

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)

Petition for Declaratory)
Ruling by the DEPARTMENT OF)
EDUCATION)

Case No. DR-05-5

Dec. No. 26

DECLARATORY RULING

Appearances:

For Petitioner: E. John McConnell, Jr., Attorney
General's Office, State of Hawaii

For Intervenor: Thomas P. Gill, Hawaii State
Teachers Association

This case involves a petition for declaratory ruling filed by the Department of Education (hereinafter DOE) on September 25, 1972, requesting the Hawaii Public Employment Relations Board (hereinafter Board) to rule on the negotiability of the work load reopening proposal submitted by Hawaii State Teachers Association (hereinafter HSTA). The oral motion of the HSTA to intervene in the proceedings in the instant matter was granted by the Board on November 2, 1972. Subsequently, on November 14, 1972, the DOE filed an amended petition requesting that the Board also rule on the negotiability of that portion of the reopening proposal on preparation periods for teachers, which requires that preparation periods be scheduled "within the students' instructional day".

Pursuant to Chapter 89, Hawaii Revised Statutes, the Board sitting en banc held a hearing on the above matters on November 17, 22, 24 and 27, and December 11 and 15, 1972, at Honolulu.

The Board, having reviewed the entire record and the briefs submitted by the parties, hereby makes the following Findings of Fact, Conclusions of Law, and Declaratory Ruling.

FINDINGS OF FACT

The Petitioner, DOE, is a public employer within the meaning of Chapter 89, Hawaii Revised Statutes.

The Intervenor, HSTA, is an employee organization thereunder.

The historic facts leading to the issues raised in the instant proceedings include the following.

The HSTA is certified by this Board as the exclusive bargaining representative of Unit 5 (teachers and other personnel of the DOE under the same salary schedule) for the purpose of collective bargaining on "wages, hours and other terms and conditions of employment." The DOE and the HSTA, after protracted and trying negotiations which reached an impasse, and after having exhausted the mandatory statutory steps which must be utilized in an attempt to settle disputes including a 60-day cooling-off period, agreed on a contract on the morning a teachers' strike was scheduled to begin, February 17, 1972. The contract, covering the period from February 29, 1972, through August 31, 1974, provides for the reopening of negotiations on salaries, fringe benefits, preparation periods and work load levels under Article XXIII A 1, which states:

"Between August 1st and August 15th in 1972, either party may give written notice of its desire to amend or modify this Agreement with respect to salaries, fringe benefits, preparation periods and work load levels, to be effective for the school year 1973-74.

"Upon such written notice, negotiations shall commence on said topics no later than September 15, 1972."

On August 11th the HSTA gave notice to the DOE of its desire to reopen negotiations with respect to salaries, fringe benefits, preparation periods and work loads for the 1973-74

school year. The Reopening Proposal of the HSTA, dated September 13, 1972, includes, in part, proposals on work load and the scheduling of preparation periods within the students' instructional day.

Article VI CC, entitled WORK LOAD, proposes that beginning with the 1973-74 school year the daily work loads of various bargaining unit personnel shall not exceed responsibility for the following number of students:

Elementary

self-contained classes

Grade K (20 students)
Grades 1-2 (23 students)
Grades 3-6 (25 students)
"3 on 2" (50 students)

departmentalized programs (not more than the number of students in a self-contained classroom times the number of teaching periods)

specialists (125 students)

Secondary

all classes (125 students)

exceptions

physical education (175 students)
industrial arts, if machinery is used (100 students)
typing (150 students)
instrumental music (200 students)
chorus (150 students)

Special Education

emotionally disturbed or trainable retarded students in self-contained classrooms (5 students)

all other special education classes in self-contained classrooms (10 students)

no special education teachers shall have responsibility for more students than the self-contained figure times the number of periods taught

Special Services

counselor

Grades K-6 (300 students)
Grades 7-12 (250 students)

out reach counselor (50 students)
registrar (1,500 students)
librarian (500 students)
district special services (to be proposed later)

Team Teaching

team teaching situation, not 3 on 2 (no more students than the 3 on 2 ratio)

Article VI X, entitled PREPARATION PERIODS, proposes, in part, that:

"Beginning with the 1973-74 school year each teacher shall be provided with at least one daily duty-free preparation period within the students' instructional day. . . ."

Negotiations on the Reopening Proposal commenced on September 13, 1972. At the outset, the DOE claimed that the work load proposal and that portion of the proposal on preparation periods, which requires that preparation periods be scheduled within the students' instructional day, are non-negotiable because they interfere with the rights and responsibilities vested in the Board of Education by the State Constitution at Article IX, Section 3, and by Section 89-9(d) of the Hawaii Revised Statutes. Consequently, the DOE petitioned this Board for a declaratory ruling on the negotiability of said issues.

The HSTA, on the other hand, during the hearing submitted that the proposal on work load did not interfere with management rights under Section 89-9(d) and was, therefore, negotiable. The HSTA pointed out that work load is directly related to class size and that this Board had already ruled that average class size ratio is negotiable in an earlier case.

(In the Matter of Hawaii State Teachers Association, Petitioner,
and Department of Education, Respondent, HPERB Case No. CE-05-4,
Dec. No. 22, October 24, 1972) With respect to the proposal
requiring that preparation periods be scheduled within the stu-
dents' instructional day, the HSTA's position was that such a
proposal is negotiable since the DOE has scheduled preparation
periods within the students' instructional day in the past and
preparation periods definitely affect working hours and the
ability of the teacher to perform teaching tasks.

In determining the negotiability of these proposals,
we are guided by Chapter 89, Hawaii Revised Statutes. Therein,
public employers are required to negotiate with and enter into
written agreements with exclusive representatives on matters of
"wages, hours and other terms and conditions of employment".
Such duty to bargain is not unrestricted, however. Section
89-9(d) sets forth, in pertinent part, the following:

" . . . The employer and the exclusive representative
shall not agree to any proposal . . . which would
interfere with the rights of a public employer to
(1) direct employees; (2) determine qualifications,
standards for work, the nature and contents of exam-
inations, hire, promote, transfer, assign, and re-
tain 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 legit-
imate reason; (4) maintain efficiency of government
operations; (5) determine methods, means and per-
sonnel 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."

Therefore, the question with which we are faced herein
is whether the evidence in the record supports the DOE's claim
that the work load proposal and that portion of the proposal
requiring that preparation periods be scheduled within the stu-
dents' instructional day so interfere with its rights as a pub-
lic employer as enumerated in Section 89-9(d) above as to render
the proposals non-negotiable.

Prior to going into the merits of the dispute on the negotiability of work load and the scheduling of preparation periods, we must have an understanding of the multiplicity of factors, including the responsibilities, duties and rights of the Board of Education and the Department of Education involved in operating the statewide public educational system, in order to establish a proper perspective of the issues.

Article IX, Section 3, of the State Constitution provides that:

"The board of education shall have power, in accordance with law, to formulate policy and to exercise control over the public school system through its executive officer, the superintendent of education, who shall be appointed by the board and shall serve as secretary to the board."

The Board of Education, the Superintendent of Education, and the DOE, which he administers, are responsible for the education of Hawaii's children in the public schools. In view of Section 298-9, Hawaii Revised Statutes, the compulsory school age law, this responsibility entails providing educational service to "all children who have arrived at the age of at least six years, and who will have arrived at the age of eighteen years, on or before December 31 of any school year" unless otherwise excluded from school, excepted from attendance or in attendance at a private school.

The record discloses that the DOE regards its mission as:

" . . . providing the best possible school system for the children and youth of Hawaii. And in the execution of this mission, a school Board has determined that it is committed to design a program that is sensitive to the individual differences of the students. . . ."

"The Board is committed to exercise the powers granted to it by the Constitution, in such a way, that quality education is provided the State of Hawaii in the most physically [sic] responsible manner, and that we try to organize our operations

so that proper use might be made of the material personnel, technological resources that might be available to the school department."
(Transcript pp. 7-8)

The complexity involved in the attainment of these ends is seen in the area of curriculum development. The Board of Education, through its executive officer, the Superintendent of Education, is responsible for the design of a curriculum package. For assistance in this area, the Superintendent has on hand a corps of specialists, among them the Assistant Superintendent for the Office of Instructional Services. He administers a staff of subject matter specialists and generalists, who develop educational policies, regulations, and guidelines, examine new techniques in instruction and review curriculum materials.

In the design of the curriculum package, the Assistant Superintendent for the Office of Instructional Services stated during the hearing that his office must take into consideration many components which comprise the educational system and implement or burden the education process -- the kind and number of human resources required, which may vary from subject to subject, school to school, class to class; the student population, including not only its size school by school, but also whether students have particular problems in an instructional area and the sociological and economic backgrounds of the students; the availability of facilities, the possible use of educational technology, the use of para-professionals, utilization of various deployments of personnel (such as team teaching which comes in various forms), and the availability of specialists to provide counseling and guidance services.

These various components are not fixed, but vary throughout the system. Therefore, there is no such thing as

a single approach to education. Various specialists at the DOE are testing and developing innovative strategies and keeping abreast of developments in the area of educational technology. Education is a dynamic field where on-going experimentation has become a necessity. This is particularly evident in the field of special education (such as work with retarded or disturbed children) where developments in medical science, as well as in education, may generate better methods of delivering educational service.

In the instant case, the work load proposal sets limitations on the maximum number of students for which a teacher, team of teachers, or specialist has responsibility.

In asserting that the work load proposal is non-negotiable, the DOE contends that it would be subjected to the following alternatives if it were required to implement the work load proposal. Such alternatives, the DOE claims, clearly infringe upon its rights to: direct, hire, transfer and assign employees, Section 89-9(d)(2); maintain efficiency of its operations, Section 89-9(d)(4); and determine methods, means and personnel by which its operations are conducted, Section 89-9(d)(5).

One necessary alternative would be to hire additional teachers as required for the implementation of the work load proposal. The DOE anticipates that this could result in very small work loads, which would constitute an inefficient use of valuable resources. Small work loads could occur if the DOE is forced to hire additional teachers for only a handful of "extra" students after the work load maximums are imposed. For example, the DOE may be forced to hire an additional kindergarten teacher if there are three remaining students after the limitation of twenty students per teacher is applied to the Grade K level. It would be likely for the DOE to decrease the number of students

in each of the other K classrooms in order that the new teacher would have responsibility for more than three students.

Very small work loads can also occur because of difficulty in recruiting teachers who are able to teach a particular combination of subjects. For example, there may be a particular school which may need an additional period of English, history, Japanese and algebra when the work load maximum of 125 students is applied to the secondary level. The DOE anticipates that it would be extremely difficult, if not impossible, to recruit one teacher who is able to teach that particular combination of subjects. The DOE would, therefore, be forced to hire more than one teacher. The work load of teachers in these subject areas would decrease accordingly with the addition of each new hire necessary to implement the work load proposal and result in inefficient use of personnel.

Small work loads could also result in a course such as algebra, which usually has a high drop-out rate. Initially in implementing the work load proposal, there may be 140 students who are enrolled in algebra. The maximum of 125 students for the secondary level would force the DOE to have at least two teachers for algebra. However, as students drop algebra from their school schedule, there may be as few as 110 students taking algebra at the middle of the semester.

Small work loads are particularly likely in areas where there is a high number of transients and military personnel. Since there is a fixed maximum on the number of students for which a teacher has responsibility, if students move away after the semester begins, the work load becomes smaller; if school-age transients enter school at mid-semester, the DOE may be forced to hire an additional teacher for the remainder of the semester; if school-age transients are in school for

only a short duration during the middle of a semester, the need to have an additional teacher based on the work load proposal may exist for only a few weeks.

If additional teachers are hired, but a concomittant expansion in facilities and equipment is not possible, the DOE submits that under such circumstances it would be forced to place two teachers in a single classroom or increase team teaching, since maximum utilization is already being made of existing facilities. Having two teachers in the same classroom would increase the noise factor, result in crowding and diminish teacher effectiveness and, perhaps, staff harmony. An increase in team teaching, on the other hand, would necessitate an intensive in-service training program because different training and skills are required for team teaching. If such in-service training program is not possible, the DOE contends that it may be forced to require teachers to do team teaching regardless of their ability to do so, and in an existing classroom that is not designed for team teaching.

Another alternative to implement the work load proposal would be to bus students to the nearest available school that could handle the "extra" students when the work load limitations had been exceeded at their regular school. Still another alternative would be to have traveling teachers, who would go from school to school, particularly in instances where subject matter specialists are difficult to recruit.

Further, the DOE submits that it may be forced, under the proposal, to resort to decreasing the number and variety of course offerings or simply turn away "extra" students who want to take a particular course, regardless of the needs and desires of the students.

It is apparent from the above, that the DOE may encounter considerable difficulty, under the work load proposal, in terms of economic costs, i.e., the hiring of additional teachers and the need to increase facilities and equipment. However, the HSTA contends, and we agree, that difficulty per se does not determine negotiability.

The portion of the reopening proposal on preparation periods at issue specifies that preparation periods be scheduled within the students' instructional day. The students' instructional day is the time during which students are required to remain in school. The work day of teachers is the time during which teachers are required to be on duty. The time differences between the students' instructional day and the teachers' work day vary among the schools. Teachers may be required to report to work fifteen to thirty minutes prior to the start of the students' instructional day and may be required to remain in school thirty to forty-five minutes after the students are dismissed from school.

The DOE submits that the provision calling for the scheduling of preparation periods within the students' instructional day is non-negotiable since it interferes with its right to direct, hire, transfer and assign employees. The DOE contends that it should be free to assign preparation periods during any portion of work day during which teachers are required to be present in the schools and for which they are being paid.

Furthermore, the DOE submits that such a proposal would result in inefficient use of personnel and facilities and would, thereby, interfere with its right to maintain efficiency of its operations and to determine the methods, means and personnel by which it conducts its operations. In support of its contention, the DOE presented evidence to show that it would not be feasible

to schedule all preparation periods within the students' instructional day. Facilities at the present time are designed for maximum utilization. If all teachers are given preparation periods during the students' instructional day, this would result in inefficient use of existing facilities and equipment or necessitate the building of additional facilities where teachers may spend their preparation periods. Additionally, evidence was presented to show that the DOE would be forced to hire additional teachers to free each teacher for one instructional period each day, which would result in inefficient use of existing manpower and recruitment problems. For example, it was stated if a teacher must be hired to free an instructor of the Japanese language from one of his periods, that new hire must also be able to teach other subjects in order to provide other teachers with preparation periods. Otherwise, the new hire would not be efficiently utilized in his teaching capacity. The remaining alternative would be for the DOE to eliminate one Japanese language period regardless of the needs or desires of the students.

The HSTA's position is that the scheduling of preparation periods is a condition of employment inasmuch as it affects working hours and the ability of a teacher to perform teaching tasks. Moreover, the HSTA contends that scheduling of preparation periods is negotiable since the DOE has scheduled preparation periods during the students' instructional day in the past and has recognized in the contract that past practices are to be maintained.

The record discloses that the purpose of having preparation periods is to allow teachers time for the pursuit of personally initiated school tasks such as preparation for instruction, student evaluation, and reflection. Although teachers

are not assigned instructional tasks, we find that a preparation period is still a period of work for which teachers are being compensated.

The record also shows that the DOE has scheduled some preparation periods during the students' instructional day in the past. However, this cannot be regarded as a past practice since the DOE has been scheduling preparation periods throughout any portion of the teachers' work day (both "within" and "outside" of the students' instructional day) as it deems feasible.

The HSTA argues that if preparation periods are not scheduled within the students' instructional day, teachers would not have the full benefit of having a preparation period due to interruptions by students and the performance of non-professional chores which are usually done prior to, or after, the students' instructional day. While it is undisputed that it may be more advantageous to the teacher if the time at which preparation periods are scheduled is during the students' instructional day, we note that the purpose of the preparation period is to free teachers from instructional tasks in order to allow them time for other personally initiated school tasks.

CONCLUSIONS OF LAW

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.

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.

While we held that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concomittantly expressed the view 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 operation of the public school system. Therefore, we further found that other issues raised in that case, which dictated the number of teachers the employer was to hire in order to implement the reduction and which dictated the assignment of teachers to specific roles, were in violation of Section 89-9(d).

Unlike our earlier determination on class size, which concerned a reduction in the average class size ratio throughout the statewide educational system, the instant work load issue is distinguishable. The work load proposal, in effect,

would rigidly fix the maximum number of students for which a teacher, team of teachers, or specialist has daily responsibility.

Here, again, we are faced with a hybrid proposal, which involves both educational policy making and has a significant impact on working conditions. Therefore, while the work load proposal is admittedly a significant term and condition of employment, we must determine, nevertheless, whether the proposal so interferes with management's right to establish educational policy and operate the school system efficiently as to render it non-negotiable under Section 89-9(d).

The DOE has the right and duty as an employer to maintain efficiency of its operations pursuant to Section 89-9(d)(5).

The Random House Dictionary of the English Language (College Edition) defines "efficiency" as:

" . . . accomplishment or ability to accomplish a job with a minimum expenditure of time and effort. . . ."

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 educational service, the DOE must be responsive to the needs of the students, to the extent possible, given 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.

Moreover, the Legislature declared when it enacted Chapter 89, Hawaii Revised Statutes, that its policy was to "promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." We are convinced that the proposal on work load would not protect the public by assuring effective and orderly operations of government as the Legislature intended.

While we find that preparation periods constitute a condition of employment, the specific issue herein concerns the scheduling of preparation periods. It is our opinion that the scheduling of preparation periods is, in effect, the scheduling of work, which has been, and should remain, the right of the DOE as an employer. Inasmuch as preparation periods are periods of work like any other for which teachers are being compensated, the DOE should continue to have the freedom to schedule preparation periods in the same manner as any other period of work, at any time during the teachers' work day (whether within or outside of the students' instructional day) as it deems feasible.

We are aware that it would be more advantageous to teachers if preparation periods are scheduled within the students' instructional day because of the likelihood of interruptions by students and the performance of non-professional, routine chores done prior to, or after, the students' instructional day. However, this should not affect the right of the DOE, as an employer, to schedule and assign the work of its employees. Nearly every employee in any enterprise must also perform routine, non-professional chores daily, at the beginning and end of the work day. Many employees similarly have less time to spend on their work due to questions arising from the people to whom they provide services. These are happenings during the normal course of a work day which all employees experience and do not, in any way, affect the employer's right to assign and schedule employees' work as it deems feasible.

Therefore, we find that the portion of the reopening proposal on preparation periods, which calls for the scheduling of such periods within the students' instructional day, would interfere with the employer's rights to assign employees and to determine the methods, means, and personnel by which it operates the public school system in a manner necessary to maintain efficient operations. Hence, that particular portion of the proposal on preparation periods may not be agreed to by the parties.

RULING

The Board, after due consideration of the foregoing and the record as a whole, hereby declares that;

- (1) The specific reopening proposal on work load, which sets limitations on the maximum number

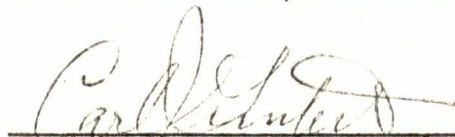
of students for which a teacher, team of teachers, or specialist has responsibility, is non-negotiable.

- (2) The portion of the reopening proposal on preparation periods, which calls for the scheduling of preparation periods during the students' instructional day, is non-negotiable.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD



Mack H. Hamada, Chairman



Carl J. Guntert, Board Member



John E. Milligan, Board Member

Dated: January 12, 1973

Honolulu, Hawaii