

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. 2816

ORDER DENYING COMPLAINANT'S
MOTION TO STRIKE RESPONDENTS
NEIL ABERCROMBIE, KALBERT
YOUNG, NEIL DIETZ, KATHRYN
MATAYOSHI, DONALD G. HORNER,
AND JAMES D. WILLIAMS'
AUGUST 1, 2011 OPPOSITION TO
HSTA'S AMENDED MOTION FOR
INTERLOCUTORY RELIEF FILED
JULY 26, 2011 AND THE
SUPPORTING DECLARATIONS,
FILED ON AUGUST 3, 2011

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE
RESPONDENTS NEIL ABERCROMBIE, KALBERT YOUNG,
NEIL DIETZ, KATHRYN MATAYOSHI,
DONALD G. HORNER, AND JAMES D. WILLIAMS'
AUGUST 1, 2011 OPPOSITION TO HSTA'S AMENDED
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On July 8, 2011, Complainant HAWAII STATE TEACHERS ASSOCIATION (Complainant or HSTA), by and through its counsel, Takahashi and Covert, filed a Prohibited Practice Complaint (Complaint) against Respondents NEIL ABERCROMBIE, KALBERT YOUNG, NEIL DIETZ, KATHRYN MATAYOSHI, DONALD G. HORNER, and JAMES D. WILLIAMS (collectively Respondents or Employer) with the Hawaii Labor Relations Board (Board) contending that Respondents engaged in a course of conduct during

the negotiations for a Unit 05 collective bargaining agreement which violated the State Constitution and numerous provisions of Hawaii Revised Statutes (HRS) Chapter 89, and constituted prohibited practices in violation of HRS § 89-13.

On July 18, 2011, Complainant filed a Motion for Interlocutory Relief with the Board.

On July 20, 2011, Respondents filed a Motion for Extension of Time to Respond to HSTA's Motion for Interlocutory Relief (Motion for Extension of Time).¹

On July 22, 2011, the Board issued Order No. 2808, Order Requiring Complainant to Amend its Motion for Interlocutory Relief and Extending the Time for Respondents' Response. The Board found that the Declaration of Wilfred Okabe (Okabe), HSTA's President, which accompanied Complainant's Motion filed July 18, 2011, did not substantially conform to the requirements of an affidavit or a declaration to support Complainant's Motion pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(10). The Board ordered Complainant to amend its Motion for Interlocutory Relief filed on July 18, 2011 to conform to HAR § 12-42-8(g)(C)(i), which requires such motion to be accompanied by "... affidavits or memoranda setting forth the grounds upon which they are based."

On July 25, 2011, Complainant filed an Amended Motion for Interlocutory Relief.

On August 1, 2011, Respondents filed their Opposition to HSTA's Amended Motion for Interlocutory Relief Filed July 26, 2011 (Opposition); Declaration of Annette L. Anderson; Declaration of Kalbert Young; Declaration of Neil Dietz; Declaration of Kathryn Matayoshi; Declaration of Lea Albert; Declaration of James H. Halvorson with the Board.

On August 3, 2011, Complainant filed a Motion to Strike Respondents' August 1, 2011 Opposition to HSTA's Amended Motion for Interlocutory Relief filed July 26, 2011 and the Supporting Declarations (Motion to Strike).

On August 9, 2011, HSTA filed its Reply Brief in Support of Amended Motion for Interlocutory Relief filed on July 25, 2011.

On August 9, 2011, Respondents filed The Employers' Memorandum in Opposition to HSTA's Motion to Strike Declarations filed August 3, 2011.

On August 10, 2011, the Board held a hearing, *inter alia*, on Complainant's Motion to Strike.

¹The Board did not rule on Respondents' Motion for Extension of Time.

After careful consideration of the arguments presented, record, and filings in this case, the Board makes the following findings of fact, conclusions of law, and decision and order denying HTSA's Motion to Strike.

FINDINGS OF FACT

To the extent that any of these Findings of Fact are better characterized as Conclusions of Law, they are to be so construed.

1. By sworn affidavit signed on August 3, 2011 (Affidavit) and attached to HSTA's August 3, 2011 Motion to Strike, HSTA's co-counsel, Rebecca L. Covert, Esq., stated that the declarations attached to Respondents' Opposition to HSTA's Amended Motion for Interlocutory Relief (including the declaration by Respondents' counsel, James E. Halvorson, Esq.) filed on August 1, 2011, do not substantially conform to the requirements of an affidavit or declaration consistent with Board Order No. 2808, and as such do not attest to the veracity of the statements contained therein, and therefore the declarations together with the Opposition filed August 1, 2011 should be stricken from the record.
2. In paragraph 3 of her August 3, 2011 sworn Affidavit, Ms. Covert stated that declaration of Mr. Okabe filed at the Board on July 18, 2011, recited the following: "I, Wil Okabe, declare under penalty of perjury that the following is true and correct."
3. In paragraph 4 of her August 3, 2011 Affidavit, Ms. Covert stated that each of Employer's declarants, with the exception of Employer's counsel James Halvorson, Esq., signed their declarations filed on August 1, 2011 "under penalty of perjury", and that Mr. Halvorson, in his declaration filed on August 1, 2011, stated only that "the foregoing is true and correct to the best of my knowledge", with no reference to law or even perjury.
4. In its August 9, 2011 Memorandum in Opposition to HSTA's Motion to Strike Declarations Filed August 3, 2011, Employer argued that HSTA's legal counsel had misstated the pertinent facts and that Mr. Halvorson's declaration begins with the phrase, "I, JAMES E. HALVORSON, declare under penalty of perjury", and that Mr. Okabe's declaration, filed July 18, 2011, states only, "I, Wilfred Okabe, hereby declare as follows."
5. Based on the record, the Board finds that all of Employer's declarations filed on August 1, 2011, including the declarations of Annette J. Anderson, Kalbert Young, Neil Dietz, Kathryn Matayoshi, and Lea Albert, contain affirmative

statements that said declarations are true and correct “under penalty of perjury.”

6. The Board also finds that Mr. Halvorson’s declaration filed on August 1, 2011 begins with the statement: “I, JAMES E. HALVORSON, declare under penalty of perjury as follows.”
7. Based on the record, the Board finds that contrary to Ms. Covert’s August 3, 2011 sworn Affidavit, Mr. Okabe’s declaration, dated July 13, 2011 and attached to Complainant’s Motion for Interlocutory Relief filed at the Board on July 18, 2011, does not contain an affirmative statement that his declaration was made “under penalty of perjury.”²
8. At hearing before the Board on Complainant’s Motion to Strike held on August 10, 2011, Complainant’s co-counsel, Herbert Takahashi, Esq., who presented arguments in support of Complainant’s motions that day, stated only that he “submitted on the basis of the existing record.” Mr. Takahashi did not correct the record as to Ms. Covert’s sworn statements in her August 3, 2011 Affidavit. At the August 10, 2011 motion hearing, counsel for Respondents argued that Employer’s Memorandum in Opposition to said Motion was “pretty self-explanatory.”
9. The Board finds that the Employer’s declarations, including Mr. Halvorson’s declaration substantially comply with the ruling in Board Order No. 2808. The term “under penalty of perjury”, employed by Respondents, and the term “penalty of law” have essentially the same meaning, as they both refer to the act of lying to a tribunal, and the term “penalty of perjury” is used in the federal courts in accordance with 28 U.S.C. § 1746.

CONCLUSIONS OF LAW

To the extent that any of these Conclusions of Law are better characterized as Findings of Fact , they are to be so construed.

1. As the Board’s rules do not reference declarations, we look to guidance from applicable court rules and Hawaii Circuit Court Rule 7(g) allows the use of declarations in lieu of affidavits and states:

²In the July 22, 2011 Order No. 2808, the Board previously found that “Mr. Okabe’s Declaration does not attest to the veracity of his statements as required by affidavits or declarations”.

In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

I, (name of person, do declare under penalty of law that the foregoing is true and correct.

Dated:
(Emphasis added).

2. The Board concludes that Employer's declarations, and the declaration of Mr. Halvorson, which use the term "under penalty of perjury" for the term "under penalty of law", substantially comply with the applicable law, including HAR § 12-42-8(g)(3)(C)(i), and the Board's prior ruling in Order No. 2808. Thus, Complainant's Motion to Strike is not supported by the facts and the law.
3. The Board also concludes that contrary to Ms. Covert's statements in her August 3, 2011 sworn Affidavit which are part of the record which Complainant's co-counsel, Mr. Takahashi, relied on at the August 10, 2011 hearing before the Board, Mr. Halvorson's declaration includes the necessary language of a valid declaration, and Mr. Okabe's declaration filed on July 18, 2011, which was previously addressed in Board Order No. 2808, does not comply with the applicable rule.

The material misstatements made by Ms. Covert in her sworn affidavit, which were not corrected by Mr. Takahashi at the August 10, 2011 Board hearing, demonstrate an egregious and reckless disregard for the truth in this case. These statements appear intended to mislead the Board into invalidating Respondents' opposition to Complainant's Amended Motion for Interlocutory Relief and are improper. Notice is hereby given that conduct of this nature will not be tolerated by the Board.

ORDER

For the reasons discussed above, the Board hereby denies Complainant's Motion to Strike filed August 3, 2011.

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ABERCROMBIE, KALBERT YOUNG, NEIL DIETZ, KATHRYN MATA YOSHI, DONALD G.
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DATED: Honolulu, Hawaii, September 2, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



ROCK B. LEY, Member

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