

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-152
	)	
UNIVERSITY OF HAWAII	)	ORDER NO. 869
PROFESSIONAL ASSEMBLY,	)	
	)	ORDER GRANTING MOTION FOR
Complainant,	)	PARTIAL SUMMARY JUDGMENT
	)	
and	)	
	)	
BOARD OF REGENTS, University	)	
of Hawaii,	)	
	)	
Respondent.	)	

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ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

On January 9, 1991, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a Prohibited Practice Complaint with the Hawaii Labor Relations Board (Board).

Complainant UHPA alleges that on January 3, 1990 (sic), President Albert Simone of the University of Hawaii (UH) announced that the names of faculty members charged with sexual harassment, the nature of charges, status of charges and information regarding any discipline imposed upon the employees would be released to the public. Complainant alleges that this unilateral variance from contract terms and past practice without bargaining or consultation violates Subsection 89-13(a)(5), Hawaii Revised Statutes (HRS). Complainant also alleges that the aforementioned acts constitute a breach of contract in violation of Subsection 89-13(a)(8), HRS.

Thereafter, on February 19, 1991, Complainant UHPA filed a Motion for Partial Summary Judgment with this Board. On February 26, 1991, Respondent BOARD OF REGENTS, University of Hawaii (BOR) filed a Memorandum in Opposition to UHPA's Motion for Partial Summary Judgment. A hearing was held on the motion on March 14, 1991.

In its motion, Complainant UHPA seeks a ruling from the Board that the disclosure of names and charges against certain faculty members, the status of the charges, and the discipline imposed are subject to bargaining under Chapter 89, HRS.

Complainant UHPA is the exclusive representative, as defined in Section 89-2, HRS, of the employees included in bargaining unit 7 (Faculty of the University of Hawaii and the community college system).

Respondent BOR is the public employer, as defined in Section 89-2, HRS, of employees of the University of Hawaii.

The UHPA and BOR are parties to a collective bargaining agreement entitled 1989-1993 Agreement Between the University of Hawaii Professional Assembly and the Board of Regents of the University of Hawaii (Agreement). Joint Exhibit No. 1.

The parties are in agreement, generally, over the facts presented in the record.

On February 26, 1990, the Office of Information Practices (OIP), issued Opinion No. 90-12, which held that under the Uniform Information Practices Act (Modified) (UIPA), Chapter 92F, HRS, the UH "must disclose the fact that

a 'formal' charge or complaint has been filed, the name of the agency employee against whom that complaint has been lodged, and disciplinary action taken in response to the formal charge, if any." Joint Exhibit No. 2, at 2. On March 5, 1990, Albert J. Simone, President of the UH, requested a further clarification of the OIP Opinion from the Attorney General.

Attorney General Warren Price, III, on December 28, 1990, sent a letter to President Simone to the effect that there was no clear error in the OIP Opinion. Joint Exhibit No. 3 at 11. Further, Simone's additional questions were forwarded to the OIP for determination of corollary issues. Id. at 2. On December 31, 1990, the OIP issued its second opinion on the subject, Opinion No. 90-39, which advised that the UH may not enter into an agreement which prohibits the disclosure of the formal charge or complaint. Joint Exhibit No. 4, at 3. The opinion also found that Section 89-19, HRS, does not take precedence over the UIPA. Id. The opinion concluded that the names of the faculty members against whom formal complaints have been filed, and any discipline imposed, must be disclosed.

Based on the two opinion letters from the OIP, and the letter from Attorney General Warren Price, III, UH President Albert J. Simone concluded that Chapter 92F, HRS, as interpreted by the OIP, required the disclosure of the information specified by the OIP. President Simone further concluded that since the release of information was compelled by Chapter 92F, HRS, there

was nothing to negotiate between the parties. See, Affidavit of Albert J. Simone.

On or about January 3, 1991, President Simone announced that Respondent would comply with the provisions of Chapter 92F, HRS, as interpreted by the OIP, and intended to release the specified information on or about January 11, 1991. President Simone also sent written notices to UH employees who had formal sexual harassment charges filed against them, providing them with an opportunity to seek judicial determination of the issue before their names and other specified information would be publicly disclosed. See, Affidavit of Albert J. Simone.

Thereafter, Complainant UHPA filed a Complaint and Motion for Temporary Restraining Order in the First Circuit Court in University of Hawaii Professional Assembly v. University of Hawaii, et al., Civil No. 91-0035-01. On or about January 10, 1991, Circuit Judge Philip T. Chun issued a temporary restraining order which temporarily prevented Respondent from releasing information concerning sexual harassment complaints against members of UHPA. Joint Exhibit No. 5.

On January 15, 1991, UHPA demanded bargaining in order to "reach mutually agreeable language that would allow the disclosure of information concerning faculty members at the conclusion of disciplinary actions and its review under the provisions of the grievance procedure and possible arbitration." Joint Exhibit No. 7.

Subsequently, Complainant also filed a Motion for Preliminary Injunction in Civil No. 91-0035-01. On January 25, 1991, Circuit Judge Marie Ann Milks heard the motion for preliminary injunction. On February 7, 1991, Judge Milks entered and filed an Order Granting Plaintiff's Motion for Preliminary Injunction. Joint Exhibit No. 7. In its order, the Court, pending final judgment, enjoined Defendants UH and Albert Simone, in his capacity as UH president "from disclosing to the public the names of any member of the Plaintiff [UHPA] formally charged or disciplined under the University's sexual harassment policies." Joint Exhibit No. 7, at 3. The Court did not enjoin the disclosure of the other specific information required to be released pursuant to Chapter 92F, HRS, as interpreted by the OIP.

On February 11, 1991, President Simone wrote to J. N. Musto, Executive Director of UHPA, acknowledging receipt of the letter, dated January 15, 1991. President Simone indicated that the OIP interpreted Chapter 92F, HRS, as requiring the disclosure of the specified information concerning sexual harassment complaints against certain UH employees. Thus, the UH determined that the disclosure, made in compliance with the law, is a non-negotiable matter in relation to the present collective bargaining agreement between the BOR and UHPA. Therefore, the UH declined UHPA's proposal to negotiate. Joint Exhibit No. 8.

On February 14, 1991, UHPA replied to Simone, stating that the public sector collective bargaining laws take precedence over other conflicting statutes. Joint Exhibit No. 9.

The Affidavit of Wade C. Zukeran, Esq., indicates that the collective bargaining agreements between the State and counties and the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, for Units 2, 3, 4, 8 and 13 contain provisions to the effect that disciplinary action taken against any employees in writing are considered confidential. See, Affidavit of Wade C. Zukeran. The agreement between the parties before us does not contain a similar provision which provides for the confidentiality of disciplinary actions.

Rule 56, Hawaii Rules of Civil Procedure, provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. In deciding whether to grant a motion for summary judgment, the Board will review the record and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, in this case, the Respondent.

Based upon a review of the record in this case, the Board concludes that there is no genuine issue as to any material fact and Complainant UHPA is entitled to partial summary judgment as a matter of law. The Board holds that parameters of the grievance procedure, including the confidential nature of disciplinary actions, are negotiable under Chapter 89, HRS.

Subsection 89-9(d), HRS, provides that the employer and the exclusive representative shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of

employment which are subject to negotiation under the chapter. The statute goes on to specifically provide that the parties may negotiate procedures governing the suspension, demotion, discharge or other disciplinary actions taken against employees.

In Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253 (1972), the Board recognized that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Subsection 89-9(d), HRS. Subsection 89-9(d), HRS, is the management's rights clause which excludes from the subjects of negotiations matters which would interfere with the rights of the employer to:

(1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reasons; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The test as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether is a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 763 (1977). In that case, the Board indicated that there must be a conclusive showing of the impact of an

issue on the employment relationship to compel negotiation and adopted the National Labor Relations Board's interpretation of a similar provision of the National Labor Relations Act. A mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms or conditions of employment.

In a subsequent case, the Board developed a balancing test to determine whether a subject matter is non-negotiable because of its interference with the employer's rights. In Department of Education, 1 HPERB 311 (1973), the Board found that class size was a hybrid issue involving policy making but which had a significant impact on working conditions. However, substantial interference with the employer's right to determine the methods, means, and personnel by which it conducted its operations and its responsibility to the public to maintain efficient operations rendered the subject matter non-negotiable.

In this case, the Board finds that the confidentiality of disciplinary proceedings is inextricably intertwined with the right to negotiate procedures relating to disciplinary actions and is therefore negotiable. The procedures regarding discipline are negotiable as specified by statute. There is no countervailing argument before the Board that the negotiation of this subject matter would undermine the right of the Employer to carry out its mission. The collective bargaining contract provisions



with the HGEA further evidence the employer's treatment of the subject matter as being negotiable.

The Board therefore hereby grants UHPA's motion for partial summary judgment.

DATED: Honolulu, Hawaii, March 23, 1992.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member

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