

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Petitioner,

and

VALERIE BIVEN; FELICIA FRIEND-
BETLACH; DIANE SCHWARTZ;
WILLIAM SCHWARTZ; KRIS YOAKUM;
LINDA LINGLE, Governor, State of Hawaii;
BOARD OF EDUCATION, Department of
Education, State of Hawaii; PATRICIA
HAMAMOTO, Superintendent, Department
of Education, State of Hawaii, and MARIE
LADERTA, Chief Negotiator, Office of
Collective Bargaining, State of Hawaii,

Intervenors.

CASE NO. DR-05-99

ORDER NO. 2549

ORDER DENYING APPLICATION
FOR APPEARANCE PRO HAC VICE
OF FRED H. ALTSHULER,
JONATHAN WEISSGLASS AND
REBECCA SMULLIN, FILED
SEPTEMBER 2, 2008

ORDER DENYING APPLICATION FOR APPEARANCE
PRO HAC VICE OF FRED H. ALTSHULER, JONATHAN
WEISSGLASS AND REBECCA SMULLIN, FILED SEPTEMBER 2, 2008

On September 2, 2008, Petitioner HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed an Application for Appearance Pro Hac Vice of Fred H. Althshuler, Jonathan Weissglass and Rebecca Smullin, seeking authorization from the Board allowing the appearance of the law firm Altshuler Berzon LLP of San Francisco, California for the purpose of associating with the HSTA's counsel for the litigation of this case. HSTA's counsel stated in a declaration that the litigation in this matter involves complex issues of law and her firm is consulting with Altshuler Berzon LLP.

On September 5, 2008, the State filed an Opposition to Petitioner HSTA's Application for Appearance Pro Hac Vice of Fred H. Altshuler, et al., Filed September 2, 2008. The State contends, *inter alia*, that the Board has no authority to grant a pro hac vice appearance as Rule 1.9, Rules of the Supreme Court, Pro Hac Vice Appearance of Counsel, provides that only a "presiding judge or judges" may grant an application of pro hac vice appearance. The State also cites Rule 1.1, Rules of the Supreme Court, Authority of the Hawaii Supreme Court, provides that, "Nothing in this rule, however,

shall be construed to alter or limit the ultimate authority of the Supreme Court to oversee and control the privilege of the practice of law in this state,” and argues that an agency does not have the authority to determine who may engage in the practice of law. The State notes that reference to the pro hac vice applicants was included in the HSTA’s Additional Memorandum of Points and Authorities in Support of Petition for Declaratory Ruling, filed August 26, 2008.

On September 8, 2008, the HSTA filed a Reply in Support of Application for Appearance Pro Hac Vice of Fred H. Altshuler, Jonathan Weissglass, and Rebecca Smullin with the Board. The HSTA contends that under the Board’s Administrative Rules, any authorized person can represent an employee organization. In addition, the HSTA contends HRS § 605-14 permits an agency to allow non-counsel to represent the interests of a party. HSTA also argues that its application is not untimely given the Board’s rules which allegedly permits non-counsel to represent a party.

On September 10, 2008, the State filed a response to HSTA’s Reply and on September 2008, the HSTA filed a Supplemental Reply to the State’s response.

After reviewing the record and the arguments presented, the Board concludes that it lacks authority to rule on HSTA’s application to permit out-of-state counsel appear pro hac vice in this matter.

Having been created by statute, the Board’s powers are limited to those delegated by the Legislature. In Preble v. Board of Trustees of the Employees Retirement System, State of Hawaii, 111 Hawai’i 498, 143 P.3d 37 (2006), the Hawaii Supreme Court held that the retirement system board was not authorized to award attorneys fees to retirees who complained of a pension miscalculation. The Court stated with respect to an agency’s powers, at p. 505:

Inasmuch as an administrative agency’s powers are limited to those delegated to it by the legislature, [footnote omitted] an agency cannot exercise “general or common law powers,” *City of Chicago v. Fair Employment Practices Comm’n*, 65 Ill.2d 108, 2 Ill.Dec. 711, 357 N.E.2d 1154, 1155 (1976). [footnote omitted.] *TIG Ins. Co. v. Kauhane*, 101 Hawai’i 311, 327-28, 67 P.3d 810, 826-27 (App.2003) (“An administrative agency can only wield powers expressly or implicitly granted to it by statute. Implied powers are limited to those reasonably necessary to make [an] express power effective.”) (internal quotation signals omitted); *Friends of Nassau County, Inc. v. Nassau County*, 752 So.2d 42, 53 (Fla.Dist.Ct.App.2000).

See also Paul’s Elec. Serv., Inc. v. Befitel, 104 Hawai’i, 412, 91 P.3d 494 (2004).

The Hawaii Supreme Court controls the privilege of practicing law in this State. Rule 1.1, Rules of the Supreme Court, provides as follows:

The Hawai'i Supreme Court (Supreme Court) shall appoint a Board of Examiners (Board) to administer the process of admission to the bar of the state. Nothing in this rule, however, shall be construed to alter or limit the ultimate authority of the Supreme Court to oversee and control the privilege of the practice of law in the state.

Rule 1.9, Rules of the Supreme Court, Pro hac vice appearance of counsel, provides, in part, as follows:

Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia who is not a resident of Hawaii may be permitted to associate himself or herself with a member or members of the Hawaii bar in the presentation of a specific case at the discretion of the presiding judge or judges.

The foregoing rule provides that a judge who is presiding over a specific case has the discretion to permit a non-resident licensed attorney to associate himself or herself with a member of the Hawaii bar in the presentation of that case. The rule is silent as to whether an administrative agency or board may also grant a pro hac vice application in a case pending before it.

HRS § 605-14 prohibits the unauthorized practice of law and provides as follows:

It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by statute of the State or of the United States; provided that nothing herein shall be deemed to authorize the licensing of a corporation to practice law except as provided in chapter 416. Nothing in sections 605-14 to 605-17 contained shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

HRS § 605-14 provides that it is unlawful to engage in the practice of law, except if the person is licensed or authorized to do so by an appropriate court, agency, or office. The HSTA argues that the Board's rules permit an employee organization to be represented by non-counsel and thus the Board may authorize an out-of-state attorney to represent the HSTA before the Board. HAR § 12-42-7, Appearance and practice before the board, provides in part, as follows:

(a) A public employee may appear in his own behalf; an employee organization may be represented by a person or persons duly designated and authorized by the employee organization; and a public employer may appear on its own behalf or through a person or persons duly designated and authorized by such employer.

(b) In any proceeding under this chapter, any public employee, employee organization, or public employer may be represented by counsel or any other authorized person.

While the Board's rule permits parties to be represented by counsel or any other authorized person, the rules do not authorize the Board to grant pro hac vice applications to out-of-state counsel to engage in the practice of law. Cf., HAR § 6-61-12(b)(2) (an attorney who is not authorized to practice law in the State but who associates with a member in good standing of the bar of the State in the presentation of a specific proceeding may appear before the State Public Utilities Commission.) Thus, absent a specific statute or rule which provides or delegates to the Board the authority to grant out-of-state counsel the right to practice law, the Board concludes that it lacks authority to consider a pro hac vice application and hereby denies the HSTA's application.

DATED: Honolulu, Hawaii, _____ September 29, 2008 _____.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

HAWAII STATE TEACHERS ASSOCIATION, Petitioner, and VALERIE BIVEN; et al.
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Copies sent to:

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