

STATE OF HAWAII
BOARD OF EDUCATION

KAMALANI ACADEMY,

Appellant

v.

STATE PUBLIC CHARTER SCHOOL
COMMISSION,

Appellee.

APPEAL NO. 23-01

FINAL DECISION OF THE BOARD OF
EDUCATION

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I. INTRODUCTION

This appeal is brought before the State of Hawaii Board of Education (the “**Board**”) as a proceeding pursuant to Hawaii Revised Statutes (“**HRS**”) §302D-15 and Hawaii Administrative Rules (“**HAR**”) Title 8, Chapter 510, wherein Kamalani Academy (the “**Appellant**” or “**Kamalani**”) requested an appellate review of the State Public Charter School Commission’s (the “**Appellee**” or the “**Commission**”) decision to not renew the Appellant’s charter contract.

II. FINDINGS OF FACT

A. Procedural History

On March 1, 2023, the Commission sent by electronic and certified mail to the Appellant the Commission’s decision to not renew Kamalani’s charter contract.

On March 24, 2023, the Appellant filed a timely Notice of Appeal with the Board.

On March 31, 2023, the Commission transmitted its Record on Appeal to the Board.

On April 3, 2023, the Appellant filed a timely Opening Brief with the Board.

On April 13, 2023, the Appellee filed a timely Answering Brief with the Board.

On April 21, 2023, the Appellant filed a timely Reply Brief with the Board.

The Board determined that oral argument in this appeal was necessary, pursuant to HAR §8-510-10. The Board held publicly observable oral argument on April 27, 2023, at 9:00

a.m. at the University of Hawaii at Manoa William S. Richardson School of Law Moot Court Room (2515 Dole Street, Honolulu, Hawaii, 96822).

The Board reviewed and deliberated on the appeal at a meeting on April 27, 2023, immediately following oral argument. The Board orally announced a summary of the conclusions of law held in this decision immediately following the decision-making meeting. The members of the Board present at the meeting confirmed the contents of this written decision through email.

B. Background

Kamalani is charter school currently operating under a charter contract (the “**Contract**”) in accordance with HRS Chapter 302D. The Contract began on July 1, 2017, with an original termination date of June 30, 2022. The Commission and Kamalani agreed to amend the Contract to add a one-year extension, effective July 1, 2022, and terminating on June 30, 2023.

Exhibit D of the Contract, entitled “Intervention Protocol,” states, in pertinent part, “[This Intervention Protocol] enables the Commission to take timely and appropriate action to notify the School about performance and/or compliance concerns and provide the School a reasonable opportunity to remedy such problems.” ROA at 65-66.¹ In accordance with Exhibit D, the Commission may issue a “Notice of Concern” (“**NOC**”) whenever it finds the charter school has “failed to meet legal or contractual compliance obligations.” *Id.* When a charter school receives a NOC, Exhibit D requires it to respond and take any necessary corrective actions. Exhibit D allows the Commission to escalate a NOC to a Notice of Deficiency (“**NOD**”) under certain circumstances, such as insufficient progress toward correcting the compliance breach, and the NOD may “include prescriptive, specific action plans and conditions for the School[.]” *Id.*

Exhibit E of the Contract, entitled “Renewal and Non-Renewal Criteria and Process,” describes some of the process the Commission uses for determining renewal or nonrenewal of a charter contract.² ROA at 68-69. Exhibit E describes two separate processes, one for schools

¹ The Record on Appeal is cited as “ROA at [PDF page number].”

² Exhibit E notes that HAR §8-505-10 through §8-505-13 contains the procedures pertaining to charter contract renewals. HAR §§8-505-12 and 8-505-13 are most pertinent to this case.

HAR §8-505-12, entitled “Performance report; notification of the prospect of nonrenewal,” provides:

“(a) The commission shall prepare a charter school performance report for each charter school whose charter contract will expire the following year. The performance report shall summarize the charter school’s performance record to date, shall be in writing, and shall be served upon the charter contract holder by registered or certified mail.

(b) If applicable, the performance report shall notify the charter contract holder of any weaknesses, deficiencies, or concerns which may result in nonrenewal of the contract and shall include but not be limited to the following:

that did not receive a NOD during the contract period and another for those that did. The process in Exhibit E for schools that received a NOD during the contract period provides, in pertinent part, "If the School received a Notice of Deficiency at any time during the contract period, the Commission will conduct a performance review hearing within 45 days of receiving the School's application for renewal. During the performance review hearing, the Commission will determine whether or not the School has earned a renewal of the charter and may apply conditions if applicable." *Id.*

On June 20, 2022, the Commission issued a NOC to Kamalani stating that it failed to comply with certain terms and conditions of the Contract due to four issues related to inaccurate projected student enrollment counts, poor maintenance of student records, noncompliance with governing board meeting requirements, and a failure to adhere to student withdrawal and transfer procedures.

On October 13, 2022, the Commission voted to escalate the NOC to a NOD. The Commission issued the NOD on October 17, 2022. On October 28, the Commission deemed the NOD resolved.

On or around November 15, 2022, the Commission presumably issued a performance report to Kamalani, although the Record on Appeal established by the Commission does not

(1) A clear and specific statement of the charter school's weaknesses or deficiencies, with references to the applicable contract terms or performance standards that have not been met; and

(2) A statement that the charter contract holder, in its response, may request a hearing conducted in accordance with section 8-505-20 and may request legal representation subject to section 28-8.3, Hawaii Revised Statutes.

(c) The charter school shall have thirty days from the date of mailing of the performance report to submit a renewal application, to respond to the performance report and any identified weaknesses, deficiencies, or concerns, to submit any corrections or clarifications for the report, and to request a hearing.

(d) If the charter contract holder disputes the commission's assessment or claim of weaknesses or deficiencies, the commission, after considering the charter contract holder's response, shall reaffirm, modify, or retract its earlier notification of weaknesses or deficiencies, and shall so notify the charter contract holder in writing served by registered or certified mail."

HAR §8-505-13, entitled "Nonrenewal decision by the commission," provides:

"(a) The commission shall make a final decision on whether or not to renew the charter contract within forty-five days following receipt of the application for contract renewal and after the hearing, if held.

(b) Within fifteen days of making its decision to renew or not renew the charter contract, the commission shall issue its decision in writing, served upon the charter contract holder by registered or certified mail with return receipt requested. The decision shall set forth, with reasonable specificity, the reason for its decision. The decision shall also include a statement that the charter contract holder may file an appeal with the board within twenty-one calendar days of receipt of the written decision of nonrenewal. The written decision shall be simultaneously transmitted to the board."

contain records showing when the Commission served the performance report to Kamalani nor is it clear what, exactly, the Commission served as the performance report for charter contract renewal purposes.³ Nothing in the record suggests that the Commission included in the performance report to Kamalani any weaknesses, deficiencies, or concerns that may have resulted in nonrenewal of the Contract. The Appellee, during oral argument, confirmed that the Commission's performance report to Kamalani did not contain any clear and specific statements of the Kamalani's weaknesses or deficiencies, with references to the applicable contract terms or performance standards that have not been met.

On December 12, 2022, the Commission sent Kamalani a notice of hearing, scheduling a hearing for Kamalani on January 24, 2023, and stating, in pertinent part, "Pursuant to Exhibit E of Kamalani Academy's Charter Contract, the Notice of Deficiency will be considered in the renewal of Kamalani Academy's contract[.]" ROA at 2490-2492.

On December 14, 2022, the Commission received Kamalani's renewal application.

On December 15, 2022, the Commission received an update on the investigation of parent complaints against Kamalani, which included investigative findings regarding potential violations of the Contract.

On January 5, 2022, the attorney for the Appellant sent a letter to the Commission to "confirm the scope of the upcoming performance review hearing." ROA at 2582-2584. The letter also noted "concerns regarding what specific allegations [would] be addressed during the hearing, and whether those allegations were properly noticed in accordance with the statutory due process afforded to Kamalani Academy before and during the hearing." *Id.* The Appellant's attorney wrote:

"Renewal proceedings that may jeopardize a charter school's position in seeking renewal are addressed in Hawaii Revised Statutes (HRS) § 302D-18 and Hawaii Administrative Rules (HAR) § 8-505-12. Specifically, regarding the prospect of nonrenewal, HRS §§ 302D-18(b) and (h) require both notice of the hearing and of the specific concern(s) that shall be addressed during the hearing. This is to afford charter contract holders the opportunity to present objections to those concerns:

(b) The authorizer shall issue a charter school performance report and charter contract renewal application guidance to any charter school whose charter

³ A draft renewal timeline developed by the Commission notes November 15, 2022, as the date for issuing performance reports. ROA at 882. The record also includes performance reports for Kamalani for five school years. ROA at 1904-1919. However, the record does not indicate when the Commission served these performance reports to Kamalani by registered or certified mail. Therefore, the record is also not clear whether the Commission served these five years of performance reports together as a package to Kamalani as the school's performance record to date, as required by HAR §8-505-12(a), or if these performance reports are just a compilation of past years' reports that the Commission issued individually during their respective reporting years.

contract is in its final contract year. The performance report shall summarize the charter school's performance record to date, based on the data required by this chapter and the charter contract, and shall provide notice of any weaknesses or concerns perceived by the authorizer concerning the charter school that may jeopardize its position in seeking renewal.

...

- (h) An authorizer shall develop revocation and nonrenewal processes that:
- (1) Provide charter contract holders with a timely notification of the prospect of revocation or non-renewal and the reasons for such possible closure;
 - (2) Allow charter contract holders a reasonable amount of time in which to prepare a response;
 - (3) Provide charter contract holders with an opportunity to submit documents and give testimony challenging the rationale for closure and supporting the continuation of the school at an orderly proceeding held for that purpose; provided that the proceeding shall be governed by the requirements set forth in this section and shall not be additionally subject to the requirements for an agency hearing under chapter 91;
 - (4) Allow charter contract holders access to representation by counsel, subject to section 28-8.3, and to call witnesses on their behalf;
 - (5) Permit the recording of proceedings described in paragraph (3); and
 - (6) After a reasonable period for deliberation, require a final determination to be made and conveyed in writing to the charter contract holders."

(Emphasis in original); *id.*

The letter concluded that because "the only reason provided to Kamalani Academy regarding the prospect of non-renewal was the issuance of a NOD and the subsequent performance review hearing required under Exhibit E upon the issuance of a NOD[,] Kamalani Academy will proceed with the understanding that the NOD, and only the NOD, will be addressed during the performance review hearing, as the only properly noticed matter for review." *Id.* The letter also noted that "Kamalani Academy's most recent performance report did not identify any concerns that would potentially jeopardize renewal of the School's Charter Contract, as required under HAR § 8-505-12(b), nor did any prior performance reports." *Id.*

On January 6, 2023, the Commission presumably sent Kamalani an amended notice of hearing, although the Record on Appeal established by the Commission does not contain said notice.⁴ According to the written decision from the Commission notifying the Appellant of Kamalani's nonrenewal, the amended notice included "the consideration of the investigative findings presented to the Commission on December 15, 2022." ROA at 2792.

⁴ Several other documents within the Record on Appeal reference the amended notice of hearing, as do the briefs from the parties. However, without the amended notice, it is not clear what it actually states, and the record remains incomplete.

On January 20, 2022, the attorney for the Appellant sent a letter to the Commission responding to the amended notice of hearing. ROA at 2585-2589. The letter asserted that the amended notice listed “ten additional allegations of potential violations” of the Contract. *Id.* Among other things, the letter argued:

“Under Hawaii Administrative Rules (HAR) § 8-505-12(b), nonrenewal hearings arise when the SPCSC identifies “any weakness, deficiencies, or concerns which may result in the nonrenewal of the contract” in a school’s annual performance report and requires a “clear and specific statement of the charter school’s weaknesses or deficiencies, with references to the applicable contract terms or performance standards that have not been met.” See also HRS §302D-18(f); Exhibit E to Kamalani Academy’s Charter Contract. The charter school is then given the opportunity to respond to those weaknesses or deficiencies identified in the performance report, and to request a hearing. Chapter 302D does not contemplate a hearing, as described in Exhibit E. However, assuming performance review hearings are permissible, they are reserved for three situations, as stated in Exhibit E: (1) when a NOD is issued, (2) when requested pursuant to HAR § 8-505-12(b)(2), and (3) when requested pursuant to HAR § 8-505-16(3).

Here, Kamalani’s performance report identified no weaknesses or concerns, as required under HAR § 8-505-12(b); and revocation proceedings under HAR § 8-505-16(3) have not commenced. Therefore, the sole reason a hearing was initiated is because Exhibit E to the School’s Charter Contract mandates such a hearing when a NOD is issued. However, by broadening the scope of matters for consideration during the January 24 hearing to include the parent complaint investigation, the Amended Notice attempts to bypass the statutory nonrenewal requirements of HRS § 302D-18 and piggyback the investigation on to the NOD performance review hearing.”

Id.

The letter ended with the Appellant’s attorney requesting that “the hearing set for January 24, 2023 be limited to the NOD issued to Kamalani Academy on October 17, 2022,” or alternatively, that the “hearing be continued for a reasonable time to afford Kamalani the opportunity to prepare a meaningful response.” *Id.*

The parties agreed to postpone the hearing to February 22, 2023, although it is not clear in the Record on Appeal when or how this occurred.⁵

On February 22, 2023, the Commission held the hearing where, through a split vote, the Commission decided to not renew the Contract.

⁵ The Record on Appeal does not contain evidence of a written agreement to postpone the hearing. This is a fact simply because the parties agree that this agreement occurred.

On March 1, 2023, the Commission sent the written nonrenewal decision to Kamalani, in which it found that Kamalani committed the following five material and substantial violations:

1. Kamalani Academy ran a new virtual program without obtaining a Charter Contract Amendment;
2. Kamalani Academy parents and/or guardians were asked to surrender or pay for technology in exchange for the release of student records upon student disenrollment from Kamalani Academy;
3. Kamalani Academy failed to follow their Commission-approved Admission Policy;
4. Kamalani Academy student records were not maintained properly; and
5. Kamalani Academy instruction was not conducted by a licensed, certified teacher.

ROA at 2791-2794.

C. Appellate Arguments

Through its Opening Brief, the Appellant argues that:

1. The Commission abused its discretion by foreclosing the opportunity to consider alternative options to nonrenewal, namely reconstitution of Kamalani's governing board;
2. The Commission exceeded its authority by broadening the scope of the hearing beyond what Exhibit E of the Contract and HRS §302D-18 contemplate, asserting that:
 - a. Because the performance report did not identify weaknesses or concerns as required by HAR §8-505-12, the only reason the Commission initiated a hearing was because Exhibit E of the Contract requires a hearing during contract renewal if the school received a NOD during the term of the Contract; and
 - b. Therefore, the Commission improperly broadened the scope of the hearing to include matters not contained in the NOD;
3. The Commission was not justified in using its executive session meeting to solicit the necessary votes to deny renewal of the Contract, accusing "someone" of hailing a Commissioner, during executive session, to return to the meeting to vote;
4. The Commission abused its discretion in failing to consider that Kamalani resolved the NOC and NOD; and
5. The five alleged violations in the Commission's written decision were not material and substantial in accordance with the Contract, contending, among other things, that whether Kamalani's records were maintained properly is vague and unsupported by evidence and that the Commission's failure to substantiate this finding in the written decision was an abuse of discretion.

Through its Answering Brief, the Appellee rebuts that:

1. Reconstitution was not available or appropriate, particularly because reconstitution is only allowable as an alternative to contract revocation, not nonrenewal of a contract;
2. The hearing was appropriate in scope because statute sets material and substantial violations of the terms of the Contract as grounds for nonrenewal, and therefore, review of Kamalani's compliance with the terms of the Contract was necessary;
3. The Commission did not abuse executive session, no solicitation of a Commissioner occurred, and the record is devoid of any evidence to the contrary;
4. The resolved NOC and NOD remain relevant, and the Commission can consider the severity and rapid accumulation of contract violations when determining whether to renew the Contract even if those violations are resolved; and
5. The Contract violations are material and substantial.

Through its Reply Brief, the Appellant rebuts in return that:

1. Reconstitution of Kamalani's governing board was an available option, asserting that statute does not limit reconstitution to only revocation proceedings and that the Commission can consider reconstitution as a condition of renewal;
2. By initiating the hearing under Exhibit E of the Contract, the Commission was bound by the limited provisions of Exhibit E, particularly because the Commission did not provide notice of any weaknesses or concerns in the performance report in accordance with HRS §302D-18(b), which would ordinarily set the scope of a performance review hearing;
3. The Appellee provides no justification for why the Commission's use of executive session was appropriate;
4. The Commission did not make any findings regarding the NOC and NOD in the written decision, and therefore, any claims that the Commission considered the resolved NOC and NOD in its decision have no bearing as such findings are absent from the record; and
5. The Commission's written decision lacks the requisite findings to substantiate its conclusion that the Contract violations were material and substantial

III. STANDARDS OF REVIEW

According to HRS §302D-15, "the [B]oard shall review an appeal and issue a final decision within sixty calendar days of the filing of the appeal." The Board administers the appeal process in accordance with HAR Title 8, Chapter 510. Upon review of the record, and pursuant to HAR §8-510-11, the Board may affirm the decision of the Commission, remand the case with instructions for further proceedings, or reverse or modify the decision if the substantial rights of the Appellant may have been prejudiced because the Commission's decision is:

- (1) In violation of statutory or regulatory provisions;
- (2) In excess of the authority or jurisdiction of the Commission;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IV. DISCUSSION

A. Commission Erred in Basing Its Decision on Weaknesses, Deficiencies, and Concerns Not Raised in the Performance Report

According to the Commission's written decision, the Commission based its nonrenewal decision on five material and substantive violations.

HAR §8-505-12(b) provides:

"If applicable, the performance report shall notify the charter contract holder of any weaknesses, deficiencies, or concerns which may result in nonrenewal of the contract and shall include but not be limited to the following:

- (1) A clear and specific statement of the charter school's weaknesses or deficiencies, with references to the applicable contract terms or performance standards that have not been met; and
- (2) A statement that the charter contract holder, in its response, may request a hearing conducted in accordance with section 8-505-20 and may request legal representation subject to section 28-8.3, Hawaii Revised Statutes."

(Emphasis added).

HAR §8-505-12 is the Commission's nonrenewal process required by HRS §302D-18(h), and a failure to include weaknesses, deficiencies, or concerns that may result in nonrenewal of the contract is also a failure to "[p]rovide charter contract holders with a timely notification of the prospect of . . . non-renewal and the reasons for such possible closure" in accordance with HRS §302D-18(h)(1).

In this case, the Commission failed to include these weaknesses, deficiencies, and concerns in the performance report to Kamalani. By failing to comply with HAR §8-505-12 and HRS §302D-18(h), the Commission made its decision upon unlawful procedure.

B. Commission Erred in Not Clearly Stating the Material and Substantial Violations with Reasonable Specificity in Its Written Decision

HRS §302D-18(g)(1) allows an authorizer to not renew a charter contract if “the authorizer determines that the charter school . . . [c]ommitted a material and substantial violation of any of the terms, conditions, standards, or procedures required under [HRS Chapter 302D] or the charter contract.” HRS §302D-18(i) requires an authorizer who does not renew a charter contract to “clearly state in writing the reasons for the . . . nonrenewal.” HAR §8-505-13(b) provides, in pertinent part, “Within fifteen days of making its decision to renew or not renew the charter contract, the commission shall issue its decision in writing, served upon the charter contract holder by registered or certified mail with return receipt requested. The decision shall set forth, with reasonable specificity, the reason for its decision.” (Emphasis added).

Reading these statutory and regulatory provisions together and because the Commission made its decision pursuant to HRS §302D-18(g)(1), the Commission’s written decision must clearly state, with reasonable specificity, the material and substantial violations of any of the terms, conditions, standards, or procedures required under HRS Chapter 302D or the Contract that Kamalani allegedly committed. In this case, according to the Commission’s written decision, the Commission based its nonrenewal decision on “material and substantial violations of the terms, conditions, standards, or procedures required under Chapter 302D, H.R.S., or the charter school contract.”

However, the five violations stated in the Commission’s written decision do not give a clear indication of the terms, conditions, standards, or procedures required under HRS Chapter 302D or the Contract that Kamalani violated. The Appellee’s Answering Brief contains multiple citations to statutory and contract provisions, but any such citations are completely absent from the violations. Without even identifying, at a minimum, the statutory or contract provisions breached, it is impossible to conclude that any such statutory or contract violation is clearly stated. As such, the Commission’s written decision does not clearly state the violations nor does it provide reasonable specificity. Instead, it is either too general or vague, at best, or potentially misleading, at worst, when considering the whole record. As the written decision is supposed to capture the basis of the Commission’s nonrenewal decision, the inadequacy of the written decision’s clarity and specificity illustrates that the Commission’s decision affected by errors of law and made upon unlawful procedure.

Not renewing a charter contract and closing a school is a high-stakes decision, and the threshold of what can be considered “reasonable specificity” in the written decision should be commensurately high. The Appellant argues:

“Rather than parsing out a specific rationale for each violation and why it meets the material and substantial threshold, the Commission merely concluded that material and substantial violations occurred.

. . .

[T]here is no discernible evidence of what the Commission relied on in determining that the five violations cited to in its Written Decision were material and substantial.”

Opening Brief at 10-11.

The Board agrees. If the Commission decides to not renew a school’s contract based on material and substantial violations, its written decision must substantiate each violation, based on factual findings, with specific rationales explaining why they are material and substantial in nature. The written decision is foundational to a charter contract holder’s appeal rights. Without this level of specificity, the written decision does not give the charter contract holder a fair opportunity to refute alleged violations.

V. CONCLUSIONS OF LAW

The Commission erred in basing its decision to not renew Kamalani’s Contract on weaknesses, deficiencies, and concerns not raised in the performance report to Kamalani. Such notice in the performance report is required by HAR §8-505-12 and, by extension, HRS §302D-18(h). By failing to include weaknesses, deficiencies, and concerns the Commission considered in its nonrenewal decision in Kamalani’s performance report, the Commission made its decision upon unlawful procedure.

The Commission erred in not clearly stating the material and substantial violations that Kamalani allegedly committed with reasonable specificity in its written decision. Because the written decision captures the basis of an authorizer’s nonrenewal decision, the inadequacy of the Commission’s written decision’s clarity and specificity illustrates that the Commission’s decision was affected by errors of law and made upon unlawful procedure.

The Board declines to opine on any other arguments raised by the parties that these conclusions of law do not address, including any substantive issues, as the Board finds it unnecessary to do so under the facts of the case. This decision and the Board’s declination to opine on other arguments shall not be construed as a judgement on the merits of the basis of the Commission’s nonrenewal decision. The Board notes that even though the Appellant is unable to initiate a lawsuit against the Commission, the Appellant is still free to pursue other administrative remedies related to the alleged Sunshine Law violations through the Office of Information Practices.

While the Board would prefer to remand the Commission’s decision with further instructions, time is of the essence in this case. The Board is concerned that a remand would

prolong the process far too long for families and staff of the school and would produce a forgone conclusion, essentially a *de facto* closure of the school. Students and families should not be prejudiced by the Commission's errors of law and procedure.

Accordingly, the Board, after reviewing the evidence of record and by unanimous vote of its members who were present and voting (Chairperson Bruce Voss, Vice Chairperson Kaimana Barcarse, and Board Members Lynn Fallin, Makana McClellan, Lauren Moriarty, and Kili Namau'u), reverses the Commission's decision to not renew the Appellant's charter contract. The Board's decision shall not be construed as determining a particular form or term length for Kamalani's renewed charter contract, nor shall the Board's decision be deemed to dictate whatever conditions the Commission determines as appropriate. The parties shall make their best efforts to execute a renewed charter contract in accordance with law subject to whatever terms and conditions the Commission determines in its sole discretion. If the parties fail to execute a renewed charter contract by the current charter contract's termination date of June 30, 2023, Kamalani's current charter contract shall be deemed as renewed for one year with a termination date of June 30, 2024.

Honolulu, Hawaii, this 28th day of April 2023.

BOARD OF EDUCATION

A handwritten signature in cursive script that reads "Bruce D. Voss".

Bruce D. Voss, Chairperson