

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. 2815

ORDER GRANTING IN PART AND  
DENYING IN PART RESPONDENTS'  
MOTION TO QUASH SUBPOENA  
DUCES TECUM ISSUED TO  
RESPONDENT NEIL DIETZ, FILED  
AUGUST 12, 2011

ORDER GRANTING IN PART AND DENYING IN PART  
RESPONDENTS' MOTION TO QUASH SUBPOENA DUCES  
TECUM ISSUED TO RESPONDENT NEIL DIETZ, FILED AUGUST 12, 2011

On August 4, 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 NEIL DIETZ (Dietz). The subpoena duces tecum included a request to bring and produce notes, documents and other materials at the time set for testimony.

On August 12, 2011, Respondents filed a Motion to Quash Subpoena Duces Tecum Issued to Respondent Neil Dietz (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 the documents are subject to an executive privilege; that certain documents were subject to the deliberative process privilege; certain documents are protected under Hawaii Revised Statutes (HRS) § 92F-13(3) (frustration of a legitimate government function); certain documents are protected by the attorney-client privilege; the documents requested in Item No. 1 refer to internal discussions held during a caucus of the employer group; documents requested in No. 5 refers to the internal deliberations of the employer group, including the formulation of proposals; documents requested in Item Nos. 6-9 are too broad and include discussions with the Governor concerning the decision to approve certain actions taken by the employer group; and documents requested in Item No. 10 requires production of all tentative agreements initialed by Dietz on behalf of the employer team which are already in Complainant's possession.

Also on August 15, 2011, Complainant filed a Memorandum in Opposition to Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent Neil Dietz. Complainant contends that Respondents failed to establish the existence of any executive, deliberative or attorney-client privilege.

On August 25, 2011, the Board conducted a hearing on motions, including Respondents' Motion to Quash. With respect to the Motion to Quash, Respondents do not object to Respondent Dietz 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*, and 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, dated August 29, 2011, 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 an executive, deliberative process, statutory privilege under HRS § 92F, 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 Dietz's 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 Dietz signed, 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.

HAWAII STATE TEACHERS ASSOCIATION v. NEIL ABERCROMBIE, et al.  
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QUASH SUBPOENA DUCES TECUM ISSUED TO RESPONDENT NEIL DIETZ, FILED  
AUGUST 12, 2011

DATED: Honolulu, Hawaii, September 1, 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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