

order

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-128
)	
UNIVERSITY OF HAWAII)	ORDER NO. 744
PROFESSIONAL ASSEMBLY,)	
)	ORDER GRANTING COMPLAIN-
Complainant,)	ANT'S APPLICATION TO TAKE
)	DEPOSITIONS AND DENYING
and)	RESPONDENT'S MOTION TO
)	REVOKE COMPLAINANT'S SUB-
BOARD OF REGENTS,)	POENAS DUCES TECUM
University of Hawaii,)	
)	
Respondent.)	
)	

ORDER GRANTING COMPLAINANT'S APPLICATION
TO TAKE DEPOSITIONS AND DENYING RESPONDENT'S
MOTION TO REVOKE COMPLAINANT'S SUBPOENAS DUCES TECUM

On July 19, 1989, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY [hereinafter referred to as UHPA] filed an Application for Permission to Take Depositions with this Board. The memorandum submitted in support of UHPA's application generally indicates that Complainant seeks the disclosure of dates, amounts of faculty retention salary adjustments and the names of persons receiving the adjustments.

On July 27, 1989, the BOARD OF REGENTS, University of Hawaii [hereinafter referred to as BOR] filed Respondent's Memorandum in Opposition to Complainant's Application to Take Depositions. Respondent argues that Complainant's application does not mention whose deposition is to be taken and further, fails to provide a general description to identify the person

or a particular class to which the person belongs. Thus, Respondent argues that the application fails to comply with Rule 30 of the Hawaii Rules of Civil Procedure. Moreover, Respondent contends that Complainant fails to state good cause for the necessity of taking depositions of the unnamed witnesses. Accordingly, Respondent maintains that the application fails to satisfy the provisions of Administrative Rules § 14-42-8, and should be denied.

Thereafter, on August 7, 1989, Complainant UHPA requested leave of this Board to take the depositions of Albert J. Simone, Ph.D, President of the University of Hawaii; Paul Yuen, Interim Vice-President of Academic Affairs; John P. Dolly, Dean of the College of Education; Jean L.J. Lum, former Dean of the School of Nursing; Charles E. Helsley, Interim Dean of the School of Ocean & Earth Science and Technology; and Donald Hall, Director of the Institute for Astronomy. The Notice of Taking Depositions Upon Oral Examination attached to UHPA's request indicates that the above-named persons are requested to provide any correspondence, notes, memos or other writings from the period July 1, 1987 through June 30, 1989 pertaining in any way to the decision-making process to implement salary retention increases and the methods used to implement them and to whom they were given.

On August 10, 1989, Respondent BOR filed Respondent's Motion to Revoke Complainant's Subpoena Duces Tecum, accompanied by the Affidavit of Sherri-Ann Loo. Respondent, in its

Memorandum in Support of Respondent's Motion to Revoke Complainant's Subpoena Duces Tecum, states that it believes that the subpoenas duces tecum issued to acquire information regarding salary retention amounts granted to certain University of Hawaii faculty members should be revoked because the information requested is irrelevant and privileged under Chapter 92F, Hawaii Revised Statutes [hereinafter referred to as HRS], as amended by Act 160, Session Laws of Hawaii [hereinafter referred to as SLH] 1989.

As to relevance, Respondent argues that since it has already admitted that it has granted salary retention increases to certain faculty members, further facts, such as who the increases were given to, how much and when, are not relevant for the purposes of establishing a prohibited practice. Respondent contends that since Complainant does not need the information it has requested of the proposed deponents in order to establish its case, the subpoenas duces tecum should be revoked. Further, Respondent contends that the information requested is privileged pursuant to Chapter 92F, HRS, as amended by Act 160, SLH 1989. Respondent contends that Act 160 amends § 92F-12(a)(14), HRS, to limit the disclosure of information regarding employees covered by Chapter 304, HRS. Respondent contends that the section specifically limits any disclosure of information regarding compensation to only the salary ranges and not the actual amounts of compensation. Moreover, Respondent argues that § 92F-12(b), HRS, sets forth the conditions under which the protected information can be

released. This provision requires disclosure pursuant to court order or legislative subpoena but does not require disclosure pursuant to an administrative agency subpoena. Since Complainant's request to take the depositions does not meet any of the necessary conditions, Respondent argues that the information sought is privileged and protected by Chapter 92F, HRS.

In oral argument, counsel for Respondent stated that the BOR could release the names of the salary retention increase recipients and the date of implementation, but maintained that the amounts of compensation could not be released. Counsel also argued that § 92F-28, HRS, is not a basis for disclosure since that provision applies to the individual's access to his or her own record.

Complainant maintains that the information sought is relevant to the instant complaint since it is necessary to establish the impact of the alleged unilateral wage increases. Moreover, the information is necessary to determine the issue of adequate remedy in terms of compliance if a prohibited practice is found by the Board. Further, Complainant argues that depositions in the instant matter would simplify the case presentation and minimize actual time spent in Board hearings.

In UHPA's Memorandum in Opposition to UH's Motion to Revoke Subpoenas, Complainant argues that § 92F-12(a)(14), HRS, delineates the sort of information that must be released to a member of the general public based on that person's

private demand. UHPA argues that it is not a member of the general public, but the certified exclusive bargaining representative of the faculty which is charged with the statutory responsibility of fairly representing them. Secondly, UHPA is not making a demand for information based upon its status as an exclusive bargaining representative but, in this case, as a party before the Board invoking the subpoena powers of the Board. UHPA relies on the Board's statutory authority to issue subpoenas under §§ 89-5(b)(4) and (5), HRS, and the authority to issue subpoenas under its own rules. Further, UHPA argues that § 89-19, HRS, provides that contrary statutes are superseded by the provisions of Chapter 89, HRS.

After consideration of the arguments presented, the Board concludes that the information sought by Complainant is relevant and a proper subject for discovery in this matter. Information pertaining to the salary retention increases is relevant to the subject of wages, a mandatory subject of collective bargaining. The information is centrally relevant to Complainant's charges regarding the alleged failure to bargain over the unilaterally granted wage increases. The amounts of the increases and the pervasive character of the distributions are relevant to this case. The Board also concludes that this information sought will materially simplify case presentation and will minimize actual time spent in hearings. Since the information sought is in the control of the BOR, the Board concludes that UHPA has established good cause

to grant its application to take the depositions. With its August 7, 1989 filing of its Request for Leave to Take Depositions Upon Oral Examination; Notice of Taking Depositions Upon Oral Examination; Memorandum in Support of Request for Leave to Take Depositions Upon Oral Examination; accompanied by the various subpoenas, the Board concludes that UHPA cured any defects contained in its original application.

After reviewing the BOR's argument that the information sought by UHPA is privileged from discovery pursuant to Chapter 92F, HRS, as amended by Act 160, SLH 1989, the Board concludes that § 92F-12(a)(14), HRS, does not prevent disclosure of the information sought here. The Board further finds that disclosure is consistent with the provisions of Chapter 92F, HRS.

Chapter 92F, HRS, is the Uniform Information Practices Act (Modified). The policies underlying the Act clearly indicate that its provisions apply to the public's access to information contained in government records. One of the specific underlying purposes and policies of the Act is to balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.¹

¹Section 92F-2, HRS, provides as follows:

Purposes; rules of construction. In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy.

Subsection 92F-11, HRS, provides the affirmative disclosure responsibilities of the agencies. Subsection 92F-11(a), HRS, provides, "All government records are open to public inspection unless access is restricted or closed by law." Subsection 92F-12, HRS, provides a list of records or categories of records which the Legislature has declared, as a matter of public policy, shall be disclosed. Subsection 92F-12(a)(14), HRS, as amended by Act 160, SLH 1989, provides as follows:

Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

* * *

(14) The name, compensation (but only the salary range for employees covered by chapters 76, 77, 297 or 304), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency, provided that this provision shall not

Footnote 1 continued

Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of

require the creation of a roster of employees; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency; . .

It is clear under these provisions that only the salary range of the employees is available to the public for inspection and duplication. It is important to note, however, that Conference

Footnote 1 continued

government agencies--shall be conducted as openly as possible.

The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.

This chapter shall be applied and construed to promote its underlying purposes and policies, which are to:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;
- (3) Enhance governmental accountability through a general policy of access to government records;
- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy. [Emphasis added.]

Committee Report No. 112-88 on H.B. No. 2002, dated April 22, 1988, indicates that the list provided in Section 12 "should not be misconstrued to be an exhaustive list of the records which will be disclosed."

As an exclusive bargaining representative, UHPA is entitled to other information under recent amendments to Chapter 92F, HRS, which is not available to the public.² The amounts of compensation or salary are not, however, subject to disclosure under this new provision.

A further analysis under the statute requires a balancing of interests. Subsection 92F-13(1), HRS, provides that the chapter does not require disclosure of government records which would constitute a clearly unwarranted invasion of personal privacy. Subsection 92F-14(a), HRS, provides that a disclosure of a government record does not constitute a clearly unwarranted invasion of personal privacy if the public

²Act 160, SLH 1989, amends Chapter 92F, HRS, by adding a provision which reads:

Disclosure to an exclusive representative. (a) The appropriate government agencies shall disclose to an exclusive representative, as defined by chapter 89, information related to the administration of payroll deductions as authorized by section 89-4, as follows: the name, social security number, bargaining unit, amounts and dates of all statutory dues and fees and voluntary payroll deductions remitted to the exclusive representative.

interest in disclosure outweighs the privacy interest of the individual. Subsection (b) of that statutory provision sets forth examples of information in which the Legislature has determined that the individual has a significant privacy interest and includes information regarding an individual's finances or income.³

Although mindful that the Legislature has declared that an employee has a significant privacy interest in information pertaining to his or her salary, we believe in this

³Section 92F-14, HRS, provides in pertinent part:

Clearly unwarranted invasion of personal privacy. (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

* * *

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a)(14);

* * *

instance that the individual's privacy interests are substantially outweighed by the public's interest in disclosure. The public's interest here lies in the maintenance of stable labor relations between government and its employees and in the protection of the public by assuring effective and orderly operations of government. In the pursuance of this prohibited practice charge, UHPA attempts to invoke the powers of this Board in enforcing its rights guaranteed under Chapter 89, HRS. As such, we believe that disclosure of the information in this case is appropriate and consistent with the expressed terms and intent of Chapter 92F, HRS. Any disclosure of the information requested would not constitute a clearly unwarranted invasion of privacy.

In any event, in this instance, UHPA is not a member of the public pursuing this information from the Employer to further its own knowledge. While it seeks the information as the exclusive bargaining representative of the 3,000 faculty members, this fact in itself is not controlling. The fact is that the UHPA is a litigant before this Board in a contested case invoking the Board's subpoena powers pursuant to § 89-5(b)(5), HRS, and the prevailing rules of discovery. There is nothing in the legislative history we have examined which indicates that our Legislature sought to raise the provisions of Chapter 92F, HRS, to create an evidentiary privilege. Indeed, the recognition of the rules of discovery

in § 92F-28(1), HRS,⁴ specifically defers to the prevailing rules of discovery and does not suggest that an evidentiary privacy privilege is to be created by statute.

In addition, the Board relies on § 89-19, HRS, which provides:

Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.

⁴Section 92F-28, HRS, provides as follows:

Access to personal records by order in judicial or administrative proceedings; access as authorized or required by other law. Nothing in this part shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record:


- (1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding; or
- (2) Where any statute, administrative rules, rule of court, judicial decision, or other law authorizes or allows an individual to gain access to a personal record or to any information in a personal record or requires that the individual be given such access.

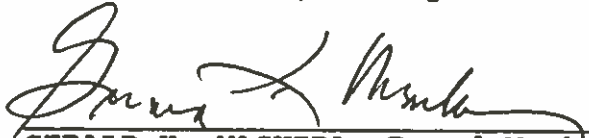
To the extent that the Board's subpoena powers conflicts with provisions in Chapter 92F, HRS, § 89-19, HRS, mandates that the provisions of Chapter 89 are controlling.

Accordingly, for the reasons set forth above, Complainant's Request for Leave to Take Depositions Upon Oral Examination is granted and Respondent's Motion to Revoke Complainant's Subpoenas Duces Tecum is denied. As the subject depositions in this matter were scheduled to be held from August 14-22, 1989, Complainant UHPA is instructed to file an Amended Notice of Taking Depositions with the appropriate time changes, accompanied by new subpoenas to be issued accordingly. The hearing presently scheduled for Tuesday, August 29, 1989 at 1:00 p.m. will be rescheduled upon motion of either party to set the case for hearing.

DATED: Honolulu, Hawaii, August 30, 1989.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

Copies sent to:

T. Anthony Gill, Esq.
Ruth I. Tsujimura, Deputy Attorney General
Joyce Najita, IRC