STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Petitioner, and BOARD OF EDUCATION, State of Hawaii, Intervenor-Employer.	)	Case No. DR-05-40 Decision No. 144

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY RULING

On October 1, 1980, the Petitioner Hawaii State Teachers Association (hereafter HSTA or Petitioner) filed with this Board a petition for a declaratory ruling. The petition requested the Board to make a determination as to whether either or both of the HSTA's proposals on weighted class size are negotiable subjects within the terms of Section 89-9, Hawaii Revised Statutes (hereafter HRS).

A petition for intervention was filed by the Board of Education, State of Hawaii (hereafter BOE or Intervenor) on October 16, 1980. The Board granted the BOE's petition for intervention by Order No. 359 on October 17, 1980.

On November 6, 1980, after due notice, the Board held a hearing on this petition. Posthearing briefs were filed by both the HSTA and the BOE on November 26, 1980 and on November 28, 1980, respectively.

Upon a full review of the record in this case, the Board makes the following findings of fact, conclusions of law, and declaratory ruling.

FINDINGS OF FACT

1. Petitioner HSTA is an employee organization and is the exclusive representative, as defined in Subsection 89-2(10), HRS, of Unit 5 (teachers and other personnel of the department of education under the same salary schedule).

2. Intervenor BOE is the public employer of Unit 5, as defined in Subsection 89-2(9), HRS.

3. At the time the declaratory ruling petition was filed, the parties were anticipating the commencement of negotiations for a new Unit 5 collective bargaining agreement on November 15, 1980. The Petitioner was intending to present a weighted class size proposal at said negotiations and therefore wanted a ruling from the Board on the negotiability of two such proposals set forth below.

4. Since 1972, there has existed a class size committee established by the Unit 5 collective bargaining agreement to process and resolve all complaints from classroom teachers as to the size of their classes.

5. Both of the HSTA's weighted class size proposals would require that the parties adopt a weighting system for assigning students to a teacher's classroom. Proposal A would also require that when the weighted class size exceeds a reasonable number that the Employer must make adjustments in the class size. Said proposal further provides that after such adjustment is made, if the classroom teacher still believes that the number of students exceeds a reasonable number, the teacher may file a class size complaint. Proposal A states as follows:

EXHIBIT "A"

> (After paragraph 7 in Article VI A as set forth in Exhibit "C", insert the following):
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> 8. The Employer, when assigning students in a teacher's classroom, shall use the following weighted system:

Identified Gifted	1.5
Certified Mentally Retarded, Educable	1.5
Certified Mentally Retarded, Trainable	3.0
Certified Seriously Emotionally Disturbed	3.0
Certified Specific Learning Disability	1.5
Chronically Disruptive	3.0
Certified Orthopedically Handicapped	2.0
Hard of Hearing	1.5
Deaf	3.0
Non-English Speaking	1.5
Partially Sighted	1.5
Blind	3.0
Multiple Handicapped...combination not to exceed	6.0
Severe Speech & Language Impairment	1.5
All Other Students Count	1.0

The Employer shall make adjustments in the class size when the weighting exceeds a reasonable number.

A teacher may compile the weighted points for the students in his/her classroom and if he/she believes that under the weighted system the number of students still exceeds a reasonable number, he/she may file a class size complaint under established procedures. The Class Size Committee shall have an allocation of $1,203,090 for each year of this Agreement for the purpose of resolving weighted class size complaints. A teacher is not precluded from filing a class size complaint for any other reason.

Proposal B, while adopting the same weighting system for assigning students as Proposal A, further provides that when the weighted number of students in a particular teacher's classroom is 10% or more above the statewide class size ratio, the Employer should reduce such class size. If the Employer does not reduce the class size, then the Employer is required to do one of the following: (a) provide additional personnel to assist the teacher in the classroom such as a classroom aide or substitute or part-time teacher, or (b) pay a premium equivalent to the cost of such assistance to the teacher. Proposal B reads as follows:

EXHIBIT "B"

(After paragraph 7 in Article VI A as set forth in Exhibit "C", insert the following):

8. The Employer, when assigning students in a teacher's classroom, shall use the following weighted system:

Identified Gifted	1.5
Certified Mentally Retarded, Educable	1.5
Certified Mentally Retarded, Trainable	3.0
Certified Seriously Emotionally Disturbed	3.0
Certified Specific Learning Disability	1.5
Chronically Disruptive	3.0
Certified Orthopedically Handicapped	2.0
Hard of Hearing	1.5
Deaf	3.0
Non-English Speaking	1.5
Partially Sighted	1.5
Blind	3.0
Multiple Handicapped...combination not to exceed	6.0
Severe Speech & Language Impairment	1.5
All Other Students Count	1.0

> When the weighted number of students in a teacher's class is 10% or more above the statewide class size ratio, the Employer may reduce the class size or, if the Employer chooses not to reduce such class size, then (a) for those classes which are between 10% and 20% above said statewide average, the Employer shall provide a classroom aide to assist the teacher, and (b) for those classes where the class size is more than 20% above such average, the Employer shall provide a substitute or part-time teacher to assist the classroom teacher. In either case (a) or (b), the Employer may, in lieu of providing such assistance, elect to pay the classroom teacher an additional amount equivalent the amount which would have been paid to the aide or substitute or part-time teacher.

6. The weighted class size proposals at issue in this case are intended to alleviate the problems created by the requirements of federal law P.L. 94-142, pertaining to education of the handicapped, that students with learning or other disabilities be mainstreamed into regular classrooms with nondisabled students.

7. In support of its proposals, the HSTA presented a document showing the number of mainstreamed students by types of disability in relation to the total number of students in the Department of Education (hereafter DOE). As of September-October 1980, out of a total of 164,781 students, the number of mainstreamed students was 4,074 integrated self contained (students who remain with a special education teacher for 50% or more of the time), 2,775 special resource classes (students

receiving special education services less than 50% of the time) and 6,500 Speakers of Limited English Program (SLEP) students who have primary languages other than English.

8. The HSTA also introduced into the record oral testimony from the Director of Programs of the HSTA and from two classroom teachers to provide examples of the effects of mainstreaming on the work load of a teacher. The examples presented in the testimony included: additional lesson plans for the tutors of SLEP students, conference with SLEP tutors, special instruction for physically handicapped students to cover material missed during therapy sessions and to the rest-room, conferences with the resource teacher for the gifted and talented students and discipline problems with the specific learning disability students.

9. The BOE presented evidence as to the burden on the employer that would be created by the two weighted class size proposals of the HSTA. To implement Proposal A would require the BOE to hire more teaching personnel and expand the number of classroom facilities to maintain the reasonable class size specified in that proposal at additional cost. Under Proposal B, the employer would also very likely have to hire additional classroom teachers to maintain the average statewide class size based upon the weighted system specified in that proposal. If the employer chose not to meet the class size requirements of Proposal B, then the employer would still have to hire teacher aides or substitute or part-time teachers to assist the regular teacher or pay a premium equivalent to the cost of hiring such personnel to comply with this proposal.

10. In conjunction with the evidence presented as to the burden on the employer created by these proposals, the BOE also introduced testimony on the interference that such proposals would have on the operation of the DOE. The weighted

class system provided in the proposals would remove the flexibility that a principal presently has in assigning students and teachers to classes. Furthermore, additional classes may have to be created and disbanded to accommodate the shifting distribution of students in individual classes. Finally, classes and programs may have to be cut in order to meet the funding and hiring requirements of these proposals.

CONCLUSIONS OF LAW

This declaratory ruling petition requests that the Board rule as to whether the two student weighting system proposals of the HSTA are excluded from the subjects of negotiation under Subsection 89-9(d), HRS. Said statutory subsection provides in pertinent part:

> (d) Excluded from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable. . . The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31 and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The HSTA contends that under two previous decisions, Decision 22, In Re Hawaii State Teachers Association and Department of Education, 1 HPERB 253 (1973) (hereafter Decision

22), and Decision 26, In Re Petition for Declaratory Ruling by the Department of Education, 1 HPERB 311 (1973) (hereafter Decision 26), that this Board has ruled that while a proposal setting statewide average class size is negotiable, the subject of the specific number of students per class is nonnegotiable. Accordingly, the HSTA asserts that because neither of their weighting system proposals specify a particular number of students per class that the proposals are subject to negotiation under said Board decisions. The BOE argues, on the other hand, that even though the HSTA proposals include no absolute numerical limits that these proposals are still essentially class size proposals, setting the number of students per individual class and therefore nonnegotiable.

In order to properly evaluate the merits of these arguments, a review of Decisions 22 and 26 is required. Decision 22 involved a charge by the HSTA that the DOE committed a prohibited practice by violating a provision in the Unit 5 collective bargaining agreement requiring that 250 new teaching positions be created in order to decrease the average class size ratio by one student. The HSTA alleged that the DOE, in lieu of creating 250 new positions, abolished 169.5 temporary support positions and placed teachers occupying those positions into the classroom teaching positions. The DOE argued in defense of the charge that there was no violation of the contract provision because said provision violates Subsection 89-9(d), HRS, and is therefore void. The Board held that the average statewide class size provision at issue in that decision was negotiable and not in violation of 89-9(d). In so ruling, the Board noted that class size is a hybrid issue involving both educational policy and impacting on working conditions of teachers. The Board then concluded that because the DOE failed to show how the reduction of the average class size

proposal would interfere with its management rights under Subsection 89-9(d), said proposal was negotiable stating:

> The DOE has put forth its own interpretation of legislative intent regarding its rights under Section 89-9(d) which we find untenable in view of enunciated legislative policy that joint-decision making is the modern way of administering government. The DOE has not presented any evidence to show that the reduction of average class size ratio by approximately one student will in fact interfere with its rights pursuant to Section 89-9(d). Accordingly, insofar as the average class size ratio is a significant condition of employment and there is no evidence in the record to show that agreement on such a provision is an unlawful interference with the employer's rights, we find that the reduction of average class size ratio by approximately one student is negotiable and that such agreement is not in violation of Section 89-9(d).
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> The issues of class size ratio, insofar as it involves overall policy dealing with the level of quality in education desired by our Legislature and developed by the DOE is, in our opinion, a management prerogative not to be interfered with by the HSTA. However, insofar as the average class size ratio constitutes a significant condition of employment, we believe that the matter is negotiable to such extent only.
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> * * *
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> Though we hold that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concommittantly believe that said section should not be too liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective management over operations of the school system. Therefore, while we hold that average class size ratio is a condition of employment, negotiation upon which does not per se interfere with employer rights under Section 89-9(d), we are of the opinion that the manner of implementing the reduction in average class size ratio involves decisions of inherent managerial policy and is not a proper subject of negotiation. 1 HPERB 253, 268-69. (emphasis added)

In Decision 26, the Board was considering the issue of the negotiability of a teacher work load reopening proposal

establishing specific maximum class sizes for each grade level. In arguing for the negotiability of this proposal, the HSTA submitted that work load is directly related to class size which was already found to be negotiable pursuant to Decision 22. In concluding that the work load proposal at issue was nonnegotiable, the Board further clarified the reasoning underlying its ruling in Decision 22 by stating:

> Inasmuch as the HSTA contends that the work load proposal is negotiable since it is directly related to class size, which this Board, it declares, has determined to be negotiable in an earlier case (HPERB Case No. CE-05-4, Dec. No. 22, October 24, 1972), we find a review of that prior case necessary.
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> In that case, we held that "wages, hours and other terms and conditions of employment" which are negotiable, and the rights of the employer reserved in Section 89-9(d) were not mutually exclusive categories. We found that class size was a hybrid issue; it involved both policy making and had a significant impact on working conditions.
>
> We determined therein that the provision calling for a reduction in the average class size ratio throughout the statewide educational system by approximately one student was negotiable. In reaching our decision, this Board balanced the employer's broad right to establish educational policy, unfettered by a collective bargaining agreement on the one hand, against the direct impact the average class size ratio had on the teachers' working conditions. Notwithstanding its admitted relation to educational policy, we found in that instance that the element of impact on teachers' working conditions was great, while the imposition of an average, statewide class size ratio had minimum impact on the DOE's right to establish educational policy. 1 HPERB 311, 320-21. (emphasis added)

After clarifying the particular analysis of Subsection 89-9(d) underlying its conclusion in Decision 22, the Board applied the balancing approach to the work load proposal at issue in Decision 26. Focusing on the effect of the proposal, the Board held that the proposal at issue was nonnegotiable because of the DOE's demonstration of the substantial interference that such a proposal would have on the employer's rights set forth in Subsection 89-9(d):

The effect of the work load proposal, in the instant case, would be to force the DOE to hire personnel and expand facilities regardless of its rights and duty to maintain efficiency of operations. Some of the alternatives which might be forced upon the DOE would constitute inefficient, wasteful use of personnel and equipment. Other consequences that may ensue if the DOE is required to implement the work load proposal would run counter to the mission of the DOE, i.e., to provide the best educational system possible for the children of Hawaii. In providing education service, the DOE must be responsive to the needs of the students, to the extent possible, give available resources. Hence, when the DOE is required to utilize methods which would cause deterioration of the learning environment of the students, such as, placing two teachers in the same classroom or increasing team teaching regardless of a teacher's ability to team teach, it becomes obvious that the DOE's right and duty to provide the best educational system possible is being interfered with. Furthermore, when the DOE is relegated to such alternatives as busing students or decreasing course offerings solely for the purpose of implementing the work load proposal, it loses its ability to remain responsive to the needs of the students.

Additionally, the work load proposal does not give any consideration to the fact that the DOE is dealing with humans, not machines, where input and output cannot be standardized. Teachers' talents vary; some are more experienced than others, some do better in large group instruction, others may be particularly suited for team teaching. Students' needs vary; some have problems in a particularly instructional area, some students are able to learn more readily. An experienced teacher may be effectively able to handle more students than an inexperienced teacher. An experienced teacher may be effectively able to handle more students than another teacher with comparable experience and ability if he had a group of above-average students.

The DOE must have enough flexibility to determine matters such as work load and curriculum based on the admixture of all the factors which affect the educational process at a given time and in a given situation. Furthermore, as developments occur in the field of education, the DOE should not be hampered in its efforts to experiment with innovative strategies and new technology in striving toward its objective of providing an excellent educational system.

Therefore, it is our opinion that the specific proposal on work load which is here

> at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with the DOE's responsibility to establish policy for the operation of the school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations. Hence, the DOE and the HSTA may not agree to the subject work load proposal because such agreement would interfere substantially with the DOE's right to determine the methods, means, and personnel by which it conducts its operations and would interfere with its responsibility to the public to maintain efficient operations. Id. at 322-323. (emphasis added)

Based upon the foregoing review of the class size decisions rendered by this Board, the Board finds that while the Petitioner HSTA has correctly stated the holdings of those decisions, the HSTA has ignored the reasoning underlying those decisions. In ruling that the reduction of the average statewide class size is a negotiable subject while a maximum number of students per individual class is nonnegotiable, the Board was not focusing on the presence or absence of specific numbers in the work load proposal. Rather, the Board was concerned with the showing of the relative impact of such a proposal on the employer's right to establish educational policy and on the working conditions of the teachers.

As previously noted in the findings of fact herein, the record of this case demonstrates that the two weighted class size proposals would have effects similar to the work load proposal at issue in Decision 26 on the operations and educational policies of the DOE. The implementation of the weighting systems would force the employer to hire additional teaching personnel and to build more classroom facilities to maintain either a "reasonable" class size standard or a class size standard of less than 10% above the average statewide class size. Due to the limitation on funds available to the DOE, the cost of additional staff and

facilities would result in a cutback on existing educational programs and a shift in the educational priorities. Some of the measures which the DOE may be forced to take in implementing these class size proposals could result in inefficient operations and financial waste for the employer. Apart from the impact on the resources of the DOE, the weighted class size proposals would also remove the existing flexibility within the DOE to assign, schedule, and set up classes according to the particular needs of the students and the varying skills of the individual teachers.

As with the work load proposal in Decision 26, the Board recognizes that the implementation of these weighted class size proposals obviously would affect the working conditions of individual classroom teachers. The HSTA provided in great detail in the record of this case examples of the effects that the federal requirements of mainstreaming has had on the individual teacher's work load. Consequently, although the HSTA did not directly address the issues of how the subject weighted class size proposals would substantially alter the present work load of the teachers and of how many teachers are affected by the mainstreaming, inferences may be drawn on these issues based upon the existing evidence in the record. Even assuming that the implementation of these weighted class size proposals would appreciably and directly impact upon the work load of some of the teachers, the Board is unable to find that such effects would outweigh the substantial interference that these proposals would have on the educational policies and operations of the BOE. Accordingly, the HSTA weighted class size proposals are excluded subjects to negotiations pursuant to Section 89-9, HRS.

Both the HSTA and the BOE cited numerous decisions from other states in support of and against the negotiability of class size proposals. The Board has carefully reviewed

these decisions and others on this issue and finds that the majority of the case law from other jurisdictions sustain both the Board's approach and determination with respect to the negotiability of class size provisions. In City of Biddeford v. Biddeford Teachers Ass'n., 304 A.2d 387, 420, 83 LRRM 2099, 2123 (Me. 1973) (Wernick, J. concurring and dissenting) the court stated:

> Although the size of a class to be taught by a given teacher plainly and seriously affects teacher "working conditions", the impacts of "class size" overlap into a number of "managerial" and "policy" areas which are of substantial qualitative importance. "Class size" requirements directly involve considerations not merely of organization, supervision, direction and distribution of personnel but also of the needs for additional school building construction or other types of capital outlays, the current population trends, the appropriate use of technological developments (such as television or other electronic teaching aids) and the swings in educational philosophies and theories and the manner of their implementation.
>
> Here, then (1) "working conditions" features are so intimately entwined with an abundant plurality of important "managerial" and pure "policy" elements that "class size" must be deemed to be an integral complex of "educational policies" and "working conditions"--incapable of separation to allow the "working conditions" factors to be negotiated in isolation and (2) with "class size" thus treated as an inseparable unit, it cannot, as a unit, qualify for collective bargaining and binding arbitration because the weight of the "educational policies" factors contained in it are sufficiently heavy to override the impacts upon the "working conditions" of teachers.

In National Education Ass'n. Topeka v. U.S.D. 501, Shawnee County, Kansas, Topeka Board of Education, 225 Kan. 445, 448, 592 P.2d 93, 96, 101 LRRM 2611, 2614 (1979), the Kansas Supreme Court was considering an appeal from a determination of a lower court that certain items including one as to class size were mandatorily negotiable. In evaluating whether the determination of the lower court on these items should be reversed, the court articulated the following test for negotiability:

> It does little good, we think, to speak of negotiability in terms of "policy" versus something which is not "policy." Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can.

After applying this test to the class size item, the court ruled that such an item was not mandatorily negotiable finding:

> On the rationale previously expressed in this opinion, Shawnee Mission, 212 Kan. at 752, is controlling on this question. Class size is not mandatorily negotiable. Further, class size has a tremendous impact on the school district because it involves such factors as the number of classrooms and teachers needed. "Amounts of work" does not include class size. We hold the trial court erred in determining class size was a mandatorily negotiable item. 225 Kan. 445, 452, 592 P.2d 93, 98.

Apart from these particular decisions emphasized above, the balancing approach to determining the non-negotiability of a class size provision impacting both on the management rights and on terms and conditions of employment has been used by other courts and labor boards in many other class size cases. Pennsylvania Labor Relations Board v. State College Area District, 461 Pa. 494, 337, 90 LRRM 2081 (1975); National Education Ass'n. v. Shawnee Mission Board of Education, 212 Kan. 741, 512 P.2d 426, 84 LRRM 2223 (1973).

The HSTA also argues that the weighted class size proposals are negotiable because of the options to maintaining the class size requirements built into the proposals. Specifically in Proposal A, the alternative is that the employer may be subject to a complaint before the class size committee. In Proposal B, the options are that the employer can hire additional aides or substitutes to assist the classroom teacher with the

extra students or can pay a premium equivalent to the cost of such assistance to the teacher.

In Decision 102, In Re George R. Ariyoshi, Governor of the State of Hawaii, et al. and Hawaii Fire Fighters Assn., 2 HPERB 207 (1979), this Board was considering the negotiability of a company manning proposal creating similar options to the maintenance of the manning requirements established by that proposal. The Board held that the existence of negotiable options within a proposal does not render the entire proposal negotiable reasoning:

> That there is a partial escape hatch for the employer in the proposal because it permits the employer to avoid maintaining the minimum manning requirements by paying premium pay does not save the proposal. The two parts of the proposal are not severable. In order to get to the situation in which it has the option of paying the penalty the Employer still must agree to that part of the proposal which requires it to maintain minimum manning. We already have ruled that it would be violative of the statute for it to agree to this. The linkage of the premium pay penalty would only come into play if the Employer violated an illegal contract provision. Id. at 213.

A similar analysis has been used also in a number of recent New York decisions. In Pearl River Union Free School District, and Pearl River Teachers Ass'n. (hereafter Pearl River), 11 N.Y. PERB 3138 (1978), the New York PERB, in ruling that the school district did not violate its duty to negotiate in good faith by refusing to bargain on five demands containing portions that were not mandatory subjects of negotiation, stated:

> Each of the demands in question consisted of a proposed contract article which contained two or more enumerated paragraphs. The hearing officer determined that at least one paragraph of each proposed article was a nonmandatory subject of negotiation. The Association contends that the hearing officer erred in these determinations. It further argues that, even if the District need not have negotiated over some of the

> paragraphs, it should have been compelled to negotiate over the remaining paragraphs. We do not agree. The record does not establish that the Association presented the various paragraphs in the five articles as comprising separable and independent demands. The District reasonably understood that the Association was seeking to negotiate each article as a single entity. It was willing to negotiate over aspects of each of the articles that constituted mandatory subjects of negotiation, but the Association never indicated its willingness to negotiate over the demanded articles without their nonmandatory aspects. Accordingly, if any paragraph in an article was not a mandatory subject of negotiation, the District committed no improper practice by refusing to negotiate as to the article as a whole.
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> We affirm the determination of the hearing officer that each of the five demands contained some elements that were not mandatory subjects of negotiation. Id. at 3140.

Accord: Town of Haverstraw and Rockland County Patrolmen's Ass'n., 11 N.Y. PERB 3177 (1978), City of Rochester Police Locust Club, Inc., 12 N.Y. PERB 3015 (1979).

Based upon the same reasoning provided in these previous rulings, the Board must conclude that the fact that there are alternatives provided in these proposals for the employer to avoid maintaining a certain class size under the weighted proposal does not alter the nonnegotiable character of these proposals. The weighted class size portions of the HSTA proposals are nonnegotiable; accordingly, the entire proposals are not bargainable.

DECLARATORY RULING

In view of all of the foregoing, the Board rules that both of the weighted class size proposals are nonnegotiable.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: February 13, 1981

Honolulu, Hawaii