

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. 2821

ORDER GRANTING RESPONDENTS'
MOTION TO REVOKE SUBPOENAS OF
SENATE PRESIDENT SHAN TSUTSUI;
SENATOR DAVID IGE; SENATOR JILL
TOKUDA; HOUSE SPEAKER CALVIN
SAY; REPRESENTATIVE MARCUS
OSHIRO; AND REPRESENTATIVE ROY
TAKUMI, FILED ON AUGUST 16, 2011;
AND ORDER GRANTING IN PART
AND DENYING IN PART
RESPONDENTS' MOTION TO QUASH
SUBPOENA DUCES TECUM ISSUED
TO RESPONDENT NEIL
ABERCROMBIE, GOVERNOR, STATE
OF HAWAII, FILED ON AUGUST 17,
2011

ORDER GRANTING RESPONDENTS' MOTION TO REVOKE SUBPOENAS
OF SENATE PRESIDENT SHAN TSUTSUI; SENATOR DAVID IGE; SENATOR
JILL TOKUDA; HOUSE SPEAKER CALVIN SAY; REPRESENTATIVE MARCUS
OSHIRO; AND REPRESENTATIVE ROY TAKUMI, FILED ON AUGUST 16, 2011;
AND ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS'
MOTION TO QUASH SUBPOENA DUCES TECUM ISSUED TO RESPONDENT NEIL
ABERCROMBIE, GOVERNOR, STATE OF HAWAII, FILED ON AUGUST 17, 2011

On August 9, 2011, Complainant HAWAII STATE TEACHERS
ASSOCIATION (HSTA) filed an Application for Issuance of Subpoenas with the Hawaii
Labor Relations Board (Board), including subpoenas duces tecum for Senate President
Shan Tsutsui, Senators David Ige and Jill Tokuda, House Speaker Calvin Say, and
Representatives Marcus Oshiro and Roy Takumi (collectively referred to Legislators) and
Respondent NEIL ABERCROMBIE (Governor), Governor, State of Hawaii, respectively.
The subpoenas duces tecum included requests for Legislators and Governor, respectively,

appear before the Board to testify and to produce certain notes, documents and other materials at the time set for testimony.

Respondents filed motions to revoke the subpoenas to the Legislators and the Governor on August 16 and 17, 2011, respectively. Complainant filed oppositions to Respondents' motions to revoke the subpoenas on August 26 and 27, 2011, respectively. On September 6, 2011, Respondents filed reply memoranda to Complainant's respective oppositions to Respondents' motions to revoke and Complainant filed a Supplemental Submission with the Board on September 7, 2011.

On September 8, 2011, the Board conducted a hearing on the instant motions to revoke subpoenas. All parties had opportunity to present further arguments to the Board. Based on a review of the record and consideration of the arguments made, the Board hereby makes the following findings, conclusions and order.

Motion to Revoke Subpoenas for Legislators

The subpoenas duces tecum directed to the Legislators requested the Legislators to appear before the Board to testify and produce the following items:

1. A true and accurate copy of all notes, records, and documents which would indicate when you commenced discussions with Governor Neil Abercrombie, Kalbert Young, or other representatives of the Governor and what those discussions consisted of on the follow subjects matters:
 - a. A proposal to reduce the budget by 5% through a statewide "labor cost savings" reductions during the 2011 legislative session.
 - b. A proposal to forestall budget reductions by 10% through a statewide "labor cost saving (sic) measure proposed by the Senate during the 2011 legislative session.
2. A true and accurate copy of all notes, records, and documents which would indicate how and what manner the statewide "labor cost savings" reductions were calculated to be \$88.2 million in FY 2012 and FY 2013 in Act 164, SLII 2011.
3. A true and accurate copy of all notes, records, and documents which would indicate how and in what manner the statewide employer-union trust fund (EUTF) contribution

reductions based on 50%/50% contribution ratio was calculated to be \$38.2 million in FY 2012 and \$19.5 million in FY 2013.

4. A true and accurate copy of all notes, records, and documents which would indicate what funds if any were appropriate (sic) to implement in 2010 and 2011 for the increases in student instruction hours as required by Act 167, SLH 2010 and Act 52, SLH 2011.

On August 16, 2011, Respondents filed a Motion to Revoke Subpoenas of Senate President Shan Tsutsui; Senator David Ige; Senator Jill Tokuda; House Speaker Calvin Say; Representative Marcus Oshiro; and Representative Roy Takumi (Motion to Revoke Subpoenas for Legislators) with the Board. Respondents contended that the subpoenas should be revoked because the subpoenas seek to obtain information from legislators who have immunity for their actions under the Hawaii Constitution and their testimony is irrelevant in the present proceedings.

On August 24, 2011, Complainant HSTA filed its Opposition to Respondents' Motion to Revoke Subpoenas of Senate President Shan Tsutsui; Senator David Ige; Senator Jill Tokuda; House Speaker Calvin Say; Representative Marcus Oshiro and Representative Jill Tokuda with the Board. Complainant contended, *inter alia*, that the legislators' immunity under Article III Section 7 of the Hawaii Constitution does not extend to documents or to conversations on the governor's statewide policy on "labor costs savings"; Respondents lack standing to raise the legislators' immunity as a basis to revoke the subpoenas; that Complainant's due process rights are violated if they are unable to present all evidence relevant to their case before the Board; and the documents sought go to the type of facts the Board is to address prior to the case going to court for consideration of the constitutional claims.

Complainant also contended the request for documents on the timing of particular legislation or confirming that meetings were held with certain Respondents to this proceeding do not fall within the legislative immunity that is the basis for Respondents' motion to revoke. Complainant asserted that to the extent the Legislators have the immunity for their actions independent of an attack on them, the subpoenas go to documents available to legislators, not statements made in the course of performing their legislative functions. Complainant argued the subpoenas go to establish the conduct of the Respondents in bargaining vis a vis the legislative budget (item #1), what information Respondents gave to the Legislators to derive the \$88.2 million in labor cost savings (item #2) and the elimination of the VEBA contributions as factors in establishing the amount of employer contributions if set at 50-50 (item #3), and which documents would indicate the funding in the budget bill appropriated to implement in 2010 and 2011 increase in student instruction hours (item #4). Complainant contended that part of its Complaint asserts the conduct of the Respondents on April 27, 2011. Timing of when matters were being considered at the legislature would corroborate statements Complainant attribute to Respondents on that date. As noted above,

through the Legislators' testimony, Complainant seeks to establish statements made by Respondents relative to the Governor's statewide policy on labor cost savings, restricting contributions to EUTF only funds, and timing of legislative actions. Complainant also seeks testimony from Legislators about the legislative process generally, deadlines during the legislative session for moving bills forward, to generally explain the form of the budget bill and the procedure for its passage, the difference between a budget bill and a collective bargaining bill, the purposes of supplemental bills with respect to collective bargaining, the nature of a biennium budget bill, and the role generally of the administration in the process of passing a budget. Complainant intends to challenge the constitutionality of imposing a statewide policy reducing labor costs to all unions and precluding bargaining on VEBA contributions.

On September 6, 2011, Respondents filed a Reply Memorandum to Respondents' Motion to Revoke Subpoenas of Senate President Shan Tsutsui; Senator David Ige; Senator Jill Tokuda; House Speaker Calvin Say; Representative Marcus Oshiro and Representative Roy Takumi with the Board. Respondents contended, *inter alia*, that the legislative immunity granted by the Hawaii State Constitution in Article III, Section 7 is broader than that afforded by the United States Constitution; the Department of Attorney General represents Respondents as well as other state entities and as the six legislators requested representation in revoking the subpoenas, the Respondents' counsel can represent the legislators' interests; and that revoking the subpoenas at issue would not interfere with Complainants' due process rights. Attorney General David M. Louie, states in a Declaration, dated September 6, 2011, *inter alia*, that he spoke to Senate President Shan Tsutsui and House Speaker Calvin Say who on behalf of themselves and the other Legislators, requested representation from the Department of the Attorney General in seeking to quash the subpoenas and asserting their legislative immunity.

On September 7, 2011, Complainant filed a Supplemental Submission in Opposition to Respondents' Motion to Revoke Subpoenas of Senate President Shan Tsutsui; Senator David Ige; Senator Jill Tokuda; House Speaker Calvin Say; Representative Marcus Oshiro; and Representative Roy Takumi with the Board. Complainant's counsel states in an affidavit filed in support of its Opposition to Respondents' Motion to Revoke Subpoenas that Senator Jill Tokuda was served with the subpoena on August 11, 2011; Senator David Ige was served on August 12, 2011; Representative Marcus Oshiro was served on August 13, 2011; Senate President Shan Tsutsui and House Speaker Calvin Say were served on August 15, 2011; and Representative Roy Takumi was served on August 16, 2011; and none of the legislators filed a Motion to Revoke Subpoenas within five days of service of the subpoenas in compliance with Hawaii Administrative Rule § 12-42-8(g)(7).

After a review of the record and the arguments presented, the Board finds that Respondents have standing to challenge the subpoenas issued to the Legislators. In Order No. 2819, Order Granting in Part and Denying in Part Respondents' Motion to Quash Subpoena Duces Tecum Issued to Bruce A. Coppa, Filed on August 15, 2011, dated September 21, 2011, the Board found that the Respondents had standing to challenge the subpoena issued to non-

party Bruce Coppa, Comptroller, State of Hawaii and Respondents' counsel may represent the State's or the non-party's interest in moving to quash the subpoenas duces tecum at issue. The Board finds that the Legislators are public officers of the State of Hawaii and they are entitled to representation by the Attorney General's office.¹ According to the September 6, 2011 declaration of the Attorney General, the Legislators requested and were assured they would be represented by the Attorney General's Office in quashing the instant subpoenas in this proceeding. Accordingly, the Board sees no difference between Respondents' and the Legislators' interests and concludes that Respondents have standing to challenge the subpoenas duces tecum issued to the Legislators.

In this case, Complainant seeks to question the Legislators on information considered by them, their meetings with Respondents and other matters dealing with their actions in formulating the budget bill during the 2011 legislative session. The Board concludes that these matters constitute actions taken in the exercise of the members' legislative functions and the Legislators are immune or privileged under the Hawaii State Constitution Article III, Section 7, from testifying as to such matters before the Board. Article III, Section 7, of the Hawaii State Constitution pertains to Privileges of Members and provides as follows:

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions; and members of the legislature shall, in all cases, except felony or breach of the peace, be privileged from arrest during their attendance at sessions of their respective houses, and in going to and returning from the same.

Thus, the Legislators are immune from having to testify before the Board for their actions taken in the exercise of their legislative functions. The Board also finds that the legislative immunity provided by the Hawaii Constitution is broader than that provided in U.S. Constitution, Article I, section 6, clause 1, which states:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except

¹HRS § 28-4 provides that the attorney general gives advice and counsel to other public officers and assists them and states as follows:

HRS § 28-4 Advises public officers. The attorney general shall, without charge, at all times when called upon, give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully.

Treason, Felony and Breach of the Peace be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning to the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

In Abercrombie v. McClung, 55 Haw. 595, 601, 525 P.2d 594, 597 (1974), the Hawaii Supreme Court held that although statements made by the President of the Senate on a subject matter of legitimate legislative concern were erroneous, they were made in the exercise of his legislative function and were therefore absolutely privileged and he could not be held to answer to the Judiciary.

Likewise, the Board finds that Complainant seeks to question the Legislators on the formulation of the State budget, a subject matter of legitimate legislative concern, and finds that the Legislators are immune from Complainant's subpoena duces tecum pursuant to Article III, Section 7 of the Hawaii State Constitution. Accordingly, based on the foregoing, the Board hereby grants the Respondents' motion to revoke the subpoenas duces tecum issued to the respective Legislators.

Motion to Revoke Subpoena for Governor Abercrombie

The subpoena duces tecum for the Governor requested him to testify and produce the following items:

1. A true and accurate copy of all notes, records, and documents of meetings, conferences, or discussions with representatives of the Hawaii State Teachers Association on the following dates:

- a. On or about February 4, 2011 where representatives of other public unions were also present.
- b. On or about April 8, 2011
- c. On or about May 1, 2011 where Calvin Say was also present
- d. On or about June 14, 2011 where Neil Dietz and Donald Horner were also present.

2. A true and accurate copy of any notes, records, documents, reports, and other reliable sources of information which would indicate the reason why you agreed to a Memorandum of Agreement dated December 23, 2010 (Exhibit 19 which is attached), the cost of the adjustment in employer

contribution amounts to the State of Hawaii, and the duration and effect of the agreement on State employees, and the impact of the agreement on unit 5 negotiations with HSTA.

On August 17, 2011, Respondents filed a Motion to Revoke Subpoena Duces Tecum Issued to Governor Neil Abercrombie with the Board. Respondents contend that the Governor's official acts are protected by an executive privilege and the Board should not compel the Governor to testify when the information can be obtained from others. Respondents contend that the Complainant failed to show a compelling necessity for the Governor to appear to testify. Respondents also contend that the subpoena duces tecum should be revoked because the subpoena duces tecum seeks documents that are confidential and privileged under the following: 1) the privilege given the confidential nature of the collective bargaining strategies and internal deliberations; 2) Executive privilege; 3) the deliberative process; 4) HRS § 92F-13(3) pertaining to the frustration of a legitimate government function; and the attorney-client privilege. Specifically, Respondents argue that Item 1 of the subpoena is too broad and could potentially include documents created during a caucus of the Employer group or negotiating team during bargaining sessions which are confidential and used to discuss strategies, deliberations, etc. Respondents contend that Item 2 requested documents which would indicate the reason why the Governor agreed to a Memorandum of Agreement, dated December 23, 2010 and could include pre-decisional information and internal discussions within the employer group.

On August 25, 2011, Complainant filed a Memorandum in Opposition to Respondents' Motion to Quash Subpoena Duces Tecum Issued to Governor Neil Abercrombie with the Board. Complainant contended that the Governor failed to establish the existence of any form of "privilege" which precludes production of notes, records, and documents of collective bargaining where there is a dispute over breach of the duty to bargain in good faith and in light of his role in negotiations for the 2011-2013 Unit 05 agreement; negotiating the 60-40 EUTF contribution agreement December 2007 (sic), and setting the government-wide policy on labor savings in Count I of the Complaint; the Governor waived any form of lawyer-client or other privilege by the submission of declarations by Respondents regarding collective bargaining and confidential communications; and quashing the subpoena duces tecum on the dispute items would violate Complainant's due process rights. Complainant contended that the Governor is a critical witness given his involvement in the negotiation process.

On September 6, 2011, Respondents and Respondent Governor Neil Abercrombie filed a Reply Memorandum to Respondents' Motion to Quash Subpoena Issued to Governor Neil Abercrombie filed with the Board. Respondents contended, *inter alia*, that the Governor is the highest ranking government official and absent extraordinary circumstances, the Governor should not be called to testify if another person could provide the information; in this case Neil Dietz, the State's Chief Negotiator and other members of the Employer's negotiating team can provide the information sought; some of the documents sought are protected by a privilege for collective bargaining strategies and internal

deliberations, especially with respect to Item 2, the materials are covered by the deliberative process privilege; and that the privileges asserted have not been waived.

Based upon a review of the record and consideration of the arguments presented, with regard to Respondents' claim that the subpoena duces tecum issued to the Governor should be revoked and the Governor not be required to testify in this matter, the Board finds that the Governor is the highest ranking official in the State government and he should not be required to testify if another witness can provide the information sought by Complainant. Respondents suggest that Neil Dietz, the State's Chief Negotiator and other members of the Employer's negotiating team can provide the information sought from the Governor. Ultimately, however, the Governor is a public employer for employees of the Department of Education included in Unit 05 and holds three of the six votes in negotiations pursuant to IIRS § 89-6(d)(3) and may have unique relevant information which cannot be provided by other witnesses. In order to balance these interests, the Board orders Complainant to first call all of its witnesses, except rebuttal witnesses, and then make an offer of proof that the Governor has uniquely relevant, specific and admissible information which could not be provided by the other witnesses. The Board may thereupon permit Complainant to call the Governor to testify before the Board in this proceeding.

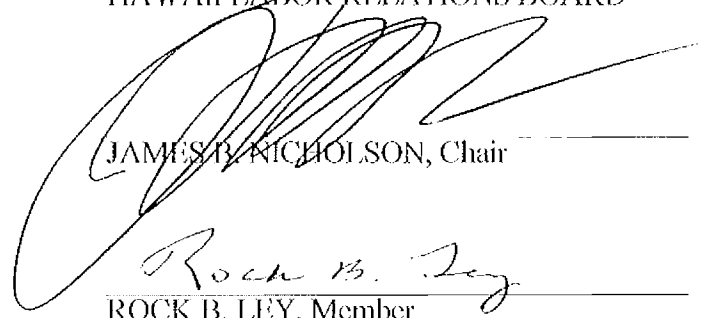
With regard to the scope of confidential information, the Board has previously ruled in Order No. 2813, Order Granting in Part and Denying in Part Respondents' Motion to Quash Subpoena Duces Tecum Issued to Respondent James E. Williams, Filed August 12, 2011; and Denying Respondents' Motion in Limine to Exclude Witness Testimony Relating to Confidential Privileged Information, Filed on August 12, 2011, dated August 29, 2011 and 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, dated September 1, 2011, that 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 are confidential and need not be produced. 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 the witness' recollection regarding dates, times, and who was present at a meeting, the information should be available at the Board hearing.

In addition, with regard to Respondents' contentions that certain matters are protected by a deliberative process or other privilege, these claims or privilege or confidentiality need to be asserted during the hearing and the Board will rule on such claim at the appropriate time. The Board may also decide to review certain documents *in camera*.

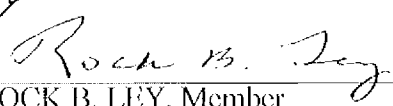
Accordingly, based on the foregoing, the Board grants in part and denies in part Respondents' Motion to Quash Subpoena Duces Tecum Issued to Governor Neil Abercrombie, dated August 25, 2011.

DATED: Honolulu, Hawaii, October 12, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



ROCK B. LEY, Member

Copies sent to:

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