

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. 2823

ORDER GRANTING SUBPOENAED
NON-PARTY RANDY PERREIRA'S
MOTION TO REVOKE SUBPOENA
DUCES TECUM, FILED ON
AUGUST 18, 2011

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SUBPOENA DUCES TECUM, FILED ON AUGUST 18, 2011

On August 4, 2011, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed an Application for Issuance of Subpoenas with the Hawaii Labor Relations Board (Board), including a subpoena duces tecum for Randy Perreira (Perreira), Executive Director, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA). The subpoena duces tecum included a request for the following:

1. A true and accurate copy of any and all notes, records, documents, and other reliable sources of information which would indicate or verify when, where, who, and in what

manner the Hawaii Government Employees Association (HGEA) received favored nations status from the employer as referred to in the April 6, 2011 settlement offer (as referred to in Exhibit 34 which is attached hereto).

2. A true and accurate copy of any and all notes, records, documents, and other reliable sources of information which would indicate or verify when, where, who, and in what manner HGEA was given assurance by employer that "all public sector bargaining units shall be subject to 5% wages reductions, supplemental time off and 50% split in premium rates" as reported to bargaining units 2, 3, 4, 6, 8, 9, and 13 employees were informed at ratification meetings as indicated in Exhibit 35-2 to 35-3 and 35-5 (attached hereto).

3. A true and accurate copy of any and all notes, records, documents, and other reliable sources of information which would indicate or verify when, where, who was present, and what was said when you met with Governor Neil Abercrombie to discuss favored nations status for HGEA and the bargaining unit employees represented by HGEA.

4. A true and accurate copy of the your (sic) signed copy of the letter of understanding on favored nations status as referred to in Exhibit LL (a copy of which is attached).

On August 18, 2011, Perreira, by and through his counsel, filed Subpoenaed Non-Party Randy Perreira's Motion to Revoke Subpoena Duces Tecum (Motion to Revoke) with the Board. Perreira contended, *inter alia*, that the documents sought by HSTA's subpoena belong to HGEA and not to the subpoenaed non-party; that notwithstanding the foregoing, except for those documents that reflect the signed, final agreement that are a matter of public knowledge, responsive documents should be protected from disclosure as confidential business trade secrets; and that the negotiations between the Employer and the HGEA are conducted with the understanding that they are confidential and requiring disclosure will interfere with the collective bargaining process. Perreira asserted, *inter alia*, that on April 6, 2011, the HGEA, on behalf of employees in bargaining units 2, 3, 4, 6, 8, and 13, reached tentative collective bargaining agreements with the public employers; that because HGEA was the first public employee union to settle contract negotiations, the HGEA and the Employer entered into a Letter of Understanding whereby HGEA would receive certain terms equal to any more favorable agreements later afforded to non-HGEA bargaining units; that confidential negotiations are essential to the collective bargaining process to ensure the free and uninhibited exchange of proposals between the employer and the union; that confidentiality must be maintained so as not to stifle preparations for

bargaining and consideration of alternatives for improved benefits; that full involuntary disclosure of negotiations will have a chilling effect and subject the HGEA and the Employer to additional pressures which will undermine and frustrate the collective bargaining process; and that functioning under an agreement of confidentiality promotes the purpose and policy of collective bargaining by ensuring harmonious and cooperative relations between the government and the employees as provided in Hawaii Revised Statutes (HRS) § 89-1, and assures that another union or Employer will not use the HGEA's bargaining strategy as leverage to generate an advantage.

On August 26, 2011, the HSTA filed a Memorandum in Opposition to Subpoenaed Non-Party Randy Perreira's Motion to Revoke Subpoena Duces Tecum (Memorandum in Opposition) with the Board. The HSTA contended that there is no merit to Perreira's objections because Perreira is the executive director of HGEA and has the requisite control over the documents sought; since the scope of HSTA's subpoena duces tecum related to Perreira excludes documents related to the bargaining strategy, the HGEA has no privilege to assert with respect to the documents sought in the subpoena duces tecum; given that HGEA and HSTA have engaged in joint negotiations with the employer in the past and the scope of the subpoena duces tecum is limited, disclosure of the documents would not infringe on any trade secret HGEA asserts against HSTA; and the testimony and documents are highly relevant as to Count I alleged in HSTA's complaint related to a statewide governmental policy to unilaterally implement a five percent (5%) salary reduction such that quashing the subpoena duces tecum on the disputed items would violate the due process rights of the HSTA in the contested case proceedings.

In its Memorandum in Opposition, the HSTA specifically recognized that if collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure and that some type of privilege is necessary to prevent the disclosure of a party's negotiating strategy during an unfair labor practice proceeding. The HSTA submitted that the burden of establishing a privilege rests with those who assert the privilege and that the HSTA is not seeking documents related to the strategy of the HGEA in its negotiations with the employer. With respect to the specific items requested, the HSTA clarified that it was not seeking notes of the HGEA negotiating strategy but rather, the HGEA's notes which were shared with the employer in reaching a formal settlement or those compiled when the HGEA and the employer were meeting together. The HSTA also argued that if the Board considered the privilege claim, under the Board's balancing test to determine challenge to a subpoena on confidentiality concerns, the balance weighed in favor of denying the motion to revoke as the documents are "highly relevant" to the HSTA's complaint. The HSTA argued that its Complaint in Count 1 alleges that the Respondents NEIL ABERCROMBIE (Abercrombie), NEIL DIETZ, and KALBERT YOUNG (Young) provided assurances to bargaining units 2, 3, 4, 6, 8, 9, and 13 employees that all public sector bargaining units shall be subject to a 5% reduction, supplemental paid time off and 50% split in premium rates. Thus, the HSTA argued that it seeks from HGEA the documents specifically directed to the labor costs savings and the favored nations status

of HGEA through the manner in which the status was obtained, the assurances given by the employer to HGEA related to that status, and statements made by the Governor related to that status.

On September 21, 2011, Perreira filed Subpoenaed Non Party Randy Perreira's Reply Brief to HSTA's Memorandum in Opposition Subpoenaed Non Party Randy Perreira's to Motion to Revoke Subpoena Duces Tecum (Reply Brief) with the Board.

Perreira argued that the HGEA and Perreira are not parties to the instant proceeding; that the information regarding when, where, who, and in what manner HGEA received favored nations status in its negotiations for bargaining units 2, 3, 4, 6, 8, 9 and 13 is confidential, and not relevant to HSTA's claims against the Respondents in this matter; that the provisions of HRS §§ 89-8, 89-9, and 89-10 make clear that the HGEA is not a party to, and has nothing to do with HSTA's negotiations or conflicts arising out of HSTA's negotiations; HSTA's subpoena duces tecum threatens to interfere with HGEA's exclusive role and responsibility to negotiate in good faith, collectively and separately, with a multi-employer group comprised of the County of Hawaii, County of Maui, County of Kauai, City and County of Honolulu, the Judiciary, the Board of Regents, and Board of Education, Hawaii Health Systems Corporation, and the State of Hawaii; and that unlike HSTA, the HGEA exclusively negotiates for bargaining units with different employer groups, e.g., HGEA Units 2, 3, 4, and 13 negotiate with the four (4) counties, the Judiciary, the Hawaii Health Systems Corporation and the State of Hawaii, HGEA Unit 6 negotiates with the Board of Education and the State of Hawaii, and HGEA Unit 8 negotiates with the University of Hawaii and the State of Hawaii; and therefore access to the HGEA's notes, if any, would pierce the confidentiality of the HGEA intra-union and inter-unit discussions and would have a chilling effect on negotiations within the HGEA and with the employer group.

Perreira argued that HSTA attempts to make a distinction between documents generated by HGEA's negotiating team that *were not shared* with the employer in reaching a formal settlement, and documents generated by HGEA's negotiating team that *were shared* with the employer in reaching a formal settlement. Perreira argued that while such distinctions might be relevant in a dispute between the employer and the HGEA and the information was being requested by the employer, that is not the case here; the HSTA was not a party to the HGEA's negotiations with the employer group, and any documents generated by HGEA's negotiating teams (shared or not) are not relevant to a dispute between the HSTA and the Board of Education and the State of Hawaii.

The HSTA had argued that the conduct of the Superintendent KATHRYN MATAYOSHI (Matayoshi) in forwarding to Perreira a copy of a June 23, 2011 letter supports the need to allow HSTA to subpoena the documents of HGEA. Perreira argued in his Reply Brief that there is no merit to this argument as Superintendent Matayoshi sent the HGEA a copy of the June 23, 2011 letter "for [its] information" not because of any conspiracy with the HGEA, but because the HGEA represents educational officers (including

Principals and Vice-Principals) in bargaining unit 6 (who supervise teachers in bargaining unit 5), and are responsible for the overall operation of the schools. See Ex. 5 to HSTA's Memo. In her cover letter to Perreira, Matayoshi emphasized that "the use of certain non-instructional days as non-work, unpaid days will not affect student instructional days." *Id.*, at 5-1. Perreira argued that the "assurance" in HGEA's "Summary of Tentative Agreement" refers to HGEA receiving favored nations status as the first union to settle. See Exhibit 35-3 attached to HSTA's Subpoena Duces Tecum. The HGEA noted that "[w]ith favored nations status" another union may negotiate a more favorable settlement, and if that happens, the employer will provide the same to HGEA bargaining units. *Id.*

Perreira argued that the HSTA appears to be confusing an "assurance" in the form of a written agreement for parity with a conspiracy with the employer to deny the HSTA a better settlement and that favored nations status does not preclude the HSTA from negotiating a more favorable settlement. Thus, Perreira argued that the documents requested in HSTA's subpoena duces tecum were confidential and outweighed any marginal relevance alleged by the HSTA.

On September 27, 2011, the Board conducted a hearing on the instant motions to revoke. The parties had full opportunity to present arguments on the instant motion, and the Board took the matter under advisement.

Based upon a review of the record and the arguments presented, the Board at this time does not find any relevance in having Perreira testify or produce any documents in these proceedings. The Board finds that based on the allegations in the complaint that the subpoena duces tecum does not describe with sufficient particularity the evidence sought from Perreira.

The Board's administrative rules, Hawaii Administrative Rules (HAR) § 12-42-8(g)(7)(D)(i) provides the basis for the Board to revoke a subpoena and provides as follows:

- (D) Ruling on motion to revoke:
 - (i) The board may revoke a subpoena on the ground that the subpoena does not reasonably relate to any matter under investigation, inquiry, or hearing; that the subpoena does not describe with sufficient particularity the evidence sought or that the evidence sought from the witness is privileged under the law or the provisions of this chapter.
 - (ii) The board shall make a statement as to the basis for its ruling. (Emphasis added).

HAR § 12-42-8(g)(8) states in part:

(8) Rules of Evidence:

- (A) In any proceeding before the board, the board shall not be bound by technical rules of evidence.
- (B) All irrelevant, immaterial, or unduly repetitious evidence shall be excluded. (Emphasis added).

HAR § 91-10, Rules of evidence; official notice, states as follows:

In contested cases.

- (1) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence (Emphasis added).

The HSTA contends that the Perreira's testimony is "highly relevant to Count I" of the instant complaint. Count I of the instant prohibited practice complaint is based upon an alleged illegal statewide government policy. The Complaint alleges the following: that the statewide governmental policy as initiated, promoted, adopted, and implemented by Respondents impinges upon the constitutional rights of public employees to organize for the purpose of collective bargaining and to negotiate core subjects of collective bargaining, that is wages, hours, and other terms and conditions of employment for bargaining unit 5 employees in violation of Article XIII, Section 2 of the State Constitution; that the adoption and implementation of the State Budget provisions (Act 164 in sections 33 and 96) at the initiation and request of Respondents Abercrombie and Young to obtain "labor costs savings" for all bargaining units through 5% salary reductions and increases in employee contributions for health care coverage and benefits changes the structure of collective bargaining and improperly involves legislative bodies in the bargaining process by making them parties to the collective bargaining process; and that the use of a parity provision in combination with the State Budget and the take it or leave it approach of Respondents impinges on the right to engage in collective bargaining as provided by law.

In reviewing the record and arguments presented by the HSTA, the Board at this time does not find Perreira's testimony relevant to these proceedings. With regard to the factual allegations in Count I of the Complaint, there is no dispute that the HGEA entered into agreements with the respective employer groups that were ratified by bargaining units 2, 3, 4, 6, 8, and 13 which provided for a five percent (5%) wage reduction, supplemental paid time off, a decrease in employer contributions for health benefits premiums from 60% to 50%, and that as the first public employee union to settle contract negotiations the HGEA and the Employer entered into a Letter of Understanding whereby the HGEA would receive certain terms equal to any more favorable agreement later afforded to non-HGEA bargaining units, by a favored nations clause or parity provision with the employer.

The Board finds that the HSTA was not a party to the HGEA's negotiations with the respective employer groups, and any documents generated by HGEA's negotiating teams (shared or not) are not relevant to a dispute between the HSTA and Respondents.

The Board finds that requiring a representative of a non-party public sector union to testify and provide any documents in its possession concerning negotiations would undermine and frustrate the spirit and intent of HRS Chapter 89 in promoting harmonious and cooperative relations between the government and its employees and would give other public sector unions an unfair advantage in negotiating current and future agreements.

Given the policies protecting the confidential nature of the collective bargaining negotiations,¹ the Board will not permit the HSTA to delve into the bargaining

¹In 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, the Board cited the confidential nature of the collective bargaining process, and stated:

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

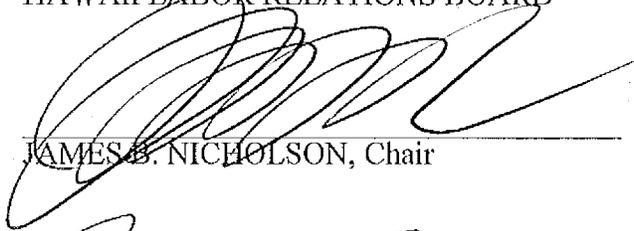
process of the HGEA, a non-party to these proceedings, to inquire into the proposals offered by the employer, the counter-proposals, the manner and basis of its contract settlements, and the ramifications of the contract provisions on the employees it represents and the employees it does not represent. The Board thus finds that the limited scope of Perreira's admissible testimony does not reasonably relate to the proceedings at issue.

The Board fails to see the probative value of Perreira's testimony to the allegations in Count 1 of the complaint. The Board finds that HSTA's inquiry into the "when, where, who, and in what manner the Hawaii Government Employees Association (HGEA)" entered into agreements with the various employer groups has no relevance to the instant prohibited practice Complaint filed by HSTA. Therefore, Perreira will not be required to appear as a witness in these proceeding or provide any documents unless the HSTA can articulate with sufficient particularity the purpose and necessity of having Perreira appear to testify in these proceedings. HSTA will also be required to demonstrate that there is not a less intrusive way of obtaining the information sought through the testimony of other witnesses to these proceedings.

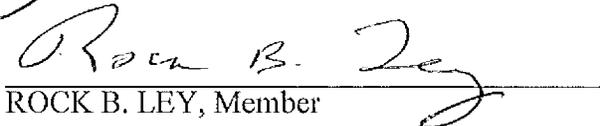
Accordingly, the Board grants Perreira's Motion to Revoke, subject to a future offer of proof, if any, that Perreira's testimony and documents are relevant and admissible.

DATED: Honolulu, Hawaii, October 21, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES E. NICHOLSON, Chair



ROCK B. LEY, Member

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customary practice in collective bargaining, and
would be inconsistent with the intent of IIRS chapter
89 to promote cooperation between the parties.
(Emphasis added).