

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Complainant,

and

NEIL ABERCROMBIE, Governor, State of  
Hawaii; DONALD G. HORNER,  
Chairperson, Hawaii State Board of  
Education; HAWAII STATE BOARD OF  
EDUCATION; KATHRYN S.  
MATAYOSHI, Superintendent, Department  
of Education, State of Hawaii; and  
DEPARTMENT OF EDUCATION, State of  
Hawaii,

Respondents.

CASE NO. CE-03-824

ORDER NO. 2935

ORDER DENYING RESPONDENTS'  
MOTION FOR PERMISSION TO  
CONDUCT DISCOVERY VIA  
WRITTEN INTERROGATORIES

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I. Background

On June 7, 2013, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Complainant) filed a Prohibited Practice Complaint (Complaint) against Respondents NEIL ABERCROMBIE, Governor, State of Hawaii; DONALD G. HORNER, Chairperson, Hawaii State Board of Education; HAWAII STATE BOARD OF EDUCATION; KATHRYN S. MATAYOSHI, Superintendent, Department of Education, State of Hawaii; and DEPARTMENT OF EDUCATION (Respondents).

On June 25, 2013, HGEA filed a Motion for Interlocutory Relief, asserting, *inter alia*, that because Respondents unilaterally decided to pay two paychecks to 10-month Teachers and Educational Assistants (Employees or EAs) on August 5, 2012, those employees would not receive a paycheck on August 5, 2013, which in turn would result in irreparable adverse impacts, including the failure to withhold the Employees' portion

of premiums for health benefits resulting in possible loss of health coverage. On July 3, 2013, Respondents filed a Memorandum in Opposition to HGEA/AFSCME's Motion for Interlocutory Relief (Memorandum in Opposition), asserting, *inter alia*, that the Employees would receive their full amount of compensation for the 2012-2013 school year as well as the 2013-2014 school year, and the employer sought to avoid an over-payment situation. One of the options proposed by Respondents' Memorandum in Opposition was to pay the Employees' 2013-2014 annual salary over 25 pay periods, in lieu of 24 pay periods, with the first payment on August 5, 2013. On July 5, 2013, Respondent filed their First Supplement to Memorandum in Opposition to HGEA/AFSCME's Motion for Interlocutory Relief, which provided further details in its attached document, "25 Pay Period Impact on EA Pay Check."

On July 15, 2013, the Board heard arguments on HGEA's Motion. After deliberation, the Board orally granted the Motion, and ordered Respondents to pay Employees pursuant to Respondents' proposed option of paying the 2013-2014 school year annual salary over 25 pay periods in lieu of 24 pay periods, with the first paycheck on August 5, 2013.

On July 17, 2013, Respondents filed their Motion for Permission to Conduct Discovery Via Written Interrogatories (Discovery Motion), requesting that HGEA specifically identify any EA who alleges he or she was not fully compensated, and the pay period or dates of work not compensated. Respondents further requested HGEA specify what term and/or condition of the Memorandum of Understanding (MOU) dated June 28, 2012, or the Bargaining Unit 3 Collective Bargaining Agreement (CBA), that was allegedly violated.

On July 23, 2013, HGEA filed its Memorandum in Opposition to Respondents' Motion for Permission to Conduct Discovery Via Written Interrogatories, asserting that salary overpayment is not the issue before the Board; rather, "failure to negotiate" is the alleged prohibited practice.

## II. Legal Standard

In general, the standard of review for a ruling on a motion to compel discovery is abuse of discretion. Hac v. University of Hawaii, 102 Hawaii 92, 100-01, 73 P.3d 46, 54-55 (2003).

Additionally, Hawaii Administrative Rules (HAR) § 12-42-8(g)(6) provides in relevant part (emphasis added):

Discovery, depositions, and interrogatories:

- (A) Upon written application and **for good cause shown, the board may permit** the parties to take deposition upon oral examination or written interrogatories in the manner prescribed under the Hawaii Rules of Civil Procedure.

Accordingly, that the Board *may* permit, only upon *good cause shown*, written interrogatories, indicates that such discovery is not part of the usual proceedings before the Board.

“‘Good cause’ is a relative and highly abstract term, and its meaning must be determined not only by verbal context of the statute in which the term is employed, but also by context of action and procedures involved in the type of case presented.” Doe v. Doe, 98 Hawaii 144, 154, 44 P.3d 1085, 1095 (2002) (quoting *Black’s Law Dictionary* at 692. As a general rule, “good cause” means a substantial reason; one that affords a legal excuse. Id. (quoting State v. Estencion, 83 Haw. 264, 267, 625 P.2d 1040, 1042-43 (1981)).

### III. Discussion

The Complaint in this case makes a number of allegations, primarily that “[t]he June 28, 2012 MOU was implemented without further negotiation by and between the Respondents and HGEA/AFSCME, and affected BU 3 Educational Assistants received two pay checks on August 5, 2012, without any explanation until October 12, 2012”; that “notwithstanding an employer’s obligation to make certain deductions and withholdings, and payments, by contract and law, Respondents had unilaterally and without any explanation . . . paid affected BU 3 Education Assistants on August 5, 2012, without making such common and routine deductions”; that “[t]he impact on BU 3 Educational Assistants of the Respondents[’] unilateral conduct and action is that on or about August 5, 2013, with or without a paycheck, certain BU 3 Educational Assistants will have their health benefits cancelled unless they make an out-of-pocket payment, through no fault of their own and as a result of the direct unilateral conduct and action of Respondents”; and that “Respondents[’] conduct . . . constitute [sic] unilateral modification to the wages, hours and conditions of work, including benefits, of BU Educations Assistants in violation of Respondents[’] duty to bargain pursuant to Section 89-9, HRS.”

Accordingly, the Board does not read the Complaint, on its face, as making allegations regarding uncompensated pay periods.



The Complaint further alleges, emphasis added, that, “[a]s a result of Respondents[’] conduct in Count I herein, *there appears to be some question* of whether the Respondents[’] notice to BU 3 affected employees concerning their responsibility for making payments normally made by the Respondents also includes denial to the affected Bargaining Unit 3 employees the agreement to reinstate/restore the 5% salary reduction, and step movements during prior contract period.” To the extent HGEA raises the issue of restoration of the 5% salary reduction, the Board does not read this as an allegation that there are any pay periods or dates for which Employees were not fully compensated (which is the information Respondents seek in their Discovery Motion); and further, this particular allegation appears inchoate such that conducting discovery at this time is not warranted.

ORDER

For the reasons discussed above, the Board finds that Respondents have not shown good cause to justify granting the Discovery Motion at this time. Complainant has not specifically alleged in the Complaint that there are any pay periods for which Employees were not fully compensated; rather, the Complaint appears to focus on unilateral actions by Respondents regarding the timing of paychecks and the failure of Respondents to make appropriate deductions from the August 5, 2012, paycheck, and a failure of the duty to bargain. To the extent Complainant may later raise, or clarify that it is raising, an allegation of uncompensated pay periods, Respondents may request that the Board reconsider its order on the Discovery Motion.

Accordingly, Respondents’ Motion for Permission to Conduct Discovery Via Written Interrogatories is hereby DENIED without prejudice.

DATED: Honolulu, Hawaii, July 29, 2013.

HAWAII LABOR RELATIONS BOARD

  
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SESNITA A.D. MOEPONO, Member

  
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ROCK B. LEY, Member

Copies sent to:  
Peter Liholiho Trask, Esq.  
Jeffrey A. Keating, Deputy Attorney General