STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Petitioner, and LINDA LINGLE, Governor, State of Hawaii; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; MUFI HANNEMANN, Mayor, City and County of Honolulu; UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, and COUNTY OF HAWAII, Intervenors.	CASE NOS.: DR-01-93a DR-10-93b DECISION NO. 470 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY ORDER

On January 23, 2007, Petitioner UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW") filed a petition for a declaratory order with the Hawaii Labor Relations Board ("Board"). The UPW alleged that public employers have served the UPW with a number of subpoenas duces tecum for records of union grievances, confidential statements made to union stewards and business agents in the course of grievance handling, investigative notes and records of grievances, union membership activities and union assessments of the merits of grievances. The UPW seeks a ruling that such subpoenas have a chilling effect on the rights of public employees in violation of Hawaii Revised Statutes ("HRS") § 89-3 and that public employees should be free to engage in lawful concerted activities without interference, restraint, or coercion from public employers. Thus, the UPW sought a ruling as to the applicability of HRS §§ 89-3 and 89-13(a)(1) to public employer efforts to seek or obtain records of union grievances, investigations of union grievances, union membership, union activities and other concerted or protected activities of bargaining unit employees covered by a collective bargaining agreement.

The UPW also submitted a Memorandum of Points and Authorities in Support of Petition for Declaratory Ruling on January 23, 2007 and Supplemental Submissions in Support of Petition for Declaratory Ruling on January 24, 2007.

On January 29, 2007, the Board issued a notice of the filing of the UPW's Petition for Declaratory Ruling and set February 14, 2007 as the deadline to file petitions to intervene in the proceedings. Thereafter, LINDA LINGLE, Governor of the State of Hawaii ("LINGLE"), the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO ("HGEA"), and MUFI HANNEMANN, Mayor, City and County of Honolulu ("HANNEMANN"), by and through their respective counsel, filed time petitions to intervene in the proceedings which were granted by the Board in Order No. 2427 on February 21, 2007.

At the Board conference scheduled on February 21, 2007, the Board, inter alia, invited the UPW to amend its petition, set a deadline for LINGLE to file a motion to dismiss the petition and scheduled a hearing for the arguments.

On February 28, 2007, LINGLE, by and through her counsel, filed a Motion to Dismiss Petition for Declaratory Ruling. LINGLE argued that the Board should decline to issue a declaratory order in this matter because the Board lacked jurisdiction over the matter and the question is speculative and does not involve existing facts which can reasonably be expected to exist in the near future. Further, LINGLE argued the UPW's petition is an attempt to usurp the jurisdiction of the Board, the arbitrators and the courts to issue subpoenas. Thereafter, on March 5, 2007, HANNEMANN, by and through his counsel, filed a substantive joinder in LINGLE's motion to dismiss.

On March 12, 2007, the UPW filed a First Amended Petition for Declaratory Ruling. The UPW alleged that subpoenas duces tecum issued by public employers and served on a union to obtain records of union grievances, confidential statements made to union stewards and business agents in the course of grievance handling, investigative notes, and records of union grievances, union membership activities, and assessments of the merits of grievances has a chilling effect on the rights of public employees in violation of HRS § 89-3. The UPW contends that under HRS § 89-3, public employees should be free to engage in lawful concerted activities without interference, restraint, or coercion from public employers. The UPW attached as exhibits a Decision and Order, issued by Arbitrator Mario R. Ramil, dated July 3, 2005 and an Order Regarding Employer's Motion to Compel Compliance with Subpoena Duces Tecum for Dayton Nakanelua or Designated Representative, dated August 18, 2005.

On March 20, 2007, the Board conducted a hearing on Respondent LINGLE's Motion to Dismiss the Petition for Declaratory Ruling. In view of objections that potential intervenors were not noticed of the amendment, the Board indicated it would give notice of the First Amended Petition and invite all jurisdictions to intervene in the proceedings. After hearing argument on LINGLE's motion as to the Amended Petition, the Board indicated it was inclined to deny the motion to dismiss the petition and set a briefing schedule to brief the issues on the merits.

Thereafter, on March 21, 2007, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY ("UHPA"), by and through its counsel, filed a Petition for Intervention and a Position Statement with the Board. UHPA On April 9, 2007, the COUNTY OF HAWAII ("Hawaii County"), by and through its counsel, filed a Petition for Intervention with the Board.

On April 23, 2007, Petitioner UPW filed its Memorandum in Support of Petition for Declaratory Ruling and Order with the Board.

In Order No. 2444, dated April 25, 2007, the Board granted the respective Petitions for Intervention and notified the intervenors of the briefing schedule.

On May 3, 2007, LINGLE, by and through her counsel, filed a Memorandum in Opposition to UPW's Petition for Declaratory Ruling. Thereafter, on May 7, 2007, Intervenor HGEA filed a joinder in the UPW's memorandum. Also on that date HANNEMANN, by and through his counsel, filed a substantive joinder to LINGLE's memorandum in opposition to UPW's Petition for Declaratory Ruling. Thereafter, the UPW filed a reply brief on May 14, 2007 and a Supplemental Submission on June 7, 2007.

After a thorough review of the record in this case, the Board majority makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW, HGEA, and UHPA are employee organizations and exclusive representatives within the meaning of HRS § 89-2, which represent the interests of public employees included in Units 01 and 10, Units 02, 03, 04, 06, 08, 09, and 13 and Unit 07 respectively.

2. LINGLE, HANNEMANN, and Hawaii County (collectively "Employers") are public employers or represent the interests of the public employers within the meaning of HRS § 89-2, in dealing with public employees employed by the State of Hawaii, City and County of Honolulu, and the County of Hawaii, respectively.

3. On or about May 22, 2005, UPW State Director Dayton Nakanelua ("Nakanelua") was served with a subpoena duces tecum from the Department of Public Safety, State of Hawaii ("PSD"), to produce any and all documents relating to Bert Taniguchi ("Taniguchi"), a grievant in a discharge case, and any and all communications between Bert Taniguchi and the union relating to his employment with PSD before Arbitrator Mario Ramil (former Supreme Court Justice referred to as "Justice Ramil"). Attachment 1 to Declaration of Dayton Nakanelua, dated March 14, 2007 attached to UPW's Memorandum

in Opposition to Motion to Dismiss Petition for Declaratory Ruling, filed on March 14, 2007 ("Nakanelua Declaration").

4. A similar subpoena duces tecum was served on the Union business agent, Loyna Kamakeeaina, on or about May 27, 2005 who represented Taniguchi in the predisciplinary investigative proceedings, and during the grievance steps prior to arbitration. Attachment 2 to Nakanelua Declaration.

5. During the grievance process Taniguchi spoke to Kamakeeaina three times regarding the disciplinary incident and the UPW business agent attended grievance meetings held with PSD representatives. Attachment 13-7 to Nakanelua Declaration.

6. Taniguchi thought the conversations with Kamakeeaina were confidential. Id. He did not know that any notes she took would be made public. Id. Taniguchi believed that if the notes the business agents take when speaking to the employees have to be turned over to the employer, it would make employees reluctant to speak frankly to the business agent and it would also limit the business agent's ability to advocate for the employee. Id.

7. The UPW retained a grievance file on the case which contained the investigative report conducted by PSD, correspondence regarding the pre-dismissal hearing and grievance step, notes taken by the business agent during the pre-dismissal hearing and a first step grievance meeting, notes of the business agent's conversations with Taniguchi and an internal memorandum on the business agent's recommendations whether to arbitrate the grievance. Attachment 6-4 to Nakanelua Declaration.

8. The UPW filed a motion for protective order with Justice Ramil who granted the motion on July 3, 2005. Attachment 6 to Nakanelua Declaration.

9. Nakanelua was previously served with another similar subpoena duces tecum from PSD to produce all documents relating to grievance filed by the UPW contesting the discharge of 14 employees on or about June 21, 2004 in approximately 27 grievances. Nakanelua Declaration. The subpoena requested any and all documentation relating to the grievance cases and any and all communications, including, but not limited to correspondence between the grievants and the UPW, pertaining their employment with PSD. Attachment 3 to Nakanelua Declaration.

10. Upon the filing of PSD's motion to compel compliance, Arbitrator Paul Aoki ("Aoki") adopted the ruling rendered by Justice Ramil in the Taniguchi case, denying the PSD's motion to compel to the extent, that:

1. The Union need not produce any documents requested by the subpoena which are covered by the attorney-client or attorney work-product privilege or which consists of communications between the Union and its members for the purposes of facilitating the Union's representation of the member regarding the grievance.

Attachment 7 to Nakanelua Declaration.

11. On or about October 4, 2006, Nakanelua was served with a subpoena duces tecum from the City and County of Honolulu to produce any and all documents, reports, notes, data, correspondence, writings, employment records, membership and benefits records, disciplinary records, grievance records, and evaluations, whether in written form or electronic form pertaining to Richard Bilan's ("Bilan") membership in Unit 01 of the UPW and his employment with the City and County of Honolulu. Attachment 4 to Nakanelua Declaration. The subpoena requested production of any and all records concerning the UPW grievance case filed by the UPW on behalf of Bilan. Id.

12. On October 5, 2006, the UPW requested the employer to withdraw its subpoena duces tecum, citing Justice Ramil's order in the Taniguchi case. The employer declined the UPW's request and the UPW filed a prohibited practice complaint in Case No. CE-01-631. Nakanelua Declaration.

13. On January 29, 2007, the UPW was served with a subpoena duces tecum from the Department of Public Works, County of Maui in a federal district court case alleging race and national origin discrimination for any and all records, correspondence, notes, memoranda, reports, and all other written material for Donald K. Kaulia ("Kaulia"), a Unit 01 employee for the County of Maui, including but not limited to records of Christopher Chang ("Chang"), UPW's Maui business agent. Attachment 5 to Nakanelua Declaration. Chang's files which were being sought were the UPW's prior grievance files for Kaulia containing investigative notes and records of grievance meetings, notes by the union business agent of discussions with employees and/or union stewards, and comments or assessments of grievances. Nakanelua Declaration.

14. The foregoing subpoenas duces tecum were all issued by public employers who are parties to the Units 01 and 10 collective bargaining agreements to obtain records and documents well beyond what had already been submitted under Section 15 of the grievance procedure

15. Given the breadth and nature of the documents and materials sought by the Employers' subpoenas duces tecum presented in this case by the UPW, a Board majority finds that allowing the employers to obtain the notes and records of conversations between the union representatives and employees in the grievance process, documents in the grievance files, membership information, and the business agent's analysis and recommendations on the merits of grievance would have a chilling effect on the rights of public employees to engage in collective bargaining without interference by the public employer. The employee would understandably be reluctant to be candid with the union representative and the union representative would likewise be adversely affected by the lack of candor in uncovering the underlying facts in a grievance or other complaint.

DISCUSSION

Petitioner UPW in this proceeding, seeks declaratory relief from the Board confirming the following proposition:

> Public employers may not seek or obtain records of union grievances, investigations of union grievances. Union membership and union activities, and concerted activities by employees for the purpose of collective bargaining and other mutual aid and protection because such conduct has a chilling effect on the rights of public employees in violation of Hawaii Revised Statutes §89-3 ("HRS"), public employees should be free to assist any employee organization and to engage in lawful concerted activities for the purposes of collective bargaining and mutual aid and protection without interference, restraint or coercion from employers.

Most broadly read, this petition for declaratory relief asks the almost axiomatic tautological question: Do employer demands for union information which interfere with or chill employee organizational or representational rights contained in HRS § 89-3 constitute a prohibited practice pursuant to HRS §89-13? The answer is of course, but the factual and procedural context in which this question is raised requires the Board to address to some degree the circumstances under which such violations may occur and the procedures by which they may be prevented.

The UPW identifies the factual circumstance of this petition as the receipt of a spate of employer generated subpoenas issued by arbitrators, in state court and federal court, which require the production of internal union documents, including those relating the processing of grievances. Rulings by arbitrators and the Board have divided over the necessity of compliance. The UPW now seeks guidance regarding the permissible scope and

treatment of such subpoenas within the context of Chapter 89. In addressing this issue the UPW argues that the Board should adopt the ruling of Justice Ramil. Employers argue against adoption on the basis that to do so would constitute a manufacture of a "union work product privilege" and the creation of such a privilege is beyond the jurisdiction of the Board. The Board majority is persuaded by Justice Ramil's reasoning of the propriety of his ruling. However, while the Board majority concurs with the Employers that it is without the power to create any privilege, it does not find the ruling creates any categorical new privilege, rather it simply correctly applies the existing work product privilege within the context of protected union representation.

Hawaii's work product privilege is summarized succinctly in Save Sunset Beach Coalition v. Honolulu, 102 Hawai`i 465, 484, 78 P.3d 1 (2003):

> [T]he work product privilege has its foundation in HRCP Rule 26, which states that parties "may obtain Discovery regarding any matter *not privileged*" and indicates that "discovery of documents and tangible things prepared in anticipation of litigation or for trial "shall be disclosed upon a showing of "a substantial need of the materials" and "undue hardship" in obtaining the materials in another fashion. HRCP Rule 26(b)(3). Further when ordering discovery of such materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation." HRCP Rule 26(b)(3).

In applying the rule to grant the union's motion to quash the employer's subpoena requiring the production of all documents and communications in the possession of a union business agent regarding an employee-member's grievance or employment, Justice Ramil must have reached three conclusions, 1) that the materials were prepared "in anticipation of litigation," 2) that the state had not made the requisite showing of need or hardship, and 3) that the union was a "representative party concerning litigation."

The Board majority concludes that Justice Ramil properly applied the rule. "Litigation" in its common meaning, See, HRS § 1-14 (words have common meaning) includes any "legal action or process." American Heritage Dictionary of the English Language. Collective bargaining grievance procedures are statutorily and contractually mandated, See, HRS § 89-10.8, so any documents produced by the union in investigating, prosecuting or resolving a employee grievance are in anticipation of litigation *ab initio*.

Except for the parties' arguments in connection with the motion to quash, the record does not reflect any further procedural opportunity for the employer to demonstrate

the requisite need or hardship necessary to overcome the privilege. But while such a procedural opportunity might be advisable, and should be freely available, its absence is not necessarily fatal. Employee grievances necessarily regard some action, inaction, interpretation, or policy by the employer. If the claim is clearly presented by the grievance, any "substantial need of the materials" and "undue hardship" in obtaining the materials, would relate to materials under the employer's control except when they relate to prohibited "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation."

Finally, the inclusion of "other representative of a party concerning litigation" in the rule convinced Justice Ramil, as it does the Board majority, that the rule applies to the union as the grievant's representative.

In support of the extension of work product representational status to unions and to provide an alternative basis for his quashing of the subpoena, Justice Ramil relied upon Cook Paint and Varnish Company, 258 NLRB 1232 (1981) ("Cook Paint"). In that case the National Labor Relations Board ("NLRB") ruled that the insistence, under threat of discipline, of an employer's attorney, requiring the production of a union steward's union notebook containing accounts of conversations with a grievant at the occasion of an industrial accident which precipitated his discipline constituted a violation of Section (8)(a)(1) of the National Labor Relations Act

> Such consultation between an employee potentially subject to discipline and his union steward, constitutes protected activity constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen statutory representatives. Such actions by Respondent also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent's probe into protected activities has not only interfered with the protected activities of those two individuals but it has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.

In quashing the subpoena, Justice Ramil relied on Cook Paint on two levels. First, he found that the recognition of protected activity status for the union steward buttressed his application of representational status under Rule 26. The Board majority

concurs. Second, he concluded that the factual similarity of the two cases (compelled disclosure of grievance information in possession of a steward representative) would constitute a prohibited practice under analogous Hawaii law so that execution of the subpoena was impossible. Again the Board majority concurs but notes that he did not suggest or conclude that any general rule or prohibition necessarily flowed from his conclusion. This implied limitation to the facts before him mirrors limitations on the applicability of Cook Paint contained in the NLRB decision:

> [W]e wish to emphasize that our ruling in this case does not mean that all discussions between employees and stewards are confidential and protected by the Act. Nor does our decision hold that stewards are, in all instances, insulated from employer interrogation.

Accordingly, the Board must conclude that Cook Paint, while persuasive in its principles and specific application, does not represent any general rule or categorical precedent and that any other claim that information requests by employers interfere with or chill the rights of employees or their unions so as to constitute a prohibited practice must be brought and proven on a case and fact specific basis.

In their Motion to Dismiss the instant petition, the Employers argue that the Board is without the jurisdiction to consider the question presented. In support of this contention they pointedly refer the Board to two of its previous rulings in United Public Workers, AFSCME, Local 646, AFL-CIO, Case Nos.: CE-01-605a and CE-10-605b ("Laderta") and United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CE-01-631 ("Lester Chang").

Neither ruling affects the disposition of the instant petition. In Laderta, the Board denied a motion to quash an employer-generated subpoena for documents in the union's possession. The union argued for suppression pursuant to a "union work product privilege" to be applied on the basis of the rulings by Justice Ramil and Cook Paint. The employer sought denial on the basis that privileges were exclusively statutory and the Board had no power to craft or recognize a heretofore nonexistent one. A divided Board was inclined to agree with employer and announced its inclination to deny the motion on jurisdictional grounds. Even though the Board's majority still finds that the Board is without power to craft privileges, the Board majority finds that its ruling has no limiting impact on the disposition of the instant petition. Conspicuously absent in the argument and consideration of that motion was the application of Rule 26. As indicated above, the Board majority concludes that the rule should be applied in such circumstances. The application of the rule does not create any new privilege and is clearly within the jurisdiction of the Board to interpret its own rules as the Board has often relied on Hawaii Rules of Civil Procedure for guidance in the interpretation and application of its rules.

In Lester Chang, the UPW filed a prohibited practice complaint against employer alleging that a federal court issued subpoena for union materials, including those related to a grievance, constituted a prohibited practice. The City filed a motion to dismiss the complaint on jurisdictional and other grounds. A majority of the Board was inclined to grant the motion to dismiss and so announced its inclination because the complaint on its face challenged the issuance and impact of a federal subpoena and the Board majority concluded that it had no power to pass on the propriety of such a subpoena as the power to do so lies exclusively with the issuing court and federal court system. The Board remains of such mind but does not conclude that the disposition of that motion in any way precludes disposition of the instant petition. On its face, the petition relates only to employer conduct and in no way necessarily implicates the issuance of subpoenas or the authority of any issuing entity. Insofar as employer conduct implicating Chapter 89 lies under our original and exclusive jurisdiction the reasoning and ruling in Lester Chang provide no basis for dismissal or alteration of the instant decision.

In summary, in response to the UPW's inquiry regarding the compelled disclosure of union information, the Board majority reaches three conclusions: 1) Employer demands which infringe upon rights protected by Chapter 89 will constitute prohibited practices, 2) pretrial discovery and disclosure must be evaluated pursuant to the provisions of HRCP Rule 26 and, 3) any conclusion of a prohibited practice resulting from an employer information demand will be only made pursuant to fact specific showings thereof.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this petition pursuant to HRS §§ 89-5(b)(5) and 91-8 and HAR § 12-42-9.

2. HRS § 89-13(a)(1) provides as follows:

> (a) 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; . . . .

3. HRS § 89-3 provides as follows:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of

employment, including retiree health benefit contributions, and to engaged in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative.

4. Employer conduct that interferes with, restrains, or coerces employees in the exercise of the rights set forth in HRS § 89-3 violates HRS § 89-13(a)(1). The test is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 163, 117 LRRM 1260 (1984); United Public Workers, AFSCME, Local 646, AFL-CIO, VI HLRB 72, 74 (2000).

5. This 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).

6. In Cook Paint, the union's shop steward represented an injured employee during the pre-arbitration settlement process. Before arbitration, the employer and its counsel questioned the shop steward regarding the conversations with the injured employee and demanded that he turn over contemporaneous notes he kept of the incident. The National Labor Relations Board ("NLRB") noted that the union steward's involvement which gave him access to the information sought by the employer was a direct result of the performance of his duties as a union steward in his representational capacity. The NLRB held that the employer's conduct by demanding that the shop steward turn over his notes violated the provisions prohibiting employers from restraining or coercing employees from the exercise of union activities.

7. Similarly, Justice Ramil extended the work product protection to the Union as a representative of the employee concerning a grievance pending arbitration and relying on Cook Paint concluded, inter alia, that the discovery of union agent notes of conversations with employees and records of union representation through the grievance procedure"would have a chilling effect" on the rights of public employees under HRS § 89-3. Justice Ramil noted that it is an unfair labor practice under NLRA because the Employer's coercive conduct (demanding that shop steward turn over his notes he had kept of the incident) violates "provisions prohibiting employers from restraining or coercing employees from the exercise of union activities. Justice Ramil

further discussed the union agent's role in grievance handling and in the protection of the public employee's rights as follows:

> Similarly, under Section 89-3, HRS, Hawaii provides employees with the right to exercise their right to union representation. The union agent stands as their representative in grievance proceedings, creating a quasi-attorney/client relationship. The discovery of the union agent's notes of conversations with employees would have a chilling effect on these section 3 rights. Accordingly, because the factual situation and issue here and in Cook Paint are the same and Chapter 89, HRS, recognizes the right to union representation, Cook Paint is persuasive authority for extending work product protection to the union as a representative of the employee concerning a grievance pending arbitration.

8. The Board has held that employee's right to pursue and correct a grievance has been held to constitute lawful protected activity. United Public Workers, AFSCME, LOCAL 646, AFL-CIO, 3 HPERB 507 (1984).

9. When an employer seeks to obtain records of union grievances, investigations of employee discipline, or notes of union stewards' and business agents' conversations with employees in the course of union representation, these actions may unduly interfere, restrain or coerce employees in the free exercise of their statutory rights. Similarly, subpoenas for records of union membership likewise may interfere with the employee's right to engage in concerted activity.

DECLARATORY ORDER

Public employer efforts to obtain records of union grievances, investigations or union grievances, union membership records, and other concerted activities of bargaining unit employees have a tendency to interfere, restrain and coerce employees in the free exercise of rights under HRS § 89-3 and in the proper case may constitute a prohibited practice violative of HRS § 89-13(a)(1).

DATED: Honolulu, Hawaii, June 29, 2007.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

Emory J. Springer
EMORY J. SPRINGER, Member

OPINION CONCURRING, IN PART AND DISSENTING, IN PART

I concur in part with the Board majority's general conclusion that under certain circumstances, actions of a public employer seeking to obtain the union's records of its grievances, investigations of employee discipline, or notes of union stewards' and business agents' conversations with employees in the course of union representation, may unduly interfere, restrain, or coerce employees in the free exercise of the employees' statutory rights, or efforts to obtain records of union membership may under certain circumstances interfere with an employee's right to engage in concerted activity, and that such interference may support a finding of a prohibited practice under HRS § 89-13(a)(1). However, as the Board majority concedes, any conclusion of a prohibited practice could only be made pursuant to a case- and fact-specific showing thereof. Certain facts that are presented as part of the UPW's petition, such as subpoenas issued pursuant to state or federal court discovery processes (discussed in more detail below), may not always support a finding of a prohibited practice, particularly where there is no showing of wilful – i.e., conscious, knowing, and deliberate intent – to interfere with the protected union activity. Because the facts that would support a finding of a prohibited practice would vary by case, it would be inappropriate for the Board to make a broad declaratory ruling, as the UPW requested in its petition, that "Public employers may not seek or obtain records of union grievances, investigations of union grievances, union membership and union activities, and concerted activities by employees for the purpose of collective bargaining and other mutual aid and protection because such conduct has a chilling effect on the rights of public employees in violation of Section 89-3, HRS."

Additionally, I dissent from the Board majority's apparent conclusion that pretrial discovery and disclosure must be evaluated pursuant to the provisions of HRCP Rule 26.[1] The discovery and disclosure facts presented in the parties' submissions involve subpoenas issued in either an arbitration or civil proceeding. The Board does not have jurisdiction to rule upon the applicability of a privilege, or the scope of allowable discovery, in either forum.

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[1]The applicability of HRCP Rule 26 is not an issue presented in the petition for declaratory ruling.

For these reasons, I respectfully dissent from the Board majority's decision to issue the present Declaratory Order, and would have dismissed the petition.[2] Additionally, I believe the Board majority should more clearly indicate the intended scope, and limitations, of its ruling.

I. Public employer efforts to obtain records of union grievances, investigations of employee discipline, or notes of union stewards' and business agents' conversations with employees in the course of union representation, or records of union membership may constitute a prohibited practice.

This 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). In Cook Paint, the NLRB ruled that the insistence, under threat of discipline, that a union steward produce the steward's notebook containing accounts of conversations with a grievant constituted a violation of Section (8)(a)(1) of the National Labor Relations Act. Accordingly the Board majority looks to Cook Paint for guidance in concluding that efforts to obtain certain union records may constitute a prohibited practice.

It should be noted, however, that Cook Paint involved a situation where the demand by the employer was accompanied by a threat of discipline, and thus the facts differ from the present petition. In Cook Paint, the threat inhibited stewards in obtaining needed information from employees because the steward knew that, upon demand of the employer, the steward will be required to reveal the substance of his discussions or face disciplinary action. The employer's demand in Cook Paint was made orally to the steward during a meeting as the employer prepared for arbitration, and not through a validly-issued subpoena under the jurisdiction of an arbitrator, court, or administrative body. Without any apparent means to contest or challenge the demand by the employer, the steward was indeed put in the position of either complying of with the demand, or face discipline himself for performing his union duties.

By contrast, the subpoenas supporting the present petition for declaratory ruling were issued pursuant to the arbitration process in the collective bargaining agreement, which is governed by HRS Chapter 658A, or the discovery process in state and federal courts, which is governed by the respective court's rules of civil procedure. Pursuant to HRS

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[2]See Hawaii Administrative Rules ("HAR") § 12-42-9(f).

§ 658A-17, the arbitrator controls discovery, and may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action. Pursuant to Rule 26 of the Hawaii Rules of Civil Procedure ("HRCP"), the state courts may issue protective orders barring or limiting the discovery that may be had.[3] Rule 26 of the Federal Rules of Civil Procedure ("FRCP") similarly provides that the federal court may issue protective orders. Accordingly, the union and employees in the present case are afforded protection to challenge or contest the scope of the subpoenas, and thus the infringement on protected activity is less than that in the Cook Paint situation.

Additionally, HRS § 89-13(a)(1) provides that it is a prohibited practice for a public employer or its designated representative wilfully to interfere, restrain, or coerce any employee in the exercise of any right guaranteed under chapter 89. In Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983), the Board interpreted the term "wilfully" and concluded, and the Hawaii Supreme Court affirmed, that the union had not committed a prohibited practice because there was no conscious, knowing and deliberate intent to violate the statute. Similarly, where an employer's action of seeking union records through subpoenas interferes with protected activity, the action must be shown to be the result of a conscious, knowing and deliberate intent to interfere with protected activity.

Accordingly, I concur with the Board majority that actions by a public employer to obtain union records may interfere with protected activity, and may support a finding of a prohibited practice under HRS § 89-13(a)(1), using Cook Paint as guidance. However, any such finding is case- and fact- specific; the exact facts that would support a finding of a prohibited practice would vary by case, and thus the Board cannot make a broad declaratory ruling that public employers may not seek or obtain certain union records.[4]

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[3]For example, a party may withhold information by claiming that it is privileged or subject to protection as trial preparation material by making the claim expressly and describing the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself that is privileged or protected, will enable other parties to assess the applicability of the privilege or protection. HRCP Rule 26(b)(6). A party may make a motion, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, for the court to make a protective order. HRCP Rule 26(c).

[4]A flat prohibition preventing a party from seeking or obtaining certain records via subpoena in the context of arbitration or civil suit would, de facto, implicate the authority of the arbitrator or court to issue subpoenas and control discovery, which is beyond the jurisdiction of the Board, and, further, may impact the pending litigation itself.

II. The applicability of HRCP Rule 26.

I respectfully dissent from the Board majority's apparent conclusion that pretrial discovery and disclosure "must" be evaluated pursuant to the provisions of HRCP Rule 26. The discovery facts presented in the parties' submissions involve subpoenas issued in either an arbitration or civil lawsuit proceeding. The Board does not have jurisdiction to rule upon the applicability of a privilege, or the scope of allowable discovery, in either forum.

As discussed above, the arbitrator controls discovery in arbitration proceedings, pursuant to HRS § 658A-17, and the courts control discovery in civil proceedings pursuant to the rules of civil procedure. The applicability of any privilege to information requested via subpoena in either an arbitration or civil proceeding is not within the jurisdiction of the Board.

The Board is free, of course, to interpret its own rules. Pursuant to HAR §§ 12-42-8(g)(6) and (7), the Board controls discovery for hearings before the Board. The Board may conclude that such discovery will be evaluated pursuant to the provisions of HRCP Rule 26, as the Board has looked to the HRCP in the past in interpreting its own rules.

The Board majority's decision, however, is not clear as to the applicable scope of its conclusion that discovery "must" be evaluated pursuant to HRCP Rule 26. To the extent the Board majority's conclusion appears intended to apply to the facts alleged in the petition – that is, to subpoenas issued in arbitration and civil proceedings – I respectfully dissent.

III. Confidentiality interests and the balancing test.

The Board has recognized in the past that certain information has confidentiality interests, even though there may not be a specific statutory "privilege" that applies[5] and thus disclosure of the information should not be compelled. For example, in Decision No. 130, In the Matter of Manuel Vincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980), this Board held that the employer's tally sheets were relevant and necessary to the grievances which alleged irregularities in the promotion procedure, and did not reach the "sensitivity" level of psychological tests that were at issue in Detroit Edison Co. v. NLRB, 440 U.S. 301, 99 S. Ct. 1123 (1979). However, the Board also held that the promotion board member's personal notes, as a reflection of management's thinking and

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[5]For example, records of union membership, which are part of the facts alleged in the instant petition, would not be covered by the Board majority's analysis of work product under HRCP Rule 26, but may nevertheless be entitled to a "shield of confidentiality," which is a term articulated in Decision No. 130, In the Matter of Manuel Vincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980).

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.

Similarly, the union information at issue here would likely be entitled to a "shield of confidentiality" regardless of whether or not a specific statutory privilege applies. Information entitled to a shield of confidentiality is subject to a balancing test, weighing one party's need for the sought-after information against the other party's legitimate concerns for confidentiality.

For example, in Detroit Edison, the Court held that the employer did not violate its duty to bargain by conditioning disclosure of employees' aptitude tests 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.

It should be noted that in at least one case before the NLRB, General Dynamics Corp., 268 NLRB 1432 (1984), the NLRB used a balancing test in evaluating whether or to what extent information that was entitled to attorney work product privilege should be disclosed to the union for purposes of the union's pending grievance. The union's need for the information was balanced against the legitimate confidentiality interest of the employer. The case involved an allegation that the employer violated Section 8(a)(5) (refusal to bargain in good faith) and Section 8(a)(1) (interference, restraint, or coercion directed against union concerted activity) by refusing to furnish certain information requested by the union, and did center on subpoenas issued in arbitration or civil proceeding.

Accordingly, in the context of collective bargaining, the general rule is that disputes concerning the disclosure of confidential information – whether constituting work product privilege or entitled to a shield of confidentiality – is subject to a balancing test.

A balancing test may thus be more appropriate than the test articulated by the Board majority in the context of collective bargaining discovery disputes, including application of work product privilege under FRCP Rule 26.[6] However, the issue of work product privilege and the application of FRCP Rule 26 was not the subject of the instant petition for declaratory ruling, and such discussion is speculative.

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[6]Again, this test would only be applicable to discovery/disclosure disputes before the Board, as the Board cannot dictate evaluation of discovery disputes to an arbitrator or the courts.

CONCLUSION

For the above-discussed reasons, I concur in part with the Board majority's conclusion that under certain circumstances, actions of a public employer seeking certain union information may unduly interfere, restrain, or coerce employees in the free exercise of the employees' statutory rights, or efforts to obtain records of union membership may under certain circumstances interfere with an employee's right to engage in concerted activity, and that such interference may support a finding of a prohibited practice under HRS § 89-13(a)(1). However, any conclusion of a prohibited practice can only be made pursuant to a case- and fact-specific showing thereof; the exact facts that would support a finding of a prohibited practice would vary by case, and thus the Board cannot make a broad declaratory ruling as requested.

Moreover, I respectfully dissent from the Board majority's apparent conclusion that pretrial discovery and disclosure "must" be evaluated pursuant to the provisions of HRCP Rule 26. The discovery and disclosure facts presented in the parties' submissions involve subpoenas issued in either an arbitration or civil lawsuit proceeding. The Board does not have jurisdiction to rule upon the applicability of a privilege, or the scope of allowable discovery, in either forum; accordingly, the Board majority should more clearly define the intended scope, and limitations, of its ruling

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