

September 14, 2015

To: State of Hawai'i Board of Education FIC Committee and all other Members

re: HR 9/15/15 Agenda Item V.A. - Committee Action on deadlines and timeline for Department of Education investigations of employee leave (Department Directed Leaves ("DDL") and Leaves Pending Investigation ("LPI"))

Aloha Board of Education Members,

Thank you for the opportunity to address Superintendent Matayoshi's 9/15/15 letter to the BOE Human Resources Committee on Agenda Item V.A.

Superintendent Matayoshi has concluded that at this time no action be taken. The reason given is that no improvements can be made until all stakeholder feedback has been received and processed.

d. Arguments in support of the recommendation

The Department has drafted and is seeking stakeholder feedback on written Procedures for Department Directed Leave and Leave Pending Investigation, the most current copy of which is attached. The Procedures cannot be finalized until the feedback has been received and considered, revisions incorporated and the unions consulted.

However, the Superintendent's argument assumes that the DOE is not within its rights to improve its own internal processes so that they afford employees greater protections *now*. It also assumes that an entire revision of all procedures must be completed before *any* improvements can be made. These premises are incorrect. There are some very pressing problems that could be dealt with in a piecemeal fashion based on priority.

For example, let's consider the issue of "due process" in DOE investigations, or rather the lack of due process.

Without a clearer definition from the DOE and the unions of what due process rights an employee under investigation has, the common societal expectations of due process should be the norm. Unfortunately, when it comes to DOE investigations, employees are *denied* due process.

COMMON UNDERSTANDINGS OF DUE PROCESS:

The right to have the assistance of counsel; the right to know one's accuser and the evidence against one; the right to confront and cross-examine that person; the right to have decision based solely upon a record generated in open proceedings; as well as the right to present argument and evidence on one's own behalf.

When an employee is placed under investigation, the DOE immediately places a gag order on the employee for an unreasonably long amount of time. This is contrary to due process and if an employee cannot discuss an incident with potential witnesses when the event is still fresh in memory, they cannot properly defend themselves.

Excerpt from DOE Sample Notice of DDL:

- **To preserve the integrity of the investigation, you are highly encouraged NOT to discuss the matter under investigation with anyone.**

This prevents the employee from gathering evidence in his/her defense. The DOE can easily change this to read:

To preserve the integrity of the investigation, you are highly encouraged not to discuss the matter under investigation with anyone for 5 days.

Allowing an employee to talk about an investigation soon after an incident occurs is the only way to enable an employee to exercise the right to “present argument and evidence on one’s own behalf.” I do not think any of the unions would object to this improvement of employee rights, and would quickly approve of this change in procedure. Why don’t you ask them?

Another necessary improvement in due process that’s needed as soon as possible is for the employee to have the opportunity to confront one’s accuser(s) very early in the process. The DOE should require an immediate meeting between an employee and an accuser, moderated by a DOE investigator (someone not connected in any way with the individuals involved) and the employee’s union representative. It is quite possible that an investigation can end with a speedy resolution with a meeting between the employee and the accuser(s).

As it stands now, due process isn’t afforded to the employee until **AFTER** the Investigation is completed:

All situations/complaints leading to the removal of an employee and placing him/her on DDL or LPI will be investigated thoroughly and expeditiously. When investigations are completed, and where allegations of misconduct have been substantiated, post-investigation/due process proceedings should commence immediately thereafter.

How backwards is that?!! I think the employee unions would agree to an immediate improvement to the process that gives the employee an early opportunity to resolve misunderstanding and conflict. Why don't you ask them?

The current procedures, as quoted above, are an affront to due process, and need immediate correction. Therefore, I ask that the Board of Education direct the Superintendent to propose to the unions improvements to the Investigation process that *actually* provide due process rights for employees such as those mentioned above. (deadline for Superintendent's proposal: 10/1/15)

It is within the BOE's power to set expectations for the Superintendent to *immediately* correct these egregious examples of due process being denied employees under investigation. I'm sorry, but I think the Superintendent's recommendation to take no action at this time is highly unsatisfactory.

1. RECOMMENDATION

The Department recommends that the Human Resources Committee take no action at this time.

There are people suffering and immediate action is necessary. The Superintendent's approach does not show strong leadership to address the crisis. This is like staring at somebody bleeding to death and saying, we can't do anything until we have a procedure agreed to by all parties concerned about how we're going to deal with this crisis.

Mahalo for your consideration,



Vanessa Ott