

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

LINDA LINGLE, Governor, State of Hawaii;
MARIE LADERTA, Director, Department of
Human Resources Development, State of
Hawaii; MUFU HANNEMANN, Mayor, City
and County of Honolulu; CHARMAINE
TAVARES, Mayor, County of Maui;
BERNARD P. CARVALHO, Jr., Mayor,
County of Kauai; WILLIAM KENOI, Mayor,
County of Hawaii; THOMAS KELLER,
Administrative Director, The Judiciary, State of
Hawaii; and THOMAS M. DRISKILL, Jr.,
President and Chief Executive Officer, Hawaii
Health Systems Corporation,

Respondents.

CASE NOS.: CE-01-717a
CE-10-717b

ORDER NO. 2750

ORDER GRANTING IN PART AND
DENYING IN PART STATE
RESPONDENTS' MOTION TO
QUASH SUBPOENA DUCES TECUM
ISSUED TO RESPONDENT MARIE
LADERTA ON SEPTEMBER 13, 2010,
FILED ON SEPTEMBER 14, 2010;
MOTION TO QUASH DEMAND FOR
DOCUMENTS FROM RESPONDENT
LADERTA PURSUANT TO LETTER
ISSUED ON SEPTEMBER 10, 2010,
FILED ON SEPTEMBER 13, 2010;
AND MOTION IN LIMINE TO
EXCLUDE EVIDENCE RELATING
TO ORAL OR DOCUMENTARY
INFORMATION WHICH ARE
SUBJECT TO THE EXECUTIVE
PRIVILEGE, THE DELIBERATIVE
PROCESS PRIVILEGE, THE
STATUTORY PRIVILEGE UNDER
HRS § 92F-13, THE ATTORNEY-
CLIENT PRIVILEGE, AND
PRIVILEGES BASED ON
COLLECTIVE BARGAINING
STRATEGIES, FILED ON
SEPTEMBER 13, 2010; AND
GRANTING IN PART AND DENYING
IN PART COMPLAINANT'S MOTION
TO REVOKE SUPPLEMENTAL
SUBPOENA DUCES TECUM OF
DAYTON NAKANELUA, FILED ON
NOVEMBER 3, 2010

ORDER GRANTING IN PART AND DENYING IN PART STATE RESPONDENTS' MOTION TO QUASH SUBPOENA DUCES TECUM ISSUED TO RESPONDENT MARIE LADERTA ON SEPTEMBER 13, 2010, FILED ON SEPTEMBER 14, 2010; MOTION TO QUASH DEMAND FOR DOCUMENTS FROM RESPONDENT LADERTA PURSUANT TO LETTER ISSUED ON SEPTEMBER 10, 2010, FILED ON SEPTEMBER 13, 2010; AND MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATING TO ORAL OR DOCUMENTARY INFORMATION WHICH ARE SUBJECT TO THE EXECUTIVE PRIVILEGE, THE DELIBERATIVE PROCESS PRIVILEGE, THE STATUTORY PRIVILEGE UNDER HRS § 92F- 13, THE ATTORNEY-CLIENT PRIVILEGE, AND PRIVILEGES BASED ON COLLECTIVE BARGAINING STRATEGIES, FILED ON SEPTEMBER 13, 2010; AND GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO REVOKE SUPPLEMENTAL SUBPOENA DUCES TECUM OF DAYTON NAKANELUA, FILED ON NOVEMBER 3, 2010

On September 13, 2010, State Respondents filed a Motion to Quash Demand for Documents from Respondent Marie Laderta pursuant to Letter Issued on September 10, 2010. Also on September 13, 2010, State Respondents filed a Motion in Limine to Exclude Evidence Relating to Oral or Documentary Information which are Subject to the Executive Privilege, the Deliberative Process Privilege, the Statutory Privilege Under HRS § 92-F(13), the Attorney-Client Privilege, and Privileges Based on Confidentiality of Collective Bargaining Strategies.

Also on September 13, 2010, Complainant filed an Application for Issuance of Subpoena, a subpoena duces tecum for Marie Laderta.

On September 14, 2010, State Respondents filed a Motion to Quash Subpoena Duces Tecum Issued to Respondent Marie Laderta on September 13, 2010.

On September 14, 2010, Complainant filed its opposition to State Respondents' Motion to Quash Demand for Documents from Respondent Marie Laderta Pursuant to Letter Issued on September 10, 2010, Filed on September 13, 2010.

On October 1, 2010, State Respondents filed an Application for Issuance of Subpoena Duces Tecum, a supplemental subpoena duces tecum for Dayton Nakanelua, the State Director of the UPW.

On November 3, 2010, Complainant filed a Motion to Revoke Supplemental Subpoena Duces Tecum of Dayton Nakanelua.

On November 9, 2010, State Respondents filed a Memorandum in Opposition to UPW's Motion to Revoke Supplemental Subpoena Duces Tecum of Dayton Nakanelua.

With respect to State Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent Marie Laderta on September 13, 2010, the Board, on September 16, 2010, issued an oral ruling granting in part the motion to quash to the extent that it requested

any notes, minutes, or other records of meetings and discussions with the employer group, or Governor Lingle and Director Kawamura.

In the context of collective bargaining, the general rule is that disputes concerning the disclosure of confidential information – whether constituting work product privilege or information that is entitled to a shield of confidentiality – is subject to a balancing test. In 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.¹

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 and thus disclosure of the information should not be compelled. For example, in Decision No. 130, In the Matter of Manuel Veincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980), the 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 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.

Applying the balancing test to the present case, the Board holds that what the representatives of the employer and the union discuss among themselves in preparation for negotiations has little relevance to what the parties ultimately agree upon. The focus must remain on the bargaining process and what the parties discussed at the table during negotiations. It is at the table that each side presents their proposal, counter proposals, and the reasoning or justification for the respective positions. It is through this process that provisions are added, deleted, and/or modified. It is through this process that bargaining history is created.

To require either party to provide information regarding their internal discussions in preparation for negotiations would not be in keeping with the customary practice in collective bargaining, and would be inconsistent with the intent of HRS chapter 89 to promote cooperation between the parties.

¹The 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 collective activity) by refusing to furnish certain information requested by the union.

Accordingly, the Board grants State Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent Marie Laderta on September 13, 2010, to the extent that Complainant seeks notes, minutes, or other records of meetings and discussions between Respondent Laderta and the employer group, or Governor Lingle and Director Kawamura, such as bargaining strategy or deliberations, or information protected by Hawaii Rules of Evidence (HRE) Rule 503² (lawyer-client privilege). Further, the Board orders that Complainant be allowed to question Respondent Laderta in such manner as to be consistent with the Board's ruling regarding the partial granting of the motion to quash; thus, State Respondents Motion to Quash Demand for Documents from Respondent Marie Laderta pursuant to Letter Issued on September 10, 2010; and State Respondents' Motion in Limine to Exclude Evidence Relating to Oral or Documentary Information which are Subject to the Executive Privilege, the Deliberative Process Privilege, the Statutory Privilege Under HRS § 92F-13, the Attorney-Client Privilege, and Privileges Based on Confidentiality of Collective Bargaining Strategies, are also granted in part and denied in part to the same extent as the Motion to Quash Subpoena Duces Tecum Issued to Respondent Marie Laderta on September 13, 2010.

With respect to Complainant's Motion to Revoke Supplemental Subpoena Duces Tecum of Dayton Nakanelua, the Board grants the motion in part and denies in part; specifically, the Board grants the motion to the extent that Respondents seek information that is protected by HRE Rule 503 (lawyer-client privilege), or information concerning internal discussions made in preparation for negotiations, such as bargaining strategy or deliberations. The Board's ruling is based upon the same legal and policy considerations as articulated above in the Board's discussion of Respondents' motion to quash.

The remaining portions of Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent Marie Laderta on September 13, 2010, and of Complainant's Motion to Revoke Supplemental Subpoena Duces Tecum of Dayton Nakanelua, are denied except as specifically granted by this order.³

²Pursuant to HRS § 91-10(1), administrative agencies shall give effect to the rules of privilege recognized by law.


³With respect to Complainant's argument that the request is overly burdensome because it spans a period of 22 years, Mr. Nakanelua testified on direct examination that the employers' monthly contributions were in the agreement for a long time, that changes were made in 1995 as to the employer's contributions, and that such changes continued until 2003, which was about the time of Governor Lingle's first involvement; further, Complainant's Exhibits 117 and 118 refer to documents dated back to 1985. Thus, the Board finds that the request is not overly burdensome. With respect to Complainant's argument that there was no hearing scheduled for November 3, 2010, counsel for the parties were informed at hearing that the Board was reserving November 3, 4, 22, 23, 29, and 30, 2010, for further hearing in this matter. With respect to

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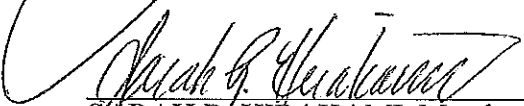
ORDER GRANTING IN PART AND DENYING IN PART STATE RESPONDENTS' MOTION TO QUASH SUBPOENA DUCES TECUM ISSUED TO RESPONDENT MARIE LADERTA ON SEPTEMBER 13, 2010, FILED ON SEPTEMBER 14, 2010; MOTION TO QUASH DEMAND FOR DOCUMENTS FROM RESPONDENT LADERTA PURSUANT TO LETTER ISSUED ON SEPTEMBER 10, 2010, FILED ON SEPTEMBER 13, 2010; AND MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATING TO ORAL OR DOCUMENTARY INFORMATION WHICH ARE SUBJECT TO THE EXECUTIVE PRIVILEGE, THE DELIBERATIVE PROCESS PRIVILEGE, THE STATUTORY PRIVILEGE UNDER HRS § 92F- 13, THE ATTORNEY-CLIENT PRIVILEGE, AND PRIVILEGES BASED ON COLLECTIVE BARGAINING STRATEGIES, FILED ON SEPTEMBER 13, 2010; AND GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO REVOKE SUPPLEMENTAL SUBPOENA DUCES TECUM OF DAYTON NAKANELUA, FILED ON NOVEMBER 3, 2010

DATED: Honolulu, Hawaii, November 17, 2010

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Complainant's argument that proposals and counter proposals are in the possession of Respondents and are immaterial, the Board finds that such information may be material or is likely to lead to admissible evidence, and that Complainant earlier made a similar request to State Respondents. With respect to Complainant's argument that request #2 does not describe the items with sufficient particularity and is unclear on its face, the Board finds the request to be sufficiently clear and particular. With respect to Complainant's argument that a single Board member is not authorized to act singularly to issue a subpoena, HRS § 89-5(i) provides in relevant part that "[i]n addition to the powers and functions provided in other sections of this chapter, the board shall . . . [h]old such hearings and make such inquiries, as it deems necessary . . . and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the productions of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions" (emphasis added); similarly, HRS § 92-16 provides that a board authorized or required to hold hearings for the purpose of receiving evidence shall have the power to subpoena witnesses "upon subpoena, signed by the chairperson, acting chairperson, or any member, or executive secretary, or executive officer of or under the board who is so authorized by the board."



NORMAN K. KATO II, Member

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