

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

BENJAMIN J. CAYETANO, Governor, State
of Hawaii and BOARD OF EDUCATION,

Public Employers-
Petitioners,

and

HAWAII STATE TEACHERS ASSOCIATION,

Exclusive Representative-
Respondent.

CASE NO. S-05-77

ORDER NO. 2004

ORDER DENYING PETITIONERS'
MOTION FOR RECONSIDERATION

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On April 3, 2001, Public Employers-Petitioners BENJAMIN J. CAYETANO, Governor, State of Hawaii and the BOARD OF EDUCATION (collectively BOE or Employer) filed a Motion for Reconsideration of our Order No. 2003, Order Denying Approval of BOE's Implementation Plan and Suspending Designation of Essential Workers; and Order Denying Reconsideration of Denial of Special Conditions, dated April 2, 2001. In its motion for reconsideration, the BOE reiterates its previously proffered answers and arguments.

On April 6, 2001, the Exclusive Representative-Respondent HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed a memorandum in opposition to the motion for reconsideration with the Board. The HSTA contends that the BOE fails in its motion to present new evidence or arguments that could not have been presented in the earlier adjudicated motion and therefore should be denied. First Ins. Co. of Hawai'i, Ltd. v. Lawrence, 77 Hawai'i 2, 881 P.2d 489 (1994). The HSTA argues that reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding. Sousaris v. Miller, 92 Hawai'i 505, 993 P.2d 539 (2000). In addition, the HSTA contends that the Board's suspension of the 322 essential workers was proper given the BOE's failure to submit an implementation plan for the utilization of the workers with sufficient detail to assure that the health and safety of the ESY students would be adequately addressed. Thus, the HSTA requests that the BOE's motion to reconsider be denied in its entirety.

Based upon the authorities cited by the HSTA, the reiteration of the BOE's previous arguments and responses is sufficient grounds to deny reconsideration. But because of the import of this issue we will in this order address the insufficiency of the BOE's Plan so that corrective action might be taken should the BOE elect to submit another Plan pursuant to the Board's Decision No. 421, submit a new petition on this matter, or seek amendments to the Board's Decision No. 421¹

In the presentation of its case in chief in this matter the BOE presented no plan as to how designated special education teachers would be implemented. It simply promised to develop a plan after teachers were designated. No proof had been offered on numerical sufficiency or actual utilization of the requested teachers. The Board was just asked to "trust" the BOE in this matter. The Board, in fact, trusted the Employer to come up with a meaningful plan. The BOE's Plan presented was so vague as to be meaningless and the numbers of ESY students and available special education EAs included in the Plan inexplicably failed to correspond with the testimony and BOE's representations and therefore were unsupported by the record. Accordingly, we disapproved the Plan.

Decision No. 421 identified specific elements which were to be included in the BOE's Plan. The BOE's one page letter and attached chart ("Plan") purports to address each of these elements. An examination of the "Plan's" responses demonstrates its inadequacy:

1. Decision No. 421: An estimate of the number of ESY students that are anticipated to attend school in the event of a BU 05 strike including the means by which such estimate was calculated.

"Plan": **Because services for these ESY students are guaranteed, we expect these ESY students to attend school.**

The Board asked how many disabled students were likely to attend school during a strike because this information would obviously be necessary to assess the probability and degree of danger to the students as well as the adequacy of the proposed plan to protect them. The "Plan" simply provides an "if we build it, they will come" approach to likely attendance. At hearing, no additional justification could be provided and the BOE could not even identify whether compulsory attendance laws would remain in effect. The "Plan" therefore provides no basis from which to assess the probability and degree of danger to these students and evidences no effort, other than the most perfunctory, of an attempt to address the issue.

¹Hawaii Administrative Rules (HAR) § 12-42-88(b) provides, in part:

The board shall retain jurisdiction to amend the order made, upon good cause shown, at any time during a strike.

2. Decision No. 421: The way in which teachers would be allocated to schools and the functions that would be performed by the teachers....

“Plan”: All 322 Essential workers will be limited to providing services to ESY students only. The ESY students will be in actual attendance at school or at an alternative worksite. ... The teachers will be providing custodial and instructional services because both type of services are necessarily integrated and address the student’s health and safety concerns.

As you will note, even with 322 Essential Workers, the DOE must still consolidate several schools. Hopefully, transportation of the teachers and students will not be a problem.

If 322 teachers are to be deprived of their right to strike, the Board concluded that there should be some reasonable indication they will be allocated and utilized in a fashion that bears some relationship to the dangers potentially posed to the ESY children. Unless there are somehow hidden messages embedded in the DOE’s “Plan,” the “Plan” tells us nothing.

3. Decision No. 421: [A]nticipated student/teacher ratios, EA/teacher ratios, and organization and classroom activities.

“Plan”: The plan provides a matrix identifying, by district, schools, ESY students, teachers to be designated essential, position numbers, and EAs assigned to the schools. For each school, and in the aggregate, the requested ratios can be mathematically determined. Because the BOE did not provide the requested ratios, the Board has conducted the calculations.

At the initial hearing on the matter, the Board received un rebutted testimony that the 20 students to one teacher ratio ostensibly used to develop the submission would in application likely exacerbate or create a danger to the handicapped children. Additionally, it was argued that meaningful instruction was impossible at such ratios. The BOE represented that any such danger would be avoided by the assignment of as many as eight educational assistants (EAs) to each class to facilitate instruction and avoid danger. Accordingly, the Board required that the BOE’s plan identify anticipated ratios and activities.

The BOE's matrix does yield the requested ratios. However, they inexplicably vary significantly from district to district and school to school. At Kalihi Kai school, it is represented that Gayle Oguro will, by herself, care for 22 severely handicapped children without the assistance of any EAs. At Farrington High School, two teachers will apparently be assigned the care of 34 students without the help of an EA. In fact student teacher ratios at or in excess of 20:1 can be found throughout the state. (E.g., Pearl City High School 28:1; Wailuku El. 21:1; Kapaa Middle 20:1; Maunawili 33:1; Moanalua El. 22:1.) The Windward District, in fact, averages a 19:1 student teacher ratio. At the other end of the scale, ratios as low as 2:1 (Hookena) and 4:1 (e.g., Pohukaina, Momilani, Waihee El., Kilauea, Waimea Canyon) have been identified. No rationale for these disparities is provided. Nor are we provided with any means by which to predict the effects of these ratios upon the safety of the ESY children.

The ratios are substantially lower when the EAs assigned to each school are included in the mix to establish a student to adult ratio. However, even after such inclusion, 30 schools still have student to adult ratios of 10:1 or more. In fact, the Windward District's average such ratio is 11:1 and Honolulu District's is 7.5:1. Again, there is an unexplained disparity between schools and districts. Sixty schools yield student to adult ratios of 3:1 or less, Hawaii Districts in fact has an average ratio of 3:1. These lower ratios provide some comfort that the safety of the children will be protected. But they also raise the question of whether teachers are in fact necessary in these classrooms. Again, no rationale for these disparities is provided. Nor is there provided any basis upon which to evaluate the necessity of designated teachers or the adequacy of the proposed allocations.

At the hearing on its "Plan," the BOE requested the designation of 15 additional teachers for Maui District (student teacher ratio average 13:1, student/adult 3.9:1) because of geographic anomalies, and to be permitted flexibility in moving designated teachers between schools and districts. While the Board acknowledges the probable need to address exigent circumstances as they arise, the BOE provided no standards by which their discretion would be exercised. They thus asked the Board to increase the designations and to permit them to ignore their "Plan" and effectively make it meaningless. Again, we are asked to simply trust the BOE, and again no foundation from which to accord such trust is provided.

As we had hoped to make clear in Decision No. 421, the Board is prepared to designate special education teachers as essential if, and when, it is demonstrated that their presence and performance, as directed by the BOE, will in fact protect the health and safety of ESY children in attendance during a strike. For the reasons stated above, the "Plan" provided by the BOE provides no such demonstration. Accordingly, the designations must remain suspended.

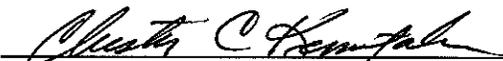
Finally, the strike is upon us. The Board remains willing, at a moment's notice, to amend Decision No. 421, if necessary. It will do so if both danger and the necessity of

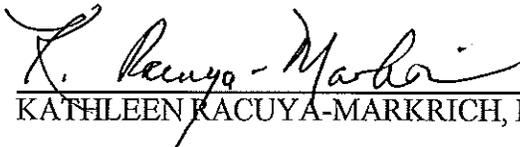
special education teachers are proven as required by law. This can be accomplished through submissions of affidavits by principals from each school or district superintendents that include an assessment based on specific information including the number of ESY students attending a particular school and their particular abilities, the number of EAs assigned to the special education class, the number and identity of the special education teacher needed to fill the essential position, a description of the organization and classroom activities.

DATED: Honolulu, Hawaii, April 9, 2001

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN KACUYA-MARKRICH, Member

Copies sent to:

Francis Paul Keeno, Deputy Attorney General
Vernon Yu, Esq.
Joyce Najita, IRC