

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS  
ASSOCIATION,

Complainant,

and

NEIL ABERCROMBIE, Governor, State of  
Hawaii; KALBERT YOUNG, Director,  
Department of Budget and Finance, State of  
Hawaii; NEIL DIETZ, Chief Negotiator, Office  
of Collective Bargaining, State of Hawaii;  
KATHRYN MATAYOSHI, Superintendent,  
Department of Education, State of Hawaii;  
DONALD G. HORNER, Chairperson, Board of  
Education, State of Hawaii; and JAMES D.  
WILLIAMS, Member, Board of Education,  
Human Resources Committee, State of Hawaii.

Respondents,

and

UNIVERSITY OF HAWAII PROFESSIONAL  
ASSEMBLY,

Intervenor.

CASE NO. CE-05-781

ORDER NO. 2813

ORDER GRANTING IN PART AND  
DENYING IN PART RESPONDENTS'  
MOTION TO QUASH SUBPOENA  
DUCES TECUM ISSUED TO  
RESPONDENT JAMES E. WILLIAMS,  
FILED AUGUST 12, 2011; AND  
DENYING RESPONDENTS' MOTION  
IN LIMINE TO EXCLUDE WITNESS  
TESTIMONY RELATING TO  
CONFIDENTIAL PRIVILEGED  
INFORMATION, FILED ON  
AUGUST 12, 2011

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On August 3, 2011, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed an Application for Subpoenas with the Hawaii Labor Relations Board (Board), including a subpoena duces tecum to Respondent James E. Williams (Williams). The subpoena duces tecum included a request to bring and produce 13 items at the time set for testimony.

On August 12, 2011, Respondents filed a Motion to Quash Subpoena Duces Tecum Issued to Respondent James E. Williams (Motion to Quash) with the Board.

Respondents moved to quash portions of the Subpoena Duces Tecum contending, *inter alia*, that pursuant to Order No. 2750, United Public Workers, AFSCME, LOCAL 646, AFL-CIO, Case Nos. CE-01-717a, CE-10-717(b), documents pertaining to the nature of the collective bargaining strategies and internal deliberations were confidential and need not be produced; that certain documents were subject to the deliberative process privilege which is codified in Hawaii Revised Statutes (HRS) § 92F-13(3); certain documents are protected by the attorney-client privilege; the requested documents in Item No. 10 are in the possession of the HSTA; and the requested documents in Items 1, 12, and 13 are matters of public record.

Also on August 12, 2011, Respondents filed a Motion in Limine to Exclude Witness Testimony Relating to Confidential Privileged Information (Motion in Limine) with the Board. Respondents argued that they anticipate that Complainant will question Respondents regarding internal discussions among the employer representatives, their deliberations, bargaining strategies, and other confidential and privileged communication. Thus, Respondents requested the exclusion of such testimony and to protect such information from disclosure because they are protected by the Deliberative Process Privilege, the Executive Privilege, the statutory privilege under HRS § 92F-13, attorney-client privilege, and the privilege based on the confidentiality of collective bargaining strategies.

On August 15, 2011, Complainant filed a Memorandum in Opposition to Respondents' Motion in Limine to Exclude Witness Testimony Relating to Confidential Privileged Information with the Board. Complainant contends, *inter alia*, that Respondents failed to properly assert a claim of privilege; and that the holding in Order No. 2750 was not applicable to this case as the Board recognized in Order No. 2750 that the test to determine whether to shield documents based on confidentiality was a balancing test given the facts of a particular case and that the issue in Case Nos. CE-01-717a, CE-10-717b was the intent of a specific provision in an agreement as compared to the allegations of multiple forms of bad faith bargaining in this case. Also on August 15, 2011, Complainant filed a Memorandum in Opposition to Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent James E. Williams.

On August 25, 2011, the Board conducted a hearing on motions, including Respondents' Motion to Quash and Motion in Limine. With respect to the Motion to Quash, Respondents do not object to Respondent Williams appearing as a witness in this proceeding, however the motion is directed to that part of the Subpoena Duces Tecum that demands production of documents that Respondents consider to be confidential and privileged.

In the context of collective bargaining, the Board adheres to the general rule that disputes concerning the disclosure of confidential information - whether constituting work product privilege or information that is entitled to a shield of confidentiality - are subject to a balancing test, i.e., the need for information balanced against legitimate

confidentiality interests, but did not create a privilege. In Order No. 2750, UPW v. Linda Lingle, et. al., Case Nos. CE-01-717a; CE-01-717b (November 17, 2010), the Board applied the balancing test and held as follows:

[W]hat 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 and 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.  
(Emphasis added).

In the instant case, in accordance with the Board's prior ruling in UPW v. Linda Lingle, et. al., *supra*, the Board grants Respondents' Motion to Quash, to the extent that Complainant seeks documents including notes, records, reports, communications, and other "reliable sources of information" (as noted in the Subpoena Duces Tecum in question) regarding internal discussions, bargaining strategy or deliberations among Respondents and within the employer group. However, in the event that the notes, records, reports, communications, and other sources of information may need to be produced for a limited purpose, for example, to refresh a witness' recollection regarding dates, times, and who was present at a meeting, the information should be available at the Board hearing. Notes or materials from formal and informal bargaining sessions with the other party are not confidential and should be produced. The Board may decide to review certain documents *in camera*.

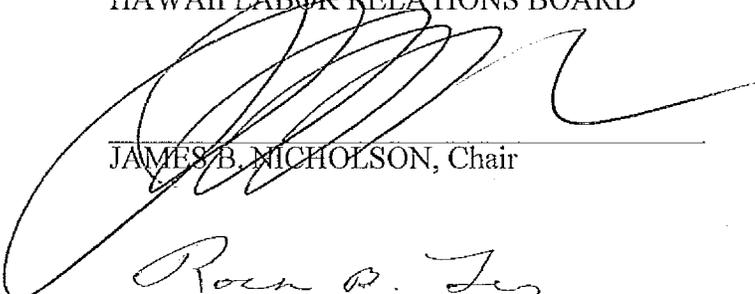
With respect to the remaining portions of Respondents' Motion to Quash, wherein Respondents assert a deliberative process privilege and the attorney-client privilege, the Board finds that Respondents have not provided a description of the subpoenaed documents with sufficient specificity to allow for a just and reasonable determination by the Board of the applicability of the privileges asserted. The Board will allow claims of privilege or confidentiality to be asserted during Respondent Williams' testimony before the Board and will rule on any such claims at the appropriate time. As to the request for subpoenaed documents allegedly in Complainant's possession already,

i.e., copies of tentative agreements which Williams signed but whose signature Complainant finds is undiscernable, the Board finds that the subpoena duces tecum requests duplicative materials and grants the Motion to Quash, in part. If Complainant does not have copies of the executed tentative agreements in its possession, Complainant's counsel can make such representation at hearing and the materials should be produced.

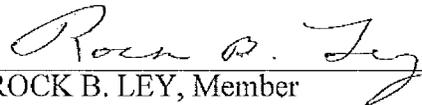
With respect to Respondents' Motion in Limine, the Board denies the Motion at this time. While the Board recognizes the privileges raised in Respondents' motion, the Board agrees with Complainant's counsel's arguments at the motions hearing, that such a motion is generally made at the start of a trial where the jury or fact-finder may be prejudiced by the introduction of certain evidence and thus, is inappropriate before the Board. In this case, the Board can rule on the evidence as it is presented at the hearing on the merits, rather than exclude the broad categories of evidence anticipated and objected to by Respondents.

DATED: Honolulu, Hawaii, August 29, 2011.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



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ROCK B. LEY, Member

Copies sent to:

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