

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-444
)	
UNIVERSITY OF HAWAII)	ORDER NO. 1873
PROFESSIONAL ASSEMBLY,)	
)	ORDER GRANTING COMPLAIN-
Complainant,)	ANT'S CROSS-MOTION FOR
)	SUMMARY JUDGMENT
and)	
)	
KENNETH P. MORTIMER, President,)	
University of Hawaii, State of)	
Hawaii; DEAN O. SMITH, Senior)	
Vice President, Office of the)	
Senior Vice President and)	
Executive Vice Chancellor,)	
University of Hawaii, State of)	
Hawaii; SHARON Y. MIYASHIRO,)	
Assistant Vice President for)	
Academic Affairs, Office of the)	
Senior Vice President and)	
Executive Vice Chancellor,)	
University of Hawaii, State of)	
Hawaii; THOMAS T. BOPP,)	
Assistant Vice President for)	
Academic Affairs, Office of the)	
Senior Vice President and)	
Executive Vice Chancellor,)	
University of Hawaii, State of)	
Hawaii; DONALD C.W. KIM, Chair,)	
Board of Regents, University of)	
Hawaii; State of Hawaii; LILY K.)	
YAO, Regent, Board of Regents,)	
University of Hawaii, State of)	
Hawaii; and BOARD OF REGENTS,)	
University of Hawaii, State of)	
Hawaii,)	
)	
Respondents.)	

ORDER GRANTING COMPLAINANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

On January 3, 2000, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) filed a prohibited practice

complaint with the Hawaii Labor Relations Board (Board) against Respondents KENNETH P. MORTIMER, President of the University of Hawaii, State of Hawaii; DEAN O. SMITH, Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii; SHARON Y. MIYASHIRO, Assistant Vice President for Academic Affairs, Office of the Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii; THOMAS T. BOPP, Assistant Vice President for Academic Affairs, Office of the Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii; DONALD C.W. KIM, Chair, Board of Regents, University of Hawaii, State of Hawaii; LILY K. YAO, Regent, Board of Regents, University of Hawaii, State of Hawaii; and BOARD OF REGENTS, University of Hawaii, State of Hawaii (collectively Respondents).

Complainant alleged that the Respondents refused to fully implement the decision of Hearing Officer James B. Marsh in the case of Dr. Beei-Huan Chao (Chao) by failing to award backpay for the period July 1, 1999, through December 31, 1999, and to offer him a terminal year in the event that his application for tenure was not approved.¹ Thus, Complainant alleged that Respondents violated the Article XI of the collective bargaining agreement concerning tenure and service, and, therefore, violated § 89-13(a)(8), Hawaii Revised Statutes (HRS).

On February 9, 2000, Respondents filed a motion for judgment on the pleadings or, in the alternative, motion for

¹On March 1, 2000, UHPA withdrew its demand that Respondents grant Dr. Chao a terminal year commencing July 1, 2000, and ending June 30, 2001, in the event he is denied tenure.

summary judgment. Respondents argued that the contract does not authorize the Hearing Officer to award backpay and that the concept of pay is severable from probationary credit. Complainant filed an opposition to this motion on February 25, 2000.

On February 16, 2000, Complainant filed a motion to continue the hearing date with the Board. Thereafter, on February 17, 2000, the Board issued Order No. 1839 granting said motion.

On February 18, 2000, the Complainant filed a cross-motion for summary judgment. Complainant asserted that the Respondents failed to comply with the Hearing Officer's award by refusing to grant backpay for the period July 1, 1999 to December 31, 1999. Respondents' opposition was filed on February 25, 2000.

On March 1 and 3, 2000, the Board conducted a hearing on the dispositive motions. Both parties were afforded full opportunity to present evidence and argument before the Board.

On April 24, 2000, the Board issued Order No. 1853 directing Complainant to file a proposed order reflecting the Board's ruling in this case.² Complainant filed its proposed order with the Board on May 15, 2000. On May 18, 2000, the Respondents filed their objections and proposed order with the Board.

²In Order No. 1853 the Board found, inter alia, that the Respondents' refusal to award Dr. Chao backpay violated §§ 89-13(a)(5) and (8), HRS. While arguably noncompliance with an arbitration award or the Hearing Officer's decision and award may constitute a refusal to bargain in good faith, UHPA did not allege a violation of § 89-13(a)(5), HRS, in its complaint. Thus, the inclusion of the (a)(5) violation in the Board's Order is a typographical error and hereby withdrawn as grounds for finding that the Respondents committed a prohibited practice in this case.

Based on a thorough review of the record and the written submissions of the parties and having considered the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.³

FINDINGS OF FACT

The UHPA is the exclusive representative, as defined in § 89-2, HRS, of faculty in bargaining unit 07.

KENNETH P. MORTIMER is the President of the University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

DEAN O. SMITH is the Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

SHARON Y. MIYASHIRO is Assistant Vice President for Academic Affairs, University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

THOMAS T. BOPP is Assistant Vice President for Academic Affairs, University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

DONALD C.W. KIM is the Chair of the Board of Regents, University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

³After considering Complainant's proposed order and Respondents' objections and proposed order, the Board has adopted those findings of fact and conclusions of law which support its decision in this case and has modified the proposed order submitted by Complainant accordingly.

LILY K. YAO is a member of the Board of Regents, University of Hawaii, State of Hawaii and a representative of a public employer, as defined in § 89-2, HRS.

BOARD OF REGENTS, University of Hawaii, State of Hawaii is a public employer, as defined in § 89-2, HRS, of employees included in bargaining unit 07.

The UHPA and the Employer are parties to a collective bargaining agreement (contract) for the period July 1, 1995 to June 30, 1999.

This matter arises out of the UHPA's appeal of the Employer's April 13, 1999 decision to deny tenure to Dr. Chao. Dr. Chao's employment was terminated on June 30, 1999 as a result of the tenure denial. UHPA appealed the Employer's decision to a hearing officer pursuant to the terms in Article XI of the contract. When the Respondents refused to meet with UHPA to select a hearing officer, UHPA grieved the matter on May 13, 1999. On September 14, 1999, an Arbitrator ordered the Employer to meet with the Union to select a hearing officer. Thereafter, the parties selected James B. Marsh (Marsh) to serve as Hearing Officer.

Marsh conducted a hearing of the matter and made a determination pursuant to Article XI, § L.8.a., of the contract, which provides in relevant part:

If the Hearing Officer determines that the provisions of this Agreement or the supplemental guidelines and procedures which form the basis of the appeal were violated in a significant manner, and further finds that there was a reasonable probability that such violation of procedure in the evaluation process adversely prejudiced the decision complained of, the Hearing Officer shall:

* * *

- 3) direct that the probationary period be extended for an additional year, notwithstanding the limitations in Article XI, and the Faculty Member be permitted to submit a new application for tenure.

Marsh found a violation of § L.8.a and awarded Dr. Chao an extension of his probationary period and permission to submit a new tenure application by the Decision and Award dated December 2, 1999.

Thereafter, the Respondents extended Dr. Chao's probationary period for an additional year retroactive to July 1, 1999. Dr. Chao was paid accrued summer pay during the month of July 1999 for services previously performed. However, for the period August 1, 1999 to December 31, 1999, Respondents placed Dr. Chao on leave without pay. The Respondents refused to pay Dr. Chao for said period on the grounds that he did not provide any services to the Employer. Dr. Chao was reinstated with pay from January 1, 2000 and given assignments for the 2000 Spring Semester. Subsequently, Marsh issued memoranda of December 13 and 21, 1999, clarifying that Dr. Chao should be reinstated retroactive to July 1, 1999, with pay.

The contract provides that the decision of the Hearing Officer is final and binding on the parties. Article XI, § L.8.c. of the contract further states that the decision of the Hearing Officer shall not be subject to the grievance procedure. Article XI, § L.8.c. provides:

- c. Neither the procedures nor the decisions arising out of Section L.8.a. and b., Negative Tenure Actions, shall be subject to further

review under Article XXIII, Grievance Procedures.

Under this provision the Hearing Officer's award is final and binding and may not be reviewed pursuant to the contractual grievance procedure. Thus, it is unlikely that UHPA could grieve the Respondents' refusal to award backpay.

DISCUSSION

Complainant asserts that the Respondents breached the terms of a contract when it refused to fully implement the Hearing Officer's decision. Complainant argues that since the Hearing Officer found that the Employer's procedural violation adversely prejudiced the April 13, 1999, decision to deny tenure to Dr. Chao, the Employer's April 13 denial of tenure was nullified. The improper denial of tenure resulted in Dr. Chao's termination on June 30, 1999. The contract provides that where a proper denial of tenure is not given in writing by June 30, a faculty member is entitled to an extension of his probationary service with the option of reapplying for tenure during that year. But for the improper denial of tenure, Dr. Chao's employment with the University would have continued through the 1999-2000 academic year. Therefore, the refusal of Respondents to pay Dr. Chao his appropriate salary for the period July 1, 1999, through December 31, 1999, constitutes a refusal to extend the probationary period pursuant to the Hearing Officer's Decision and Award. The Respondents' failure to comply with the Hearing Officer's final and binding Award is a violation of the contract. Consequently, the Respondents violated § 89-13(a)(8), HRS.

Section 89-13, HRS, refers to prohibited practices, and provides in pertinent part:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(8) Violate the terms of a collective bargaining agreement; . . .

The Respondents contend that the Hearing Officer does not have authority to award backpay to the faculty member. Respondents argue that the contract restricts the Hearing Officer's decisional authority only to the matters specifically covered in the following subparagraphs of Article XI, § L.8.a.:

1) direct that the application dossier be reconsidered; may direct that the reconsideration process commence at any of the levels of review, or that any intervening level of review up to the Chancellor or appropriate Vice President be omitted; and may also direct that any improper material which has prejudiced the decision be expunged from the dossier; and/or

2) direct that a new TPRC be appointed in accordance with the provisions of this Agreement; or

3) direct that the probationary period be extended for an additional year, notwithstanding the limitations in Article XI, and the Faculty Member be permitted to submit a new application for tenure.

Respondents argue that the scope of the Hearing Officer's authority with respect to the actions at issue was to "direct that the probationary period be extended for an additional year" under subparagraph 3. Since the Hearing Officer, by the operation of Article XI, had no authority to address backpay, the Respondents contend that they are under no obligation to award backpay to Chao.

Further, Article XI severs the link between the concept of pay and probationary period by specifically authorizing periods of leave without pay to be credited towards the probationary period. Also, the Respondents assert management rights in refusing to award backpay to Dr. Chao because he did not provide any services during the period at issue.

In State of Hawaii Organization of Police Officers, 5 HLRB 597 (1996), the Board retained jurisdiction over a dispute arising from a specific contractual violation pursuant to § 89-13(a)(8), HRS. The Board held that its determination of jurisdiction would be made on a case-by-case basis. In this case, the Board shall exercise its jurisdiction over this complaint because of the final and binding nature of the Hearing Officer's Award, the specific exclusion of the subject matter from further pursuit through the grievance procedure, and because the alleged noncompliance with the award necessarily implicates Respondents' noncompliance with the procedures agreed upon between the parties to resolve disputes over adverse tenure decisions.

The Board finds that Respondents initially denied Dr. Chao's tenure and subsequently terminated him on June 30, 1999. Respondents thereafter denied the review of the negative tenure decision by a second Hearings Officer and an Arbitrator ruled that Respondents' denial violated the contract. The matter was submitted to Hearing Officer Marsh pursuant to the contract who reviewed the tenure denial and directed the Respondents to extend Dr. Chao's probationary period for an additional year commencing July 1, 1999 and permit him to submit a new application for tenure.

In reaching this conclusion, Marsh found, inter alia, that the provisions of the collective bargaining agreement or the supplemental guidelines and procedures were violated in a significant manner and further, there was a reasonable probability that such violation of procedure in the evaluation process adversely prejudiced the decision complained of. Marsh's decision was issued on December 2, 1999. Marsh later clarified that he intended that Dr. Chao be reinstated with backpay. Respondents however, reinstated Dr. Chao and placed him on leave without pay from August 1, 1999 through December 31, 1999 and returned him to duty with pay beginning on January 1, 2000. Dr. Chao was retained on the University payroll during the month of July 1999 to compensate him for earned summer prorata pay.

According to the contract, the Hearing Officer's decision is final and binding on the parties. While the Respondents interpret the Hearing Officer's remedial authority as limited literally to the specific remedies in the contract, the Board believes that absent clear limiting contractual language, inherent in the Hearing Officer's power to find the contract or guideline violation and provide a remedy to the faculty member who has been prejudiced by the employer's breach is the specific remedial authority to extend the faculty member's probationary period and impliedly, to rescind his termination and award backpay for the faculty member for his wrongful termination. The Board appreciates the Respondents' argument that they are reluctant to pay Dr. Chao because he did not perform the services during the period at issue but their decision not to grant Dr. Chao tenure was found to be

improper and Dr. Chao was terminated pursuant to that improper decision.

In this regard the Board finds based on the record that Respondents intentionally refused to award backpay to Dr. Chao pursuant to the Hearing Officer's decision even after receiving clarification from the Hearing Officer that such an award was intended. Respondents reinstated Dr. Chao and consciously placed him on leave without pay status. The Board concludes that Respondents' reinstatement of Dr. Chao to January 1, 2000 is contrary to the Hearing Officer's award and constitutes a wilful violation of § 89-13(a)(8), HRS.

The Board concludes based upon the record that there are no genuine issues of material fact presented and Complainant is entitled to judgment as a matter of law.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to §§ 89-5 and 89-13, HRS.

The Board finds based on the record that there are no genuine issues of material fact presented and Complainant is entitled to judgment as a matter of law.

An Employer commits a prohibited practice in violation of § 89-13(a)(5), HRS, when it refuses to bargain in good faith with the union.

An Employer commits a prohibited practice in violation of § 89-13(a)(8), HRS, when it violates the terms of a collective bargaining agreement.

The Respondents wilfully breached Article XI, § L.8.a. of the contract by refusing to comply with the Hearings Officer's award to retroactively reinstate Dr. Chao to his position with backpay. The Respondents' failure to award backpay constitutes a violation of § 89-13(a)(8), HRS.

ORDER

Based on the foregoing, the Board orders the following:

(1) The Employer shall award Dr. Chao backpay for the period August 1, 1999 through December 31, 1999, less any unemployment benefits received;

(2) The Employer shall, within thirty (30) days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where Unit 07 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting; and

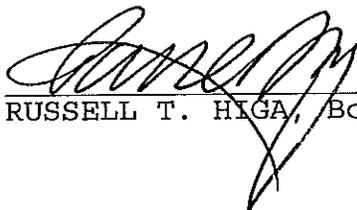
(3) The Employer shall notify the Board within thirty (30) days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, May 31, 2000 .

HAWAII LABOR RELATIONS BOARD

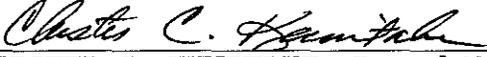


BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY and KENNETH P. MORTIMER,
President, University of Hawaii, State of Hawaii; et al.
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CHESTER C. KUNITAKE, Board Member

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