

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. 2848

ORDER GRANTING INTERVENOR
UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY'S
MOTION TO QUASH SUBPOENA (J.N.
MUSTO) OR IN THE ALTERNATIVE
TO COMPEL A MORE PARTICULAR
STATEMENT OF THE NATURE OF
TESTIMONY

ORDER GRANTING INTERVENOR UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY'S MOTION TO QUASH
SUBPOENA (J.N. MUSTO) OR IN THE ALTERNATIVE TO COMPEL
A MORE PARTICULAR STATEMENT OF THE NATURE OF TESTIMONY

On August 9, 2011, Complainant HAWAII STATE TEACHERS ASSOCIATION (Complainant or HSTA) filed an "Application for Issuance of Subpoenas; Exhibits 1 through 48" with the Hawaii Labor Relations Board (Board) that contained Exhibit 21 which was issued to J.N. Musto, Ph.D. (Dr. Musto), Executive Director of the University of Hawaii Professional Assembly (UHPA). The subpoena requested Dr. Musto's appearance before the Hawaii Labor Relations Board (Board).

On August 15, 2011, UHPA's counsel filed with the Board "Intervenor University of Hawaii Professional Assembly's Motion to Quash Subpoena (J.N. Musto) or in the Alternative to Compel a More Particular Statement of the Nature of Testimony." UHPA contends, *inter alia*, that HSTA's counsel (a) failed to substantively comply with the Board Chair's directive to provide a brief summary or general statement of the nature of the testimony expected of Dr. Musto; (b) provided a brief description of the nature of Dr. Musto's expected testimony that is so general and vague that "it has no meaning"; and (c) failed to demonstrate that Dr. Musto is a fact-witness or that Dr. Musto has first-hand knowledge of any of the facts, circumstances, claims and prayers for relief described in HSTA's prohibited practice complaint (Complaint).

On August 23, 2011, HSTA filed with the Board its Memorandum in Opposition to Intervenor University of Hawaii Professional Assembly's Motion to Quash Subpoena (J.N. Musto) or in the Alternative to Compel a More Particular Statement of the Nature of the Testimony. HSTA contends, *inter alia*, that:

1. "At this time, without any witnesses having been called to testify, HSTA is limited in how much specificity it can provide related to the scope of Dr. Musto's testimony. HSTA lacks an ability to first depose Dr. Musto to learn the extent of his knowledge. Under Hawaii Administrative Rule 12-42-8(g)(6), discovery is limited and only permitted to upon good cause shown. As Dr. Musto is available and in the State, there was no good cause to request he be deposed and without having deposed Dr. Musto, HSTA is limited as to what level of specificity it can state in a 'brief summary or general statement of the nature of the testimony expected of the witness.'"
2. "While Dr. Musto was not present at the HSTA negotiation sessions, HSTA cannot say that Dr. Musto is not a fact-witness to the events taking place between HSTA and the Respondents during HSTA's negotiation process."
3. Also, UHPA members are affected by the same state budget as HSTA members. HSTA would question Dr. Musto about Section 96 of the 2011 budget (Exhibit 1) and the effect of that section on the UHPA contract if the section is deemed constitutional."¹

¹Section 96 of the 2011 budget (HB 200, CD1) states in part:

Notwithstanding any provision to the contrary, the director of finance, with the approval of the governor, shall transfer into retirement benefit – state (BUF 741) \$88,200,000 for fiscal year 2011 – 2012 and \$88,200,000 for fiscal year 2012 – 2013 for labor savings attributable to collective bargaining agreements for all bargaining units and pursuant to any executive memoranda that results in salary

On February 9, 2012, the Board's Chair stated on the record that the Board will be issuing a written order granting Intervenor's Motion to Quash, and that Dr. Musto will not be required to appear as a witness in these proceedings, unless the HSTA can articulate with sufficient particularity the purpose and necessity of having Dr. Musto appear to testify. The Board's Chair stated further that HSTA will be required to show that Dr. Musto has direct, first-hand knowledge of the facts, circumstances, claims and prayers for relief described in the Complaint. UHPA intervened in this case for the sole purpose of assuring UHPA's rights are protected and ensuring that any Board decision does not upset the balance of rights contemplated by Hawaii Revised Statutes (HRS) Chapter 89.

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. Dr. Musto was for all relevant times the Executive Director of UHPA.
2. UHPA is an employee organization and the exclusive representative, as defined in HRS § 89-2,² of employees included in Unit 07, composed of Faculty of the University of Hawai'i and the community college system.
3. UHPA and the public employers are parties to a collective bargaining agreement for Unit 07, effective July 1, 2009 - June 30, 2015.

savings for all employees not included under collective bargaining in respective state agencies[.]

²HRS 89-2, provides in part as follows:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

* * *

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

4. UHPA was not a party to the 2010-2011 negotiations between HSTA and Respondents.
5. In Order No. 2811, dated August 12, 2011, the Board granted UHPA's Petition for Intervention and recognized UHPA's legitimate needs to assure that its statutory right to strike is not diminished by a decision of the Board and to ensure that any Board decision does not upset the balance of rights contemplated by Chapter 89.
6. Intervenor UHPA argues that HSTA's counsel has not presented to the Board any particularized offer of proof as to Dr. Musto's testimony and the relevance of his testimony to the Complaint. UHPA argues further that HSTA has not demonstrated that Dr. Musto is a fact-witness in this case or possesses first-hand knowledge of any of the facts, circumstances, claims and prayers for relief described in the Complaint.
7. HSTA contends, *inter alia*, that:
 - a. "At this time, without any witnesses having been called to testify, HSTA is limited in how much specificity it can provide related to the scope of Dr. Musto's testimony. HSTA lacks an ability to first depose Dr. Musto to learn the extent of his knowledge. Under Hawaii Administrative Rule 12-42-8(g)(6), discovery is limited and only permitted to upon good cause shown. As Dr. Musto is available and in the State, there was no good cause to request he be deposed and without having deposed Dr. Musto, HSTA is limited as to what level of specificity it can state in a 'brief summary or general statement of the nature of the testimony expected of the witness.'"
 - b. "While Dr. Musto was not present at the HSTA negotiation sessions, HSTA cannot say that Dr. Musto is not a fact-witness to the events taking place between HSTA and the Respondents during HSTA's negotiation process."
 - c. "Also, UHPA members are affected by the same state budget as HSTA members. HSTA would question Dr. Musto about Section 96 of the 2011 budget (Exhibit 1) and the effect of that section on the UHPA contract if the section is deemed constitutional."
8. The Board finds that, the instant Complaint does not contain any specific allegation that the implementation of Section 96 of the 2011 budget (Section

96) is unconstitutional. In addition, the Board finds that the issue regarding a constitutional challenge to Section 96 is beyond the Board's jurisdiction. Thus, any testimony relating to the constitutionality of Section 96 and its effect on the Unit 07 UHPA contract if deemed constitutional would be objectionable as a legal opinion and irrelevant and immaterial as to the Complaint before the Board.

9. Based upon a review of the record and the arguments presented, the Board finds that Dr. Musto will not be required to appear as a witness in these proceedings unless HSTA can articulate with sufficient particularity the purpose, necessity and relevance of having Dr. Musto testify. HSTA will be required to show that Dr. Musto has direct, first-hand knowledge of the facts, circumstances, claims and prayers for relief described in the Complaint.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. 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).
2. 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).

3. HAR § 91-10, Rules of evidence; official notice, states as follows:
In contested cases.
 - (1) Except as provided in section 91-8.5, 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).
4. In general, the Board lacks the power to pass upon the constitutionality of a statute. See, Rettkowski v. Department of Ecology, 122 Wash.2d 219, 858 P.2d 232, at 236 (holding that it is a fundamental rule of law that “an agency may only do that which it is authorized to do by the Legislature”); Tri County Tel. Ass’n, Inc. v. Wyoming Public Service Comm’n, 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, “As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do”); cf. Stop H-3 Association v. State, 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (observing that, “[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred”); HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (maintaining that an agency “generally lacks the power to pass upon the constitutionality of a statute. The law has long been clear that agencies may not nullify statutes.”) (Quoting 4 K. Davis, Administrative Law Treatise § 26:6, at 434 (2d ed. 1983)). Thus, a question regarding the constitutionality of Section 96 is a matter outside of the Board’s jurisdiction.
5. UHPA was not a party to the HSTA negotiations, and HSTA has not shown that Dr. Musto has first-hand knowledge of any of the facts, circumstances, claims and prayers for relief described in the Complaint.
6. HSTA argues that Dr. Musto will testify on Section 96 of the State Budget, 2011, how it applies to UHPA, and the constitutionality of that section. In Finding of Fact No. 6, the Board found that HSTA has not raised a constitutional question regarding Section 96 in its Complaint. Therefore, any testimony from Dr. Musto regarding a constitutional question pertaining to Section 96 would be irrelevant or immaterial, and objectionable and in the nature of a legal opinion.

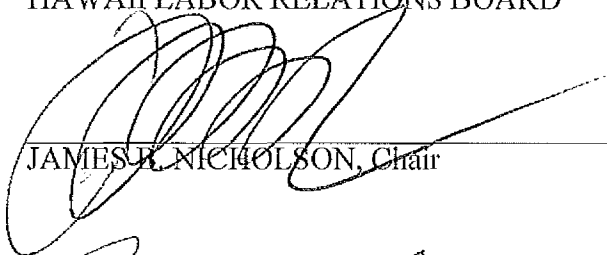
7. Based upon a review of the record and the arguments presented, the Board finds that Dr. Musto will not be required to appear as a witness in these proceedings unless the HSTA can articulate with sufficient particularity the purpose and necessity of having Dr. Musto appear to testify. HSTA will be required to show that Dr. Musto has direct, first-hand knowledge of the facts, circumstances, claims and prayers for relief described in the Complaint.

ORDER

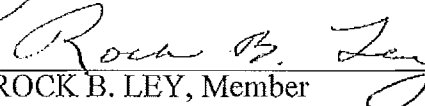
For the reasons discussed above, the Board grants Intervenor UHPA's Motion to Quash Subpoena (J.N. Musto) or in the Alternative to Compel a More Particular Statement of the Nature of Testimony, filed on August 15, 2011.

DATED: Honolulu, Hawaii, May 14, 2012

HAWAII LABOR RELATIONS BOARD



JAMES E. NICHOLSON, Chair



ROCK B. LEY, Member

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