud sent UHPA a letter denying the information request, asserting there is no policy allowing for such a request.
15. On November 3, 2009, the UHPA responded to Johnsrud, citing representational rights under Article XXIV of the Agreement for allowing the information request. The UHPA also offered an opportunity to discuss alternate methods for the UHPA to obtain information.
16. Article XXIV.B.2 of the Agreement provides:

Any information pertaining to the grievance in the possession of the Employer needed by the grievant or the Union in behalf of the grievant to investigate and process a grievance shall be provided to them on request within seven (7) working days.

17. On December 11, 2009, Johnsrud, as the President's designee, issued a Step 2 decision denying the grievance. In the decision, Johnsrud concluded, inter alia, that the allegations in the grievance were not subject to the grievance process; additionally, that Mochida's allegedly anti-union statements were not a factor in Hinshaw's decision to deny the request for promotion, which was based on the promotion documents that Faculty Member had written and Hinshaw's own independent evaluation, and that Hinshaw cited legitimate reasons for her decision to deny promotion.

18. On December 7, 2009, the UHPA filed the instant Complaint against the BOR, alleging the BOR engaged in a prohibited practices by failing to issue a Step 2 hearing decision within 20 days as required by the Unit 07 Agreement and refusing to advance the grievance to arbitration; and failing to provide information requested by the UHPA to investigate a grievance as provided by the Agreement. The Complaint alleges prohibited practices under HRS §§ 89-13(a)(1), (5), (7), and (8).
19. On February 1, 2010, the BOR filed its Motion for Summary Judgment, asserting that the plain meaning of the Agreement prohibits disclosure of the TPRC members' identities as well as any information from the TPRC relating to the promotion review process; that the Agreement does not permit disclosure of such information; and that the promotion review process in the Agreement provides for multiple levels of review of a faculty member's promotion application.
20. On February 10, 2010, the UHPA filed its Memorandum in Opposition to [the BOR's] Motion for Summary Judgment, asserting that genuine issues of material fact exist; that the BOR has a right to request information needed to process a grievance and the Board has jurisdiction to hear the prohibited practice; and that the BOR's conclusory statements do not support a motion for summary judgment.
21. On March 10, 2010, the Board heard oral argument on the motion for summary judgment.
22. As a preliminary matter, the Board finds that the BOR failed to issue a Step 2 decision within 20 days as required by the Agreement.⁴ The BOR had requested an extension due to employees being unavailable during the summer break; however, on November 3, 2009, the UHPA requested a response, as the summer break was over, and the BOR apparently did not render a decision until December 11, 2009. Thus, although a Step 2 decision had not been made at the time the Complaint was filed on

⁴Article XXIV.C.2.b, which governs Step 2 of the grievance procedure, provides in relevant part:

The President or the President's designee shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the appeal or grievance is filed and shall render a response in writing to the grievant within twenty (20) calendar days after the close of the meeting.

December 7, 2009, the Employer did render a Step 2 decision on December 11, 2009, enabling the UHPA to proceed to the next step of arbitration. Accordingly the Board finds that the claim involving the issuance of the Step 2 decision is moot because the requested remedy has already been provided.

23. At the hearing on the motion for summary judgment, the parties did not dispute that the names of the TPRC members themselves are confidential. Further, given the provisions of Article XIV.K of the Agreement to which both parties agreed, the Board finds that the Employer has a legitimate need to keep information relating to the TPRC promotion review process confidential.
24. The Board finds that the names or any other identifying information of the TPRC members need not be disclosed by Employer.
25. The Board finds, however, that the UHPA made reasonable attempts to discuss alternative methods for the UHPA to obtain information that it considers necessary for the processing of a grievance that alleges discrimination, and that the Employer did not make a similar effort to discuss alternatives, or propose alternatives, or in any way indicate a willingness to discuss the issue of alternative means with the UHPA.
26. The Board finds that the UHPA has a legitimate need for information regarding the non-promotion in order to process a grievance that alleges discrimination.
27. The Board therefore finds that the Employer was obligated to discuss alternative means with the UHPA regarding information that is otherwise confidential yet needed by the UHPA to process a grievance alleging discrimination.
28. In summary, the Board finds that the Employer was not obligated to provide the identities or other information from the TPRC relating to the promotion review process that is confidential under Article XIV.K of the Agreement. However, the UHPA requested that the BOR discuss alternate methods for the union to receive information that it deemed necessary for the processing of a grievance, and thus the BOR was obligated to discuss alternate means with the BOR, which it wilfully failed to do.

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.
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. Id.
5. It is generally recognized that summary judgment may be granted sua sponte summary judgment to a non-movant when there has been a motion but no cross-motion. See, Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982) (when one party moves for summary judgment and at a hearing the record reveals no genuine dispute on a material fact, the court may sua sponte grant summary judgment to the non-moving party); Kassbaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 494 (9th Cir. 2000); 10A Charles A. Wright, Arthur R. Miller & Mary Kane, Federal Practice and Procedure § 2720, at 347 (3d ed. 1998). The record must be carefully reviewed to determine that the moving party against whom summary judgment was rendered had a full and fair opportunity to ventilate the issues involved in the motion. Cool Fuel, 685 F.2d at 311.
6. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. See Doe v. Doe, 116 Hawai‘i 323, 326, 172 P.3d 1067, 1070 (2007).

7. The Complaint alleges prohibited practices pursuant to HRS §§ 89-13(a)(1), (5), (7), and (8), which provides:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

- (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[.]

8. The Board looks to the Hawaii Supreme Court's evolving guidance in interpreting provisions of HRS Chapter 89. In 2007, the Hawaii Supreme Court reiterated that in assessing a violation of HRS § 89-13, the Board is required to determine whether the respondent acted with "conscious, knowing, and deliberate intent to violate the provisions" of HRS Chapter 89. In re Hawaii Government Employees Ass'n., AFSCME, Local 152, AFL-CIO, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007) ("With respect to HRS chapter 89, this court has said that 'wilfully' means 'conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89' . . . Thus, in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89 when it removed the campaign materials"). Accordingly, when assessing an alleged prohibited practice under HRS § 89-13, the Board will determine whether the respondent acted with "conscious, knowing, and deliberate intent" to violate the provisions of HRS chapter 89.

9. The 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).

10. 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).
11. 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").
12. In Detroit Edison, the Court held that the employer did not commit an unfair labor practice 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.
13. In Board Order No. 130, In the Matter of Manuel Veincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980), the 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 and In the Matter of Manuel Veincent, Jr., et al., the Board concludes that the Employer has a legitimate need to keep information relating to the TPRC promotion review process confidential, and that the names or any other identifying information of the TPRC members need not be disclosed by Employer.

15. The Board further concludes, however, that the UHPA has a legitimate need for information regarding the non-promotion in order to process a grievance that alleges discrimination. The Board therefore concludes that the Employer was obligated to discuss alternative means with the UHPA regarding information that is otherwise confidential yet needed by the UHPA to process a grievance alleging discrimination.
16. The Board concludes that the Employer's actions in withholding certain information regarding the TPRC pursuant to the provisions of Article XIV of the Agreement do not constitute a prohibited practice.
17. The Board concludes, however, that the wilful refusal of the Employer to discuss alternative means for the UHPA to obtain information that is needed to process a grievance alleging discrimination does constitute a prohibited practice pursuant to HRS § 89-13(a)(5), which is a wilful refusal to bargain collectively in good faith with the exclusive representative.⁵ The Board finds that the Employer had a fair opportunity to argue the facts relevant to this issue. Based on the record, the Board finds no genuine issues of material fact and that UHPA is entitled to judgment as a matter of law on this issue.
18. The Board concludes that UHPA's claim that the BOR failed to issue a Step 2 decision within 20 days as required by Article XXIV.C.2.b of the Agreement is moot. Although a Step 2 decision had not been made at the time the Complaint was filed on December 7, 2009, the Employer did render the Step 2 decision on December 11, 2009, enabling the UHPA to proceed to the next step of arbitration. The Board thus concludes the claim of an HRS § 89-13(a)(8) violation by the late issuance of the Step 2 decision is moot as there is no effective remedy the Board could impose.
19. The Board also concludes that the BOR's refusal to provide UHPA the names of the TPRC members or responses to the questionnaires did not violate Article XXIV.B.2 of the Agreement because of the confidentiality provisions of Article XIV.K. Thus, the Board concludes that the BOR did not violate HRS § 89-13(a)(8) by refusing to provide the TPRC members' names and information regarding the TPRC.

⁵University of Hawaii Professional Assembly v. Tomasu, 79 Hawai'i 154, 900 P.2d 161 (1995) (the duty to bargain includes the duty to engage in midterm bargaining on appropriate subjects when requested by a union).

20. Accordingly, the Board concludes that the BOR committed a prohibited practice pursuant to HRS § 89-13(a)(5) when it wilfully refused to discuss alternative methods for obtaining information needed by the UHPA to process a grievance alleging discrimination in the promotion process.
21. The Board concludes that the BOR did not commit a prohibited practice pursuant to HRS §§ 89-13(a)(1) and (7).

ORDER

The Board grants in part and denies in part the BOR's Motion for Summary Judgment, and grants summary judgment in favor of the UHPA.

In summary, the Board finds that the Employer was not obligated to provide the identities or other information from the TPRC relating to the promotion review process that is confidential under Article XIV.K of the Agreement. However, the UHPA requested that the BOR discuss alternate methods for the Union to receive information that it deemed necessary for the processing of a grievance, and thus the BOR was obligated to discuss alternate means with the BOR, which it wilfully failed to do, and thus committed a prohibited practice pursuant to HRS § 89-13(a)(5). The Board hereby orders the BOR to negotiate with the UHPA regarding alternative methods to obtain information necessary to process a grievance alleging discrimination in the promotion process.

The BOR shall notify the Board in writing of the steps taken to comply herewith in 10 days of the receipt of this order with a certificate of service of the notice on the UHPA.

DATED: Honolulu, Hawaii, May 10, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

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