STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BOARD OF EDUCATION, Department of Education, Respondent.	Case No. CE-05-58 Order No. 333

ORDER DENYING MOTION FOR INTERLOCUTORY ORDER

On June 12, 1980, Complainant Hawaii State Teachers Association filed a Motion for Interlocutory Order to preserve the status quo in the above matter until such time as the Board renders decisions in this and related cases DR-05-39 and RA-05-40, also filed by Complainant.

Specifically, Complainant requests that such Order restrain Respondent from abolishing any further Diagnostic Prescriptive Team and Speech and Hearing Specialist positions which have been or are presently occupied by certified personnel who are members of Unit 5, and further, that such positions be continued as certified positions and be staffed by their present occupants, or by temporary appointments if necessary, until the resolution of the aforementioned cases.

The above-entitled matter has been continued until moved upon by the parties or by the Board (Order No. 309, dated March 17, 1980). Complainant requested the continuance when it filed the above-mentioned DR and RA petitions because it believed that said petitions could dispose of the issues raised in the instant case.

A hearing on the motion herein was held on June 18, 1980. The transcript was received on July 8, 1980.

At the hearing Complainant agreed with Chairman Hamada that the interlocutory order it sought was in the nature of a preliminary injunction (Tr. 13). The burden was therefore upon Complainant, as the movant, to show irreparable harm.

The U. S. Court of Appeals for the Fourth Circuit recently rendered a decision in an analogous case, Columbia Local, American Postal Workers Union, AFL-CIO, v. Bolger, USCA 4, No. 79-1123, May 9, 1980. There, the U. S. Postmaster General appealed the entry of a preliminary injunction preventing the Postal Service from implementing certain personnel changes at the Columbia, South Carolina post office pending arbitration. The Appeals Court concluded that federal injunctive relief was not necessary to protect the arbitral process therein and reversed and vacated the injunctive decree.

In Columbia Local the court analyzed the following line of cases:

Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970), established that the federal courts could, in certain circumstances, enjoin strikes by unions over arbitrable issues to protect the arbitral process itself.

Buffalo Forge Co., v. United Steelworkers of America, 428 U.S. 397 (1976), made clear that the authority to enjoin under Boys Markets was limited to injunctions to enforce the union's promise to arbitrate. The strike involved in Buffalo Forge was a sympathy strike, not a strike over an arbitrable issue, and injunction was denied.

In Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc., 550 F. 2d 1237 (9th Cir. 1977), the union

sought to enjoin the employer from implementing changes in work schedules pending arbitration of the question. The court denied the injunction, relying upon Buffalo Forge principles. Arbitration would not be undermined by the changes proposed because the arbitrator could restore the status quo ante by his award.

In Lever Brothers Co. v. International Chemical Workers Union Local 217, 554 F. 2d 115 (4th Cir. 1976), the union sought to enjoin the relocation of a plant from Baltimore, Maryland to Hammond, Indiana. The court affirmed the grant of a preliminary injunction because the proposed relocation could not so easily be undone by the arbitrator's award.

Under these authorities the Columbia Local court vacated the preliminary injunction before it, holding that:

> . . .the appropriate test for issuance of injunction in the instant case is whether the conduct proposed must be enjoined because the available arbitral process could not possibly restore the status quo ante in an acceptable form were that conduct to be found violative of contract rights. This would render the arbitral process a hollow formality and necessitate injunction maintaining the status quo pending arbitration.
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> We think there is no sufficient showing here that the arbitrator could not, by his award, satisfactorily return the parties to the status quo ante if this were required by the arbitration result.

Similarly, the Board here finds insufficient evidence that its eventual decisions in the subject cases could not return the parties to the status quo ante if this were required by its rulings.

The following excepts of testimony given at the hearing herein are significant:

In an interchange between Chairman Hamada and Respondent's attorney Larry D. Kumabe:

Chairman Hamada: At present, Mr. Kumabe, the positions have not been abolished?

Mr. Kumabe: At present, Mr. Chairman, the positions have been abolished and they are now created as civil service positions in the Unit 13 bargaining unit.

What the DOE proposes to do is to fill those positions with the temporary employees pending the outcome of this hearing.

Chairman Hamada: Now, if the Board rules in the CE case, the prohibited practice case, that the DOE had no authority to take the positions out of Unit 5 and place those positions in Unit 13, and direct the department to take the positions from Unit 13 back into Unit 5, what would the department do?

Mr. Kumabe: Mr. Chairman, I am assuming that if a Board order was issued to that effect, the Department of Education would give it's [sic] best effort to comply with that order. (Tr. 12-13)

Direct examination by Complainant's attorney Thomas P. Gill of Sam Moore, negotiations and research specialist employed by Complainant:

Q. Mr. Moore, what was the understanding with the DOE or Mr. Yoshii as to what would happen to these temporary teacher positions in the case that the Board were to rule that they should remain in Unit 5?

A. . . .The agreement was that these individuals would be retroactively converted to probationary status teachers if the HPERB were to rule that the position should stay in Unit 5. For those persons who would have, during this interim period, had otherwise attained tenure, they would be given tenure at whatever time they otherwise would have attained the tenure.

Q. In other words, they would be given credit for the actual service they performed?

A. That's right. In other words, they were clear-line positions, unencumbered positions, but the people were being encumbered because of the process of trying to switch them over. So the agreement essentially was that the

people would not be hurt if the Board ruled that they should stay in Unit 5. The DOE would then make them whole. . ..(Tr. 45-47)

An interchange between Member Milligan and the parties' attorneys:

Mr. Milligan: . . .My question is: Suppose we have a hearing on your moving these positions and we rule against you, do you feel we have the power to do so?

Mr. Kumabe: After a hearing, yes.

Mr. Milligan: After a hearing?

Mr. Kumabe: Yes, [sic]

Mr. Milligan: Then you would reestablish those positions?

Mr. Kumabe: Yes, this would be within your authority.

Mr. Milligan: If that's the way we ordered it?

Mr. Kumabe: Right.

Mr. Milligan: If we did that, where would you be hurt?

Mr. Gill: If the Board ruled in reasonable time, perhaps there would not even be any particular harm. But what we are pointing out is that we've already had a bumper in effect by having tenured teachers sent back into the system because they abolished the position, which bumps other people down the line. We've already had this and can't do anything about that.

The other thing is that they are busy over here at civil service. Apparently, you know, Mrs. Sugino apparently doesn't plug people into those positions. What happens to those positions? We're just suggesting: Why create the problem? Just leave it the way it is. You rule. Okay, we do it that way. (Tr. 99-100)

The Columbia Local court stated:

That there might be some measure of difficulty in devising appropriate compensatory relief for any employees found in the arbitral process to have been transferred in violation of the bargaining agreement does not make of the process a hollow formality.

Similarly, this Board is of the opinion that in the cases related to this motion, while precise status quo ante may not be achieved, Respondent is not engaging in such conduct as to make the Board's proceedings in said cases a hollow formality compelling injunctive relief.

The motion is denied.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

John E. Milligan, Board Member

Dated: July 14, 1980

Honolulu, Hawaii