

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. S-03-33
	)	
JOHN WAIHEE, III, Governor,	)	ORDER NO. 1050
State of Hawaii,	)	
	)	ORDER GRANTING AMENDMENT TO
Petitioner,	)	PETITION RELATING TO STRIKE
	)	OCCURRING OR ABOUT TO OCCUR
and	)	ENDANGERING PUBLIC HEALTH
	)	AND SAFETY AND GRANTING
HAWAII GOVERNMENT EMPLOYEES	)	SECOND MOTION FOR INTERLOCU-
ASSOCIATION, AFSCME, LOCAL 152,	)	TORY RELIEF PENDING ISSUANCE
AFL-CIO,	)	OF FINAL BOARD DECISION
	)	
Exclusive	)	
Representative.	)	
	)	

ORDER GRANTING AMENDMENT TO PETITION RELATING  
TO STRIKE OCCURRING OR ABOUT TO OCCUR ENDANGERING  
PUBLIC HEALTH AND SAFETY AND GRANTING SECOND MOTION FOR  
INTERLOCUTORY RELIEF PENDING ISSUANCE OF FINAL BOARD DECISION

On April 20, 1994, Petitioner JOHN WAIHEE, III (Employer), by and through his attorneys, filed an Amended Petition Relating to Strike Occurring or Strike About to Occur Endangering Public Health or Safety with the Hawaii Labor Relations Board (Board). The Amended Petition seeks to have the Board designate Educational Assistants, Work Site Training Assistants, and Teaching Assistants as essential positions which must be staffed during a work stoppage by employees in Units 03, 04 and 13.

Also on April 20, 1994, Employer, by and through his attorneys, filed a Second Motion for Interlocutory Relief Pending Issuance of Final Board Decision with the Board. Employer moved the Board for an order designating positions which are identified in his motion, as essential pro tempore, until such time as the Board has the opportunity to complete its investigation and has

issued its final decision on this matter. The affidavits attached to the motion indicate that the list attached as exhibits to the motion are additional positions needed to provide services to students with social, emotional and behavioral disabilities who require direct supervision and assistance. Employer requests Educational Assistants, Work Site Training Assistants, and Teaching Assistants be designated as essential to be staffed pending a final order in the case to avoid imminent danger to the health or safety of the disabled children. Employer also requested this Board to amend its prior decision in Order No. 1036 because two positions previously petitioned for as School Security Attendants are in fact, Educational Assistants.

On April 22, 1994, the Board heard evidence and argument on the Employer's Second Motion for Interlocutory Relief. Employer also orally moved for leave to amend its petition. The Board majority hereby grants Employer's motion to amend the petition to include Educational Assistants, Work Site Assistants, and Teaching Assistants in his request for essential positions.

With respect to the Employer's Second Motion for Interlocutory Relief, the Board takes notice of its Decision No. 352, JOHN WAIHEE, III, in Case Nos.: S-03-29a, et seq., dated April 22, 1994, where the Board found that a strike by Bargaining Units 03, 04 and 13 is in progress and that withdrawal of services by employees in certain positions would cause imminent danger to the health or safety of the public. As of this date, the Board has not yet completed its investigation on the instant petition. Given these facts and upon review of the motion and affidavits in support

of the motion, the Board hereby grants Petitioner's second motion for interlocutory relief as set forth herein.

The Board's investigatory power under Section 89-12, Hawaii Revised Statutes (HRS), is broad and encompasses the authority to set requirements in the event of a strike occurring or about to occur which may jeopardize the health or safety of the public. The Board is of the opinion that this authority includes the power to issue interlocutory relief pending the completion of its investigation.

The Board relies on the analysis for interlocutory relief stated by the Hawaii Intermediate Court of Appeals in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272 (1981). The three requirements for the granting of interlocutory injunctive relief are: 1) Is the party seeking the relief likely to prevail on the merits? 2) Does the balance of irreparable damage favor issuance of injunctive relief? 3) Does the public interest support the granting of injunctive relief? The Court also noted that:

The more the balance of irreparable damage favors the issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits. [Citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable harm favors the issuance of the injunction.

Id. at 276.

With respect to whether the Petitioner is likely to succeed on the merits, the Board's experience is that a vast majority of positions requested by the public employers in their

petitions is granted, albeit modified slightly in terms of number and hours of work required.

Furthermore, the balance of irreparable damage heavily favors the issuance of the interlocutory order. Section 89-12, HRS, provides that public employees have a qualified right to strike and that the public's right to health and safety services is paramount. The possibility that the public's health or safety would be imminently jeopardized if these positions were not staffed clearly outweighs any perceived impact to the employee who is denied his or her qualified right to strike.

Finally, the public interest overwhelmingly supports the granting of injunctive relief in this case. The Board has a statutory obligation to protect the health and safety of the public from imminent danger caused by a public worker strike. The public has a right to have essential services provided. This order is of a temporary nature and will protect the public while the Board continues to hear relevant evidence on the instant petition.

On balance, even if the Board's final orders in this matter indicate that more positions are granted in Petitioner's motion than are established by the record, the Board chooses to err in favor of the protection of the public by the granting of Employer's motion.

Counsel for the Exclusive Representative HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) argues that the positions at issue here are not essential because there is no threat of imminent danger to the health or safety of the disabled students because other nonstriking staff are available

to provide for their immediate medical needs. The Board, however, finds that the health or safety of moderately to severely disabled children would be in imminent danger if the Educational Assistants positions requested were not staffed during a strike and its order is restricted to providing services to these students.

Further, Counsel for HGEA argues that the Teaching Assistants and Work Site Assistants provide teaching and tutoring services as opposed to basic necessary care. As the Employer failed to provide any countervailing arguments regarding the Teaching and Work Site Assistants, the Board is persuaded those positions should not be included in this order.

The Board hereby orders that only those Educational Assistant positions set forth in the exhibits attached to Petitioner's motion, which provide services to moderately and severely handicapped students, shall be deemed essential for purposes of this motion and are required to be staffed in order to avoid an imminent danger to the health or safety of the public.

In addition, the Board denies Employer's request to amend its previous Order No. 1036.

The Board further orders that the General Orders issued in Decision No. 352, JOHN WAIHEE, III, dated April 22, 1994, in Case Nos.: CE-03-29a, et seq., are hereby incorporated by reference herein and are made applicable.

DATED: Honolulu, Hawaii, April 22, 1994.

HAWAII LABOR RELATIONS BOARD

  
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BERT M. TOMASU, Chairperson

JOHN WAIHEE, III, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,  
AFSCME, LOCAL 152, AFL-CIO; CASE NO. S-03-33

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RUSSELL T. HIGA, Board Member

Dissenting Opinion

I respectfully dissent. Although I agree with the majority of the Board that we have the authority to issue interlocutory orders of this nature, I would deny this second motion for interlocutory relief because Employer should have requested the relief granted in this order in its first motion which was granted by this Board in Order No. 1036 in Case No. S-03-33, issued on April 16, 1994.

  
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SANDRA H. EBESU, Board Member

Copies sent to:

Janice Kemp, Deputy Attorney General  
Charles K.Y. Khim, Esq.  
Joyce Najita, IRC