

**TOSIWO NAKAMURA, JOSHUA KOSHIBA, and
SADANG SILMAI, Plaintiffs**

v.

**THOMAS O. REMENGESAU, in his capacity as District
Administrator of Palau District, Trust Territory
of the Pacific Islands, Defendant**

Civil Action No. 135-75

Trial Division of the High Court

Palau District

September 14, 1976

Action by teachers dismissed because they had been elected to the District Legislature. The Trial Division of the High Court, Hefner, Associate Justice, held that policy under which the teachers were dismissed was illegal.

1. Labor Relations—Dismissal or Discipline of Employee—Grounds

Board of Education policy providing that teachers and other educational personnel could not hold elective positions in the government if they would be absent from their job for a period in excess of their annual leave was in conflict with statute listing the persons disqualified from candidacy for the elective positions held by teachers challenging the policy, but not including teachers and other educational personnel in the list of disqualified persons, an indication that they were not intended to be on the list, and the policy was invalid. (43 TTC § 102)

2. Labor Relations—Dismissal or Discipline of Employee—Grounds

Board of Education policy providing that teachers and other educational personnel could not hold elective positions in the government if they would be absent from their job for a period in excess of their annual leave, and providing for appeal to the board, was clearly unreasonable as to classification and of so wide a scope and breadth as to be illegal, since it included anyone working for the educational system, and allowed those with enough leave, and successful appellants to the board, to hold elective positions, despite the policy that holding elective positions would disrupt the school.

<i>Assessor:</i>	SINGICHI IKESAKES
<i>Reporter:</i>	MISSY F. TMAN
<i>Counsel for Plaintiffs:</i>	JESSE PENNINGTON, ESQ., MLSC JOHN K. RECHUCHER, ESQ.,
<i>Counsel for Defendant:</i>	<i>District Attorney, Yap</i>

HEFNER, *Associate Justice*

This matter was heard at 1:30 P.M., September 9, 1976. The plaintiffs were represented by Jesse Pennington, MLSC and the defendant was represented by John Rechucher, District Attorney.

Both counsel stipulated to the following facts:

1. The plaintiffs are employees of the Trust Territory Department of Education.
2. All of the plaintiffs were elected to the Palau District Legislature in September, 1975.
3. Prior to the April 1976 legislative session, the plaintiffs received letters from the Department of Education relating to their dismissal from the department.

4. The letters and memoranda attached to the plaintiffs' complaint were sent by the defendant and Department of Education and received by the addressees on or about the dates reflected thereon. For the purposes of resolving this matter, the Court can consider all the contents of the exhibits attached to the complaint.

5. The plaintiffs are teachers or other educational personnel within the meaning of Micronesia Board of Education Policy # 73-2.

6. The plaintiffs are not department heads or assistant department heads as described in 43 TTC 102(c).

7. At the April session of the District Legislature, none of the plaintiffs had accrued annual leave which would have exceeded the time necessary to attend legislative functions as specified in Policy # 73-2.

8. The pertinent provisions of the Policy which are in dispute, read as follows:

Teachers and other educational personnel may not hold elective appointive positions in local, district or territorial government bodies, (other than responsibilities assigned to them by District or Headquarters Directors of Education, District Administrators, or the High Commissioner) if the requirements of said office require absence from assigned educational responsibilities in excess of legal (annual) leave time earned by the employee.

In unusual circumstances, an employee may appeal to the Micronesia Board of Education for exception to this policy by stating in writing the particular problem and the circumstances that justify it as an exception. Said appeal with comments from the District Directors of Education and the District Administrators shall be submitted to the Director of Education who may act for the Board and report to the Board all appeals and actions taken.

Both counsel further stipulated that there were no factual matters in dispute and that the only issue to be resolved was the validity of the Board of Education Policy # 73-2.

The Court then proceeded to hear the matter on argument from counsel and the matter was submitted for a decision.

The Micronesia Board of Education (hereinafter referred to as Board) was established by the Congress of Micronesia in 1969. Title 41, Section 7 of the act states in part:

The Board shall have power in accordance with law to formulate policy and to exercise control over the educational system in the Trust Territory. The power and responsibilities of the Board shall include but not be limited to defining educational objectives for Micronesia,

In April of 1972, the Congress of Micronesia enacted P.L. 4C-49, Title 61, which is known as the Trust Territory Public Service System Act. It is this law that the defendant relies upon to support the policy enunciated in Policy Statement # 73-2.

Title 61, Section 11(1)(c) states in essence that no employee shall engage in any outside employment or other outside activity which results in impeding government efficiency.

The main thrust of the defendant's argument is that since the legislative session and responsibilities demand so much time of a legislator, the efficiency and operation of a school is adversely affected when key personnel such as teachers and educational administrators are absent from their duties for prolonged periods of time.

The plaintiffs generally do not disagree with this argument, but maintain that the policy is over-inclusive, vague and violates the equal protection, and due process provisions of the Trust Territory Code. In addition, plaintiffs argue that the policy as written is an invalid usurpation of legislative authority to determine the qualifications of members of the District Legislature.

Since at least 1966, the Trust Territory Code has listed the persons or parties who are disqualified as candidates for membership in any district legislature. TTC, 1966 ed. Section 47(e) superceded by 43 TTC 102.

At all times the statute has been in effect, employees of the Trust Territory Government or District Administration who are assistant department heads or higher have not been able to hold office in a district legislature. The positions of the plaintiffs have never been included in the section and the defendant concedes this.

The defendant attempts to justify the Board policy by arguing that since the Board has the power to formulate policy pursuant to 41 TTC 7, it exercised its power properly in view of the passage of Title 61 in 1972 and particularly in carrying out the mandate in Section 11 of that title.

[1] This attempted justification is defeated on several grounds. First, if the Congress of Micronesia determined that teachers or certain educational personnel should be disqualified from being district legislators, it would have made specific reference to them in 43 TTC 102. Second, the specific mention in 43 TTC 102(c) to assistant department heads or higher, rules out any theory that the Congress of Micronesia overlooked the question of teachers or educational personnel. Third, the authority given to the Board to formulate policy in 41 TTC 7, must be "in accordance with law." The conflict of the policy with 43 TTC 102(c) is clear and is not in accordance with the law.

There are additional significant defects with the policy which demand attention and which may provide guidance for the future.

This Court is not unmindful of the rational and intended result of the policy in question. The operation of a public school is a most important matter. It might be said that the future of Micronesia rests in the students now being

educated in its schools. Without a proper education system, Micronesia will suffer from the lack of leaders, technicians, professional people, and the variety of skilled persons required to make Micronesia a viable and effective political and social community in whatever form its future political status may be.

However, what is being tested and determined today is the way the Board attempted to assure a smooth running educational system and one that would not be disturbed by teachers and other educational personnel leaving their posts for long periods of time during school months to serve as legislators.

[2] Initially, it is apparent on the face of Policy # 73-2 that it is so broad, it includes anyone working for the education department. Not only are teachers and their supervisors included, but clerks, janitors or school cafeteria personnel are also within the policy's scope. It may be argued that teachers and other critical personnel should be excluded from membership in district legislatures because they cannot be replaced during the school year, but it is difficult to imagine that a clerk, cook in a school cafeteria or a janitor could not be replaced for the time necessary to attend a legislative session.

Even if the Board did not intend to include positions such as cooks or janitors, the whole argument and reason for the policy comes into question when the remainder of policy is considered. On the one hand, the purported purpose of the policy is to keep the teachers and other educational personnel at the school. However, the same policy defeats this purpose by allowing an employee with sufficient accrued leave to assume the legislator's position. In addition, the policy provides an "appeal" process in unusual circumstances and leaves the final determination to the Director of Education or the Board. Therefore, the final decision of whether an employee may hold a position

in the District Legislature is vested in an executive branch official or board. The possibility of manipulation of the legislative branch is ever present under the existing policy.

In addition, Policy # 73-2 as written, bars membership in any district legislature regardless of any other factors. If the district legislature meets in the summer time, on weekends or at nights, the teachers or other educational personnel are still forced to choose between their job as an educator or to serve as a legislator. Yet, if the same person has sufficient annual accrued leave or receives approval from the Director of Education or the Board, he may serve in the dual capacity of teacher and legislator. The classification is clearly unreasonable.

It is therefore clear that the scope and breadth of the Board's policy is such that it cannot pass legal scrutiny as written and as applied to the plaintiffs.

This is not to say that the Board cannot set proper limitations upon Department of Education personnel to assure their presence on a day to day basis during the crucial days and months of a school year.

The intention of the Congress of Micronesia in enacting Title 61 is clear. If any government employee within the scope of the act engages in any outside employment or other outside activity not compatible with the full and proper discharge of the responsibilities of his position, the employee must choose between his job or outside activity. This statute has previously been upheld by this Court. *Armaluuk v. Mereb*, Civ. 39-74, Palau (1975).

Therefore, although the plaintiffs win the battle over Policy #73-2, they may well lose the war over the application of Title 61 and any Board policy formulated in accordance with that law. That remains to be seen and is a question which is not now before this Court.

It is therefore the judgment of this Court that the Micronesia Board of Education Policy enunciated in # 73-2 is hereby declared to be null and void and of no legal effect and the defendant is permanently enjoined from removing plaintiffs from their positions in the Department of Education in reliance upon or using as authority for their removal, the Policy enunciated in # 73-2. No determination is made herein as to the propriety of the removal of the plaintiffs pursuant to any other provisions of law which may be applicable.