Op. Ltr. 95-06 Arbitrator's Decision Affirming the Discharge of a Hawaii State Library Employee

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

March 16, 1995

Ms. Carol Tomioka
Address Withheld
Honolulu, Hawaii 96817[1]

Dear Ms. Tomioka:

Re: Arbitrator's Decision Affirming the Discharge of a Hawaii State Library Employee

This is in reply to your letter to the Office of Information Practices ("OIP") received September 26, 1994 requesting an advisory opinion concerning whether the Hawaii State Library ("Library") acted appropriately in circulating to Library employees a copy of an arbitrator's Decision and Award affirming the discharge of a Library employee for excessive absenteeism, poor work performance, and misuse of a doctor's report.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an arbitrator's Decision and Award affirming the Library's discharge of a library employee for excessive absenteeism, poor work performance, and misuse of a doctor's report, is a government record that is available for public inspection and copying.

BRIEF ANSWER

Yes, provided that 30 days have elapsed following the issuance of the arbitrator's decision sustaining the employee's suspension or discharge. Section 92F-14(b)(4)(B), Hawaii Revised Statutes, as amended by Act 191, Session Laws of Hawaii 1993, provides that an agency employee does not possess a significant privacy interest in:

> (B) The following information related to employment misconduct that results in an employee's suspension or discharge:
>
> (i) The name of the employee;

[1]Ms. Tomioka's home address has been redacted from this opinion, since we have previously opined that under section 92F-13(1), Hawaii Revised Statutes, an agency should not publicly disclose an individual's home address to avoid a clearly unwarranted invasion of personal privacy.

(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 with respect to misconduct that occurs while the officer is not acting in the capacity of a police officer;

. . . .

Haw. Rev. Stat. §92F-14(b)(4)(B) (Supp. 1992) and (Comp. 1993) (emphases added).

The UIPA does not define the meaning of the term "employment misconduct." However, an examination of the legislative history of the 1993 amendments to section 92F-14(b)(4), Hawaii Revised Statutes, convinces us that the Legislature intended the information described by the amendment to be publicly available any time an agency employee is either suspended or discharged from public employment as a form of disciplinary action, except for police officers disciplined for off-duty misconduct.

Furthermore, section 92F-14(b)(4)(B)(iv), Hawaii Revised Statutes, requires the public availability of "findings of fact and conclusions of law" issued in connection with the employment misconduct. In determining whether the arbitrator's decision constitutes "findings of fact and conclusions of law," since government agencies usually do not prepare findings of fact and conclusions of law when suspending or discharging an employee, and comparing this clause with clause (iii) of section 92F-14(b)(4)(B), Hawaii Revised Statutes, which requires the availability of "[t]he agency's summary of the allegations of misconduct," we believe that the Legislature must have intended that the "findings of fact and conclusions of law" to be disclosed would be the arbitrator's findings of fact and

conclusion of law, or in cases that do not proceed to arbitration, the findings of fact and conclusions of law of the decisionmaker at the highest invoked step in the grievance adjustment process.

The arbitrator's Decision and Award in this case contains not only the findings of fact and conclusions of law, but also the name of the employee and the disciplinary action taken, information that is all made public under section 92F-14(b)(4), Hawaii Revised Statutes.

However, we believe that the Arbitrator's Decision and Award in this case was prematurely circulated within the Library, since less than thirty calendar days had elapsed following the issuance of the arbitrator's decision on September 6, 1994 when the Library circulated the decision on or about September 13, 1994.

FACTS

In a written Decision and Award dated September 6, 1994, an arbitrator affirmed the Library's decision to discharge a library employee for excessive absenteeism, poor work performance, and misusing a doctor's report in connection with an application for sick leave.

The Arbitrator's Decision and Award contained sections entitled Statement of the Case, Applicable Contract Provisions, Issues Presented, Statement of Facts, Analysis, Decision, and Award. The Statement of Facts contained subsections summarizing the employee's employment and medical history, and the employer's actions. The Decision section of the Decision and Award also was divided into subsections addressing the employee's excessive absenteeism, whether the employee was treated differently because other employees were not discharged for the use of approved sick leave, the employee's failure to perform work assignments, and the employee's "misuse and misrepresentation" of a doctor's report in connection with the submission of requests for leaves of absence for sick leave.

In your letter to the OIP requesting an opinion, you stated that Library's East Oahu District Administrator gave a copy of the Arbitrator's Decision and Award to each branch librarian attending a district meeting, and that the Director of the Hawaii State Library routed copies of the decision to the State Library staff. According to your letter to the OIP, the day following the routing of the decision, the Director of the Hawaii State Library routed a memorandum explaining why she had routed the decision, stating that it was "being circulated because it is a

public document and another district had made copies for the libraries in their district."

In your letter to the OIP, you questioned whether the Arbitrator's Decision and Award should have been circulated among Library staff, because it contains personal and medical information relating to the discharged Library employee.

DISCUSSION

I. INTRODUCTION

The UIPA provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Only the UIPA's "clearly unwarranted invasion of personal privacy" exception, section 92F-13(1), Hawaii Revised Statutes, would arguably permit the Library to withhold public access to the Arbitrator's Decision referred to in your letter to the OIP.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

An agency is not required by the UIPA to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

Under the UIPA, the "[d]isclosure 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." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992). Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an

individual has or does not have a "significant" privacy interest. Section 92F-14(b), Hawaii Revised Statutes, provides that an agency employee does not have a significant private interest in:

> (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 with respect to misconduct that occurs while the officer is not acting in the capacity of a police officer;
> . . . .

Haw. Rev. Stat. §92F-14(b)(4)(B) (Supp. 1992) and (Comp. 1993) (emphases added).

Section 92F-14(b), Hawaii Revised Statutes, is nearly identical to section 3-102(b) of the Uniform Information Practices Code ("Model Code") upon which the UIPA was modeled by the Legislature. The commentary[2] to the Model Code indicates:

> Portions of subsection (b)(1), (2), (4), and (8) not only identify information possessing a significant individual privacy interest, but also identify **closely** related information that is **outside** the scope the scope of the privacy interest. This latter information is subject to disclosure as though it were a

[2]The UIPA's legislative history urges those interpreting its provisions to consult the Model Code commentary "to guide the interpretation of similar provisions" found in the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988); see also Haw. Rev. Stat. § 1-24 (1985).

> part of the Section 3-101 enumeration of disclosable information.

Model Code § 3-102 commentary at 24 (1980) (boldface in original, emphasis added).

Thus, section 92F-14(b)(4), Hawaii Revised Statutes, not only sets forth examples of information in which an individual possesses a significant privacy interest, but it also sets forth information in which an individual does not possess a significant privacy interest and that is subject to public disclosure, as if it were a part of the list of records in section 92F-12(a), Hawaii Revised Statutes, that must be publicly available "any provision to the contrary notwithstanding."

When the Legislature adopted Act 191, Session Laws of Hawaii 1993, we believe that it concluded that as a matter of public policy, public officials who have been suspended or discharged for "employment misconduct" do not have a significant privacy interest in this information. The UIPA does not define the meaning of the term "employment misconduct."

The Hawaii Supreme Court has stated that "when construing a statute, [the court's] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Pacific International Services Corp. v. HURIP, 76 Hawai'i 209, 216 (1994). Furthermore, "[i]f statutory language is ambiguous or doubt exists as to its meaning, courts may take legislative history into consideration in construing a statute." Id. at 217. In our opinion, the phrase "employment misconduct" is ambiguous, since doubt exists as to its intended meaning, and the term is undefined in the UIPA. Thus, we now turn to an examination of the legislative history of Act 191, Session Laws of Hawaii 1993.

Conference Committee Report No. 61, dated April 29, 1993 states:

> The purpose of this bill is to amend section 92F-14, Hawaii Revised Statutes (HRS), the Uniform Information Practices Act (Modified) to clarify what type of information, regarding employment-related misconduct, may be disclosed and when such disclosure may be made.
>
> Your Committee finds that the current law regarding disclosure of public employee misconduct has led to confusion, uncertainty and controversy.

> A balance needs to be drawn between the public's right to know about government functions and the public employee's right to privacy.
>
> Your Committee notes that this measure appropriately distinguishes between minor and more serious misconduct by focusing on the disciplinary consequences, and protects the employee from the disclosure of information while formal grievance procedures are still in progress. Yet the bill also serves the public at large by refusing to provide further protection from disclosure of misconduct when the employee has exhausted non-judicial grievance adjustment procedures, and has been suspended or discharged.
>
> Your Committee also finds that because of the unique responsibilities of police officers, special care must be taken to clearly delineate private conduct from conduct as a government employee.

Conf. Comm. Rep. No. 61, 17th Leg., 1993 Reg. Sess., Haw. S.J. 764, Haw. H.J. 900 (1993) (emphases added).

Based upon the report of the conference committee quoted-above, rather than attempting to define what constitutes "employment misconduct," we believe that the Legislature, when amending section 92F-14(b)(4), Hawaii Revised Statutes, determined that any time an agency employee is suspended or discharged by an agency as a form of disciplinary action, the information set forth in section 92F-14(b)(4), Hawaii Revised Statutes, would be publicly available, provided that the employee has exhausted all non-judicial grievance procedures available to the employee, and in the case of police officers, only if the misconduct occurred while the officer was acting in the capacity of a police officer. Thus, we conclude that because the Library employee was discharged by the Library, and this was sustained by the arbitrator, the provisions of section 92F-14(b)(4), Hawaii Revised Statutes, require the disclosure of certain information upon request.

Under section 92F-14(b)(4)(B), Hawaii Revised Statutes, an agency employee who has been suspended or discharged does not have a significant privacy interest in:

> (i) The name of the employee;
> (ii) The nature of the employment related misconduct;

> (iii) The agency's summary of the alleged misconduct;
> (iv) Findings of fact and conclusions of law; and
> (v) The disciplinary action taken by the agency;
> . . . .

Haw. Rev. Stat. §92F-14(b)(4)(B) (Supp. 1992) and (Comp. 1993) (emphases added).

Since agencies typically do not issue findings of fact or conclusions of law in connection with the suspension or discharge of an agency employee, the Legislature must have been referring to the findings of fact and conclusions of law in a written decision of an arbitrator sustaining the suspension or discharge, or the decisionmaker at the highest step of the grievance adjustment process invoked by the employee. Furthermore, section 92F-14(b)(4)(B), Hawaii Revised Statutes, provides for the availability of "the agency's summary of the alleged misconduct," something, that in our opinion is different from findings of fact and conclusions of law. Thus, we conclude that the Legislature must have intended the public availability of a Decision and Award of an arbitrator sustaining an agency employee's suspension or discharge, provided that thirty calendar days have elapsed following the issuance of the arbitrator's decision.

In the case before us, the arbitrator issued his decision on September 6, 1994. According to your letter to the OIP the arbitrator's decision was circulated to Library staff on September 13, 1994, less than 30 calendar days following the issuance of the arbitrator's decision and award. Thus, while it is our opinion that section 92F-14(b)(4), Hawaii Revised Statutes, does provide that the arbitrator's decision shall be public, it appears that the Library prematurely circulated the arbitrator's decision, having done so before 30 days had elapsed following the issuance of the arbitrator's decision on September 6, 1994.

According to your letter to the OIP, the day after a Library administrator circulated the arbitrator's decision, the administrator issued a memorandum stating that the decision was circulated "because it is a public document." In this regard, we note that the UIPA provides:

> **§92F-16 Immunity from liability.** Anyone participating in good faith in the disclosure or nondisclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed, or result from such acts or omissions.

Haw. Rev. Stat. § 92F-16 (Supp. 1992).

In OIP Opinion Letter No. 91-20 (Oct. 28, 1991), based upon the legislative history of section 92F-16, Hawaii Revised Statutes, we concluded that it was intended to ensure that proceedings involving the disclosure of government records will proceed against agencies and not individual employees. The UIPA's legislative history explains:

> 8. Immunity. The bill will provide in Section -16 that good faith actions of employees in handling records distribution shall not subject them to liability. In this way, public employees will be free to act according to the intent of the law without the defensive posture which was perhaps a consequence [of chapter 92E, Hawaii Revised Statutes.] This bill provides that actions will proceed against agencies and not individual employees. Employees [sic] misconduct can, of course, be handled under normal personnel provisions.

H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw. S.J. 689, 690 (1988).

It appears that the Library administrator circulated the arbitrator's decision and award in the good faith belief that it was a public government record. As such, we believe that a court might likely conclude that the circulation of the arbitrator's decision and award was undertaken in good faith, for purposes of section 92F-16, Hawaii Revised Statutes.

CONCLUSION

For the reasons set forth above, we believe that the arbitrator's decision and award must be made available for public inspection and copying, provided that thirty calendar days have elapsed following the date of the issuance of the arbitrator's decision affirming the Library's discharge of the library employee. In our opinion, section 92F-14(b)(4)(B), Hawaii

Revised Statutes, requires that availability of an arbitrator's decision sustaining the suspension or discharge of an agency employee. It does appear, however, that Library personnel prematurely circulated a copy of the arbitrator's decision and award within the Library, since 30 days had not elapsed from the date of the arbitrator's decision on September 6, 1994 sustaining the discharge of the Library employee.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: Honorable Bartholomew A. Kane
Florence Yee
East Oahu District Administrator