

In the Matter of )  
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BOARD OF REGENTS, University ) Case No. CU-07-17  
of Hawaii, )  
 )  
Complainant, ) Decision No. 100  
 )  
and )  
 )  
UNIVERSITY OF HAWAII )  
PROFESSIONAL ASSEMBLY, )  
 )  
Respondent. )  
 )

On March 21, 1977, the University of Hawaii Board of Regents (hereafter BOR) filed a prohibited practice charge against the University of Hawaii Professional Assembly (hereafter UHPA).

The BOR charged that a memo written by the UHPA president to the members of Unit 7 (faculty of the University of Hawaii and the community college system) constituted a prohibited practice. The charge alleged that the memo:

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(2) violated Subsection 89-13(b)(5), HRS, (violation of collective bargaining agreement) by advising faculty that MQs can be disregarded.

On March 31, 1977, UHPA filed its answer affirmatively alleging that the Hawaii Public Employment Relations Board (hereafter HPERB or Board) did not have subject matter jurisdiction and that the matter should be deferred to arbitration.

Hearings in this case were held on April 22, 1977, May 6, 1977, May 16, 1977, June 30, 1977, April 25, 1978, and May 12, 1978. A post-hearing brief was filed by the BOR on November 8, 1978.

Based upon the entire record herein, the following findings of fact, conclusions of law, and order are made.

#### FINDINGS OF FACT

Petitioner BOR is the public employer, under Subsection 89-2(9), HRS, of the employees of Unit 7.

Respondent UHPA is an employee organization within the definition set out in Subsection 89-2(8), HRS. UHPA was and is, at all times relevant, the certified exclusive representative of all employees in bargaining unit 7 (faculty of the University of Hawaii and the community college system) as defined by Subsection 89-6(a)(7), HRS.

UHPA President Helen Yamada wrote the memo upon which this complaint focuses.

In the Unit 7 contract for the period from March, 1975 to June, 1977, UHPA and the BOR agreed upon the following article:

## ARTICLE V, PROMOTION

### A. Criteria for Promotion.

Criteria for promotion shall relate to the candidate's accomplishments in teaching, research and community service if he is in an instructional category, or other appropriate activities for those Faculty not engaged in instruction. Criteria shall be established in writing, and be made available to the Faculty concerned. (Emphasis added)

Pursuant to this contractual provision, departmental criteria for promotion were developed. The following was the process by which the departmental criteria were proposed and adopted:

The Departmental Chairman or a departmental committee drafted a statement which went through the Chancellor's Office to the subcommittee of the Council of Academic Deans. (The Chancellor has delegated his authority to validate the criteria to this subcommittee.) The subcommittee reviewed the statement and then sent it back to the department.

UHPA has continuously maintained the position that departmental criteria are the controlling criteria in determining whether a candidate should be promoted. Essentially, departmental criteria allow a promotion in the specialist category without a doctorate where training is equivalent to that represented by a doctorate. (Tr. 2 at 122)

The BOR acknowledges that departmental criteria were developed with the sanction of the University Chancellor, but maintains that the minimum qualification (MQ) requirements contained in the Faculty Handbook govern promotions and that these MQs cannot be replaced or superseded by the departmental criteria. (Tr. 2 at 110-112) Essentially, MQs require doctorate or masters degree for promotion to certain classifications.



The present dispute arose from the application of Faculty Handbook MQs to several faculty members who, because they did not meet the educational MQs, were denied promotion. Those candidates had received faculty recommendations based upon departmental criteria but did not meet the MQ requirements as specified in part 3 of the Faculty Handbook.

On the basis of the denial of promotions to these candidates, UHPA filed a class action grievance with the BOR.\* Pending the grievance procedure, UHPA's Board of Directors discussed and decided to give guidance to faculty members in conducting the promotion review process. The Helen Yamada memo to the members of Unit 7 was the result of the UHPA Board's discussion and was also in response to faculty requests for guidance.

The memo, written on November 1, 1976, states in pertinent part:

"Until this dispute [referring to the above-mentioned grievance procedure] is settled, UHPA's stand is that only the established departmental criteria apply. . . . What should Personnel Committees and Chairpersons do to insure that the best interests of faculty are protected? . . . the following is suggested:

1. Proceed by applying the validated departmental criteria, and write a recommendation with supporting statements. Next, consider the minimum qualifications. . . .
2. Where the application of the minimum qualifications is to the disadvantage of the candidate, a separate statement on why the minimum qualifications should not be pertinent to the particular case, should be added. . . ."  
(Emphasis added)

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\*Several of the candidates are presently going through individual arbitration proceedings concerning whether MQs should or should not be waived in their cases.

The memo was written in the context of an ongoing dispute between the union and employer over the applicability of the MQs. The Helen Yamada memo merely made suggestions to the faculty members regarding MQs and promotion recommendations.

BOR claimed that memo influenced faculty members in their recommendations. However, the evidence BOR presented is insufficient to buttress this claim.\*

#### CONCLUSIONS OF LAW

This case presents the question of whether, under the above facts, a union can be held to have violated Subsection 89-9(d), HRS, and the Unit 7 collective bargaining agreement because the union president wrote a memo to unit members.

During the dispute between the BOR and UHPA over whether MQ requirements should supersede all other criteria in determining promotions, Helen Yamada wrote a memo to the Unit 7 members. The memo advised the faculty members to apply only departmental criteria. In addition, it also suggested that faculty recommendations should discuss why MQ requirements should not be applied where application of the MQs would be to a candidate's disadvantage.

This case requires the Board to determine whether the writing of that memo and the application of the memo's suggestions constitute a prohibited practice under Subsection

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\*The evidence presented was not convincing, particularly in view of the fact that prior to the writing of the Helen Yamada memo, several candidates were promoted and approved by the Chancellor without meeting the MQ doctorate requirements. (Tr. 3 at 78, Tr. 4 at 3-9)



89-13(b)(4) and (5), HRS. These Subsections provide, in pertinent part:

(b) It shall be a prohibited practice for public employees or for an employee organization or its designated agent wilfully to:

\* \* \*

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement. . . .

Under 89-13(b)(4), HRS, it would be a prohibited practice for UHPA to wilfully refuse or fail to comply with any provisions of Chapter 89, HRS. The BOR contends that the Helen Yamada memo violated 89-13(b)(4) because it induced faculty members not to apply MQs and thereby to violate Subsection 89-9(d), HRS, and that the memo itself violated 89-9(d).

Under Subsection 89-9(d), matters of classification and reclassification are excluded subjects of negotiations.\* In Decision 97, In the Matter of University of Hawaii Professional Assembly and Board of Regents, University of Hawaii, Case Nos. CE-07-38, CE-07-39, MQs were viewed as part of the classification scheme. In that decision, the Board stated:

"The classification of faculty which the BOR does pursuant to the authority expressly conferred upon it by Section 304-13, HRS, is, in

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\* The subsection, in relevant part, provides:

89-9(d) "Excluded from the subjects of negotiations are matters of classification and reclassification, . . .

The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, . . ."

our opinion, removed by Section 89-9(d), HRS, from the scope of negotiations because it is a 'matter of classification.' The statutory intent clearly is to remove from negotiations for all public employees the subjects of classification and reclassification. . . . The University's plans would classify unit 7 members based upon their duties and responsibilities, and according to the kind, level, and qualifications of their work, . . . . Accordingly, they concern matters of classification and as such may not be the subject of negotiations."

The first portion of 89-9(d) excludes MQs from being subject to negotiations. In the present case, the memo was written pursuant to a grievance procedure. Negotiations were not contemplated at that point. The memo and its suggestions to the faculty members regarding MQs were several steps removed from the sphere of negotiations.

Assuming arguendo that faculty members followed the memo's suggestions and did not apply MQ requirements, the faculty could not have violated 89-9(d) as their actions (recommendations) were not within the ambit of negotiations.

In addition, under Subsection 89-9(d), HRS, the BOR and UHPA may not agree to any proposal which would interfere with the BOR's right to determine qualifications and to promote personnel. The memo does not constitute an agreement on a proposal between the BOR and UHPA. If anything, it reflects the continuing disagreements between UHPA and the BOR over promotion criteria.

Since Subsection 89-9(d), HRS, deals only with excluding certain subjects, including classification schemes, from the scope of permissible topics for negotiations and prohibits agreement on proposals which would interfere with the BOR's right to promote and determine qualifications, the Helen Yamada memo, which merely was an expression of the



union's point of view in an ongoing controversy, could not violate Subsection 89-9(d), HRS.

Also, because the faculty members neither negotiated nor agreed to a proposal that interfered with BOR's rights, the faculty members also could not have violated 89-9(d) by following the suggestions in the Helen Yamada memo.

Significantly, as to the charge of violating Subsection 89-9(d), HRS, the memo and circumstances surrounding its writing show that neither UHPA nor Helen Yamada nor the faculty members had any intent to wilfully refuse or fail to comply with that subsection or any other part of Chapter 89, HRS.

UHPA is prohibited, by Subsection 89-13(b)(5), HRS, from wilfully violating the terms of the collective bargaining agreement. The Unit 7 contract states that "criteria for promotion shall relate to the candidate's accomplishments. . .[and] shall be established in writing. . ." It is difficult to understand how the act of writing a memo can be regarded as violating this provision, and the Board hereby rules that it did not.

During the hearings herein, the UHPA attorney raised a procedural question as to whether the Board had subject matter jurisdiction where unit members are currently in arbitration proceedings on the same subject (promotions and application of MQs). His motion was premised upon Judge Kawakami's decision in Civil Nos. 44559, 44563 and 44580, which stated in pertinent part:

" . . .the Board lacked the authority and jurisdiction to issue a declaratory ruling on the matter which was pending arbitration. . ." Frank Fasi v. HPERB, HGEA v. HPERB, HSTA v. Frank Fasi. (This ruling is currently being appealed. See S. Ct. No. 6119.) (Emphasis added)



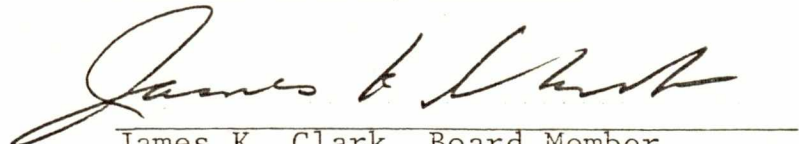
The present case is a prohibited practice proceeding, not a declaratory ruling case. Therefore, Judge Kawakami's ruling does not apply to it.

ORDER

For reasons cited in the opinion above, the prohibited practice charges brought by the Board of Regents of the University of Hawaii in Case No. CU-07-17 are dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
James K. Clark, Board Member

  
John E. Milligan, Board Member

Dated: February 8, 1979

Honolulu, Hawaii