

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAII  
PROFESSIONAL ASSEMBLY,

Complainant,

and

BOARD OF REGENTS, University of  
Hawaii, State of Hawaii,

Respondent.

CASE NO. CE-07-805

ORDER NO. 2893

ORDER DENYING RESPONDENT'S  
MOTION TO DISMISS OR IN THE  
ALTERNATIVE FOR SUMMARY  
JUDGMENT, FILED ON JULY 13, 2012;  
DENYING COMPLAINANT'S  
COUNTER-MOTION FOR SUMMARY  
JUDGMENT, FILED ON JULY 20, 2012;  
AND DENYING RESPONDENT'S  
MOTION TO REVOKE SUBPOENA  
DUCES TECUM, FILED ON JULY 20,  
2012; AND NOTICE OF HEARING  
AND FILING DEADLINES

ORDER DENYING RESPONDENT'S MOTION TO DISMISS OR IN THE  
ALTERNATIVE FOR SUMMARY JUDGMENT, FILED ON JULY 13, 2012;  
DENYING COMPLAINANT'S COUNTER-MOTION FOR SUMMARY JUDGMENT,  
FILED ON JULY 20, 2012; AND DENYING RESPONDENT'S MOTION TO REVOKE  
SUBPOENA DUCES TECUM, FILED ON JULY 20, 2012; AND NOTICE OF  
HEARING AND FILING DEADLINES

On June 1, 2012, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (Complainant, UHPA, or Union) filed the instant Prohibited Practice Complaint (Complaint) against Respondent BOARD OF REGENTS, University of Hawaii, State of Hawaii (Respondent or BOR) with the Hawaii Labor Relations Board (Board). Complainant alleged that Respondent obstructed UHPA's investigation of a faculty member's disciplinary incident which constitutes a failure to bargain in good faith with the exclusive bargaining representative in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(5), as well as a breach of the 2009-2015 collective bargaining agreement (CBA) between the parties, and in violation of HRS § 89-13(a)(3). On June 25, 2012, the Board conducted the prehearing/settlement conference in this matter. The hearing on the merits had previously been scheduled on July 9, 2012, within the 40-day requirement of HRS § 377-9 and Hawaii Administrative Rules (HAR) § 12-42-46. During the prehearing, the Board set July 5, 2012 as the deadline to file any dispositive

motions. The Board also instructed the parties that if a dispositive motion is filed by the deadline, then the Board will notify the parties; remove the July 9, 2012 hearing from the calendar; and schedule a hearing on the motion(s).

On July 5, 2012, the parties filed a Stipulation and Order to Reschedule Hearing Dates (Stipulation and Order) with the Board in which the parties agreed to extend the deadline to file a dispositive motion to July 13, 2012 and schedule the hearing for the motion(s) on July 27, 2012. The parties also waived the 40-day hearing requirement. The Board approved the Stipulation and Order and issued Order No. 2856 on July 5, 2012.

On July 13, 2012, Complainant filed an Application for Depositions Upon Written Interrogatories and for Issuance of Subpoena Duces Tecum (Application) with the Board. Complainant filed the Application to take the deposition of the University Registrar by written interrogatories and for the issuance of a subpoena duces tecum to appear before a court reporter on August 3, 2012 and to bring the following documents: the local addresses, telephone numbers and email addresses for seven student witnesses, the Nondisclosure of Directory Information forms filed for the students, and all emails, memoranda between the Registrar Stuart Lau and/or Vice Chancellor Reed Dasenbrock, Trish Kimura, Dean Mary Boland, Marla Acosta, and the seven students, concerning the disclosure of directory information for the students between March 14, 2012 and July 13, 2012. Complainant contended that it sought to issue subpoenas to witnesses for attendance at the hearing but the Complainant did not have the information necessary for service of the subpoenas.

Also on July 13, 2012, Respondent filed a Motion to Dismiss or in the Alternative, for Summary Judgment with the Board. Respondent contended that the instant Complaint should be dismissed because the Complaint failed to state a claim for relief or there were no disputed material facts remaining, and therefore, summary judgment should be granted in its favor. Respondent contended that the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, with accompanying regulations, 34 CFR § 99, protects the privacy rights of students and regulates the disclosure of directory information, including the student's name, address, telephone listing and e-mail addresses and Respondent properly honored the students' request to opt out from disclosing their directory information. Moreover, Respondent contended that it has a policy not to release information absent legal compulsion and in this case, Respondent was not obligated to provide the student contact information to UHPA. In addition, Respondent contended that the violation of the collective bargaining agreement claim should be deferred to the grievance and arbitration procedure, as the arbitrator should determine the scope and extent of prehearing discovery under HRS Chapter 658A.

On July 18, 2012, Complainant filed a Notice of Taking Deposition Upon Written Interrogatories with the Board.

On July 20, 2012, the parties filed a Stipulation as to Facts and Joint Exhibits with the Board.

Also on July 20, 2012, Complainant filed a Counter-Motion for Summary Judgment with a Memorandum in Support of Counter-Motion and in Opposition to Respondent's Motion to Dismiss or in the Alternative for Summary Judgment. Complainant contended that based upon the facts in the record, UHPA stated a claim for relief that BOR violated HRS §§ 89-13(a)(5) and (8) by willfully failing to provide UHPA with the students' contact information and that the evidence was sufficient to support the finding of prohibited practices. Complainant requested that the Board grant its Counter-Motion for Summary Judgment and deny Respondent BOR's Motion to Dismiss or in the Alternative for Summary Judgment and to further grant its requested remedies. Complainant contends, *inter alia*, the following: (1) that on March 14, 2012, seven days after UHPA's request for the students' directory information, UH should have provided the information requested since none of the students had filed a Non-Disclosure form of their directory information; (2) that UH wrongly determined that Respondent's balancing test favored the students' interest in confidentiality and that such balancing test should be in favor of the faculty member and UHPA; (3) that the UH policy to accept a student's Non-Disclosure at any time is a post-hoc rationale created by the BOR to confuse the issues and it is in violation of Article XXVIII of the collective bargaining agreement; and (4) the UH's actions informing the students that they could file a Non-Disclosure form before March 16 were acts to obstruct UHPA's investigation of the incidence and a violation of HRS §§ 89-13(a)(5) and (8).

In addition, on July 20, 2012, Respondent filed its Memorandum in Opposition to Complainant's Application for Deposition Upon Written Interrogatories and for Issuance of Subpoena Duces Tecum and Motion to Revoke Subpoena Duces Tecum. Respondent objected to the granting of the application for a subpoena for prehearing discovery under HAR § 12-42-8(g)(6) without an opportunity to be heard and contended that the student contact information was protected by FERPA. In addition, the BOR contended that the e-mails or other communications sought by UHPA were not relevant to the underlying grievance and UHPA failed to demonstrate a need for the information.

On July 26, 2012, Complainant filed a Reply Memorandum in Support of Application for Deposition Upon Written Interrogatories and for Issuance of Subpoena Duces Tecm (sic). Complainant contends that Respondent's opposition to the Application was untimely or alternatively, that Respondent's opposition lacks merit. Complainant contends that the instant Complaint alleges that Respondent acted to obstruct Complainant's investigation of a disciplinary incident by discouraging the students to cooperate with UHPA's investigation of the incident through written communications and meetings and failing to produce information to UHPA pursuant to Articles XVII and XXIV

of the applicable collective bargaining agreement. Complainant contended, *inter alia*, that it seeks the students' contact information in order to investigate the disciplinary incident and to present its prohibited practice charge; that the information can be released pursuant to a lawfully issued judicial order or subpoena, upon the condition that the students are notified in advance of the compliance therewith; and that the information is relevant to the prohibited practice charge.

Also on July 26, 2012, Respondent filed its Memorandum in Opposition to Complainant's Counter-Motion for Summary Judgment with the Board. Respondent argued, *inter alia*, that the parties agreed to hold the matter in abeyance while engaged in settlement discussions but Respondent did not agree to produce the directory information by March 14, 2012; that FERPA trumps any notion that UHPA has an inherent right to the directory information and that FERPA protects the privacy of certain information and requires that before disclosures are made that the affected students or their parents have the right to file an objection to the disclosure of information; that the BOR had a duty and obligation to allow the students time to decide whether or not to protect their directory information; that the students chose to opt out; and that nevertheless, the University policy is not to release such information to third parties such as UHPA. Respondent contend that UHPA failed to show the absence of undisputed material facts and that it is entitled to summary judgment in its favor on the limited issue of whether the University was required to disclose directory information on March 14, 2012.

On July 27, 2012, the Board conducted a hearing on the foregoing motions. All parties had full opportunity to present evidence and argument to the Board. After deliberating on the issues, the Board indicated that it would hold the subpoena duces tecum in abeyance and take the motions under advisement.

The Board finds, *inter alia*, that there are material facts in dispute as to whether: (1) Respondent agreed to produce directory information for the student-witnesses by March 14, 2012; (2) Respondent wrongly determined that the students' interest in confidentiality outweighed the faculty member and UHPA's rights; (3) Respondent violated the collective bargaining agreement in refusing to release the directory information; and (4) Respondent's actions informing the students that they could file a non-disclosure form before March 16, 2012 were acts to obstruct UHPA's investigation of the incident and a violation of HRS §§ 89-13(a)(5) and (8). Based upon a thorough review of the record, including the Stipulation of Facts and Joint Exhibits, filed on July 20, 2012, and the arguments presented, the Board hereby denies Respondent's Motion to Dismiss or in the Alternative, for Summary Judgment, Filed on July 13, 2012; Complainant's Counter-Motion for Summary Judgment, Filed on July 20, 2012; and Respondent's Motion to Revoke Subpoena Duces Tecum, Filed on July 20, 2012. Accordingly, the Board will schedule a hearing on the merits.

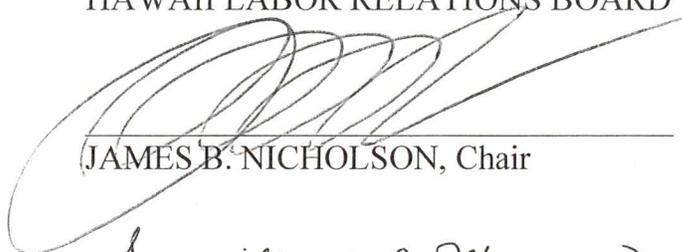
NOTICE OF HEARING AND FILING DEADLINES

NOTICE IS HEREBY GIVEN that the Board will conduct a hearing on the instant prohibited practice complaint on **April 4 at 10:00 a.m. and April 5, 2013 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

NOTICE IS ALSO GIVEN that the deadline to file and exchange witness and exhibit lists is **March 28, 2013 at 12:00 noon.** The witness lists should contain a short summary of the witness' anticipated testimony. Complainant shall also provide a list with the order of its first five witnesses. The deadline to file applications for subpoenas is **March 28, 2013 at 12:00 noon.**

DATED: Honolulu, Hawaii, March 7, 2013.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair

*Sesnita A.D. Moepono*  
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SESNITA A.D. MOEPONO, Member

*Rock B. Ley*  
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ROCK B. LEY, Member

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