

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-05-287
)	
HAWAII STATE TEACHERS ASSOCIATION,)	ORDER NO. 1279
)	
Complainant,)	ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY ORDER; NOTICE OF PREHEARING CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT
)	
and)	
)	
HERMAN AIZAWA, Superintendent, Department of Education, State of Hawaii; BOARD OF EDUCATION, State of Hawaii and DEPARTMENT OF EDUCATION, State of Hawaii,)	
)	
Respondents.)	
)	

ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY ORDER; NOTICE OF PREHEARING CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

On December 12, 1995, the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board. The HSTA alleged that Respondents HERMAN AIZAWA, Ph.D., Superintendent of Education, BOARD OF EDUCATION, State of Hawaii (BOE) and the DEPARTMENT OF EDUCATION, State of Hawaii (DOE) (collectively Employer or State) violated § 89-13(a)(8), Hawaii Revised Statutes (HRS), by announcing that they will not grant sabbatical leaves for bargaining unit members for the 1996 school year. The HSTA contends that Article VI (sic), Section H of the applicable collective bargaining agreement provides that the Employer shall grant sabbatical leaves for no less than fifty (50) bargaining unit members. The HSTA contends that the past practice of the DOE has

been to issue leave information and application procedures and forms each year in October for the following school year. The HSTA contends that the DOE has unilaterally withheld issuance of sabbatical leave information, application procedures and forms in violation of the Unit 05 contract.

Also on December 12, 1995, Complainant filed a motion for interlocutory order with the Board. Complainant seeks an order from the Board compelling the Respondents to distribute sabbatical leave information, application procedures and forms forthwith, and grant sabbatical leave to fifty (50) bargaining unit members as quickly as practicable thereafter.

The Board conducted a hearing on Complainant's motion on January 8, 1996. The parties were represented by counsel and had full opportunity to present evidence and argument to the Board. Based upon the record before the Board, the Board makes the following findings and order.

Complainant HSTA is the exclusive representative certified to represent employees included in bargaining unit 05 as set forth in § 89-6, HRS.

Respondent DOE is the State executive department which operates the public school system in the State of Hawaii.

Respondent BOE is the public employer, as defined in § 89-2, HRS, of the employees of the DOE, including employees in bargaining unit 05.

Respondent AIZAWA is the Superintendent of Education, appointed by the BOE and is the executive officer of the DOE.

AIZAWA represents the public employer and as such is a public employer within the meaning of § 89-2, HRS.

The HSTA and the BOE are parties to a collective bargaining agreement (contract) which expired on June 30, 1995 and has been extended until January 31, 1996.

Article XIII, Section H of the contract provides as follows:

The Employer shall grant sabbatical leaves as provided for in the 5400 series for no less than fifty (50) bargaining unit members. A sabbatical leave shall be granted at full pay for one semester or half pay for a full year.

While the provision does not specifically provide for the frequency at which the Employer grants sabbatical leaves, the past practice of the DOE has been to grant fifty sabbatical leaves per year. Additionally, the practice of the DOE has been to issue sabbatical leave information, application procedures and forms each year in October for the following school year.

Procedure 5406 which implements Regulation 5406 provides that the deadline for a teacher to submit an application for sabbatical leave is November 10. The procedure further provides that the school principal completes the application and forwards a copy to the district superintendent by November 15. The district superintendent then submits a list of recommended applicants to the Office of Personnel Services by November 25. The Superintendent then approves or disapproves the application, and the applicant is notified by December 18.

At a meeting on November 7, 1995, representatives of the DOE notified the HSTA that they would not grant sabbatical leaves

in the forthcoming year. The DOE representatives stated that there would be a moratorium on sabbaticals during negotiations and the sabbatical information would not be distributed. The HSTA indicated that it would grieve the matter.

Irene Igawa, HSTA negotiations specialist and field representative, testified that sabbatical leaves are granted to teachers with seven (7) years of experience for professional development and to provide a respite. Igawa testified that the application process begins in October of the previous year to permit the teachers to arrange courses of study and research with universities and their faculty well in advance of actual enrollment. Igawa's affidavit submitted in support of the HSTA's motion for interlocutory order states that many applicants for sabbatical leaves are scholarship and grant recipients who may permanently lose such benefits if denied sabbatical leave. In addition, Igawa stated that some courses or educational programs are not consistently offered by an accredited university or the course work involves professors who are not available from year to year. Thus, if the applicants are denied sabbatical leaves in this instance, the applicants may miss the opportunity to complete the desired course work.

The Union contends that the DOE violated the instant contract provision by imposing a moratorium on the granting of sabbatical leaves. The Union contends that if its motion is not granted, there will be irreparable harm in the loss of educational programs, certification in certain specialties and a loss of jobs if the employees are not given the opportunity to take sabbatical

leaves in the forthcoming year. The Union also argues that the public school students will be damaged by the loss of the teachers' training. The HSTA also argues that there is a permanent loss of earnings and potentially a loss of opportunity for a particular curriculum at the university. Further, the Union does not oppose instructions to be issued with the application forms which indicate that the DOE has proposed a moratorium on the granting of sabbatical leaves in the forthcoming year.

According to the Employer, nothing in the School Code requires the DOE to announce or distribute forms for sabbatical leaves. Albert Yoshii, Personnel Director of the Office of Personnel Services, DOE, testified that the DOE by practice issues a standard memorandum with the criteria for selection, deadlines for the submission of the forms, and the conditions for requesting and approving the leaves in or about September or October for the following year. Yoshii confirmed that the Employer's practice was to grant fifty leaves each year and that the application forms are in the individual schools and are available to the teachers. Yoshii testified that the negotiations over the new Unit 05 contract broke off in May 1995. Because of fiscal constraints, the DOE has considered various cost saving measures and considered suspending sabbatical leaves for Units 5 and 6. The costs for the sabbatical leaves total approximately \$1 million. The DOE thus decided that granting sabbatical leaves was not a good practice to continue when faced with the layoff of workers and withheld the sabbatical information.

Yoshii testified that Donald Nugent, Assistant Superintendent of Personnel Services, DOE, contacted Joan Husted from the HSTA to inform her that the sabbatical leaves would be suspended. Yoshii testified that the parties were scheduled to meet to negotiate the day after the hearing on this motion and that the DOE intended to propose that the sabbatical leaves be suspended for school year 1996-97.

According to Yoshii, the administration decided that if no sabbatical leaves are approved for the next school year, it would be preferable not to make the applications available, approve of them, and then rescind the approvals. The DOE decided not to send the instructions out because it would cause unnecessary hardship and confusion on the part of the applicants. Yoshii also testified that alternatively, teachers may apply for an unpaid professional improvement leave where the employee can receive credits for retirement.

Thus, the Employer contends that it has already granted fifty sabbatical leaves for the 1995-1996 school year and it does not intend to revoke the current sabbatical leaves. Further, the DOE contends that the contract does not specifically require the Employer to distribute sabbatical information, application procedures and forms. In addition, the State argues that the Union has failed to establish that any violation was wilful. Moreover, the Employer argues that the contract provision will expire on January 31, 1996 and the DOE intends to propose a moratorium on the granting of sabbatical leaves for the next contract.

The Board has relied upon the analysis provided by the Hawaii Intermediate Appellate Court in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272 (1981), in considering whether interlocutory relief is appropriate. The three requirements for granting interlocutory injunctive relief are: 1) Is the party seeking 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 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.

Based on the Penn analysis, then, where the movant shows a great probability of succeeding on the merits, the less the movant has to show that the balance of irreparable harm favors the issuance of the injunction.

Thus, while the contract does not specifically state when the sabbatical leaves are to be approved, the contract specifically provides that the Employer must grant sabbatical leaves to no less than fifty bargaining unit members. While the Employer argues that the provision does not require the Employer to disseminate information to prospective applicants, both parties agree that the Employer's past practice has been to follow the promulgated Procedure 5406 which requires the submission of an application for

sabbatical leave in October of the preceding year and approval within a specified time frame. The nature of the sabbatical leave requires that the leaves be granted in the school year preceding the leave in order to permit sufficient preparation to arrange for the teachers' course of study.

The practice has been that in September or October of each year, the DOE sends out a standard memorandum distributing the application information. In this past year, the administration decided that it would seek a moratorium on sabbatical leaves for the 1996-97 school year. Thus, the department intentionally withheld the information to reduce confusion to eligible applicants. The evidence at this stage suggests that the intent of the administration was to ignore the contract provision without negotiating over the provision with the HSTA. Thus, the Board finds that the Employer's failure to disseminate information regarding the application procedures was due to the Employer's desire to institute a moratorium on sabbatical leaves pending negotiations and to effectuate a moratorium for the next school year. Moreover, the intent of the Employer by failing to initiate the distribution of literature was to ensure that there would be no applications submitted and no leaves granted.

The Board therefore finds that the HSTA has shown a substantial likelihood that it will succeed on the merits of its complaint. As long as the instant contract provision is in effect, the Employer is under an obligation to comply with the provision and its regulations promulgated pursuant thereto.

The difficulty with the instant motion is that if the motion is granted pending a final decision and the DOE is ordered to grant fifty sabbatical leaves, it inhibits the DOE from canceling the leaves at a later time because the Department may be responsible for costs incurred by the teachers in reliance on the granting of the leave. If the instant motion was denied and the applications were not made, then the teachers would be forestalled from ever applying for sabbatical leave for the next school year. The effect would be to render the contract provision on sabbatical leaves meaningless without prior negotiation with the Union.

Thus, with respect to the balance of irreparable harm, the Board finds that teachers would be irreparably harmed by the denial of the motion since they would never have an opportunity to apply for leave. The teachers would be foreclosed from seeking professional improvement under the existing contract provision and for all practical purposes a moratorium on sabbatical leaves for the 1996-97 school year would be in effect.

On balance, the DOE would not suffer irreparable harm by distributing information regarding the application process and granting the leaves under the existing contract provision. The Board, however, suggests that the DOE include a caveat with the application materials indicating that the administration is proposing a moratorium on sabbatical leaves for the 1996-97 school year in the current contract negotiations. If the Employer is successful in negotiating the moratorium, any potential applicants should be on notice that the sabbatical leaves may be subsequently canceled.

With respect to the public interest, the Board finds that the public school children and the system itself benefits from the teachers' sabbatical leaves in that the teachers improve their professional skills and knowledge by the completion of further study in order to receive further certification or to pursue a course of study which is in higher demand in the system. Further, the Board finds that it is in the public's interest to have the Employer comply with the terms of the contract and its promulgated procedures and past practices while the same are in effect. Notwithstanding the Employer's fiscal constraints, the Board finds that the Employer should not be permitted to unilaterally implement its decision to institute a moratorium on an existing contractual provision without prior negotiation with the Union.

Based upon the foregoing, the Board hereby grants the instant motion for interlocutory relief to the extent that the instant contract provision is in effect. The Respondents shall forthwith distribute sabbatical leave information, application procedures and forms, and grant sabbatical leave to fifty (50) bargaining unit members as quickly as practicable. Thereafter, Respondents may include a caveat that the Employer is seeking a moratorium on sabbaticals in negotiations.

YOU ARE HEREBY NOTIFIED that the Board, pursuant to § 89-5(b)(4), HRS, and Administrative Rules § 12-42-47, will conduct a prehearing conference on the above-entitled prohibited practice complaint on January 26, 1996 at 9:00 a.m., in the Board's hearings room, Room 203, 550 Halekauwila Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a

settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.


YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to §§ 89-5(b)(4) and 89-14, HRS, and Administrative Rules §§ 12-42-49 and 12-42-8(g) on the instant complaint on February 5, 1996 at 9:00 a.m. in the above-mentioned hearings room. The purpose of the hearing is to receive evidence and arguments on whether Respondent committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

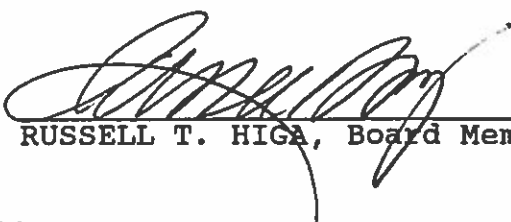
The parties shall submit four copies of any exhibits identified and introduced into the record to the Board. Additional copies for opposing counsel shall also be provided.

All parties have the right to appear in person and to be represented by counsel or other representative.

DATED: Honolulu, Hawaii, January 18, 1996.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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Sandra H. Ebisu
SANDRA H. EBESU, Board Member

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