Dec. File

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, Respondent.	)	Case No. CE-07-62 Decision No. 138

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 28, 1980 the University of Hawaii Professional Assembly (hereafter UHPA) filed with this Board a prohibited practice complaint against the Board of Regents, University of Hawaii (hereafter BOR or the University).

UHPA charged BOR with committing prohibited practices under HRS §§89-13(a)(1), (5) and (8) by inserting qualifications to the implementation of a panel of referees as provided for in the collective bargaining agreement of the parties.

In its Answer and Counterclaim Respondent BOR denied Complainant's charges and counterclaimed that UHPA was engaged in prohibited practices under HRS §§89-13(b)(2) and (5) by failing to execute the steps necessary for the implementation of said panel of referees.

On July 10, 1980 the Board conducted a hearing in this matter. The parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments. The parties submitted post-hearing memoranda on August 1, 1980.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant UHPA is, and was at all times relevant, the certified exclusive representative, as defined in HRS §89-2(10), for all employees in bargaining unit 7 (faculty of the University of Hawaii and the community college system).

Respondent BOR is the public employer, as defined in HRS §89-2(9), of the employees in Unit 7.

UHPA and BOR are parties to the Unit 7 collective bargaining agreement in effect from July 1, 1979 through June 30, 1981.

The instant dispute focuses on the following provisions of Article V, Promotion, of the collective bargaining agreement:

> 1. PANEL OF REFEREES
>
> Referees shall be utilized to assist in expediting the consideration of allegations of procedural violations in situations in which the TPRC[1] has recommended against promotion and the Chancellor has decided against promotion.
>
> A panel shall consist of five (5) referees to be jointly selected by the President of the University or his designee and the President of the Assembly or a senior Faculty Member designated by him, for each of the two (2) years of this Agreement.
>
> The referees shall be selected from among persons with experience in and knowledge of the University. These persons may be from within or without the University.
>
> Assignment of a referee to review a given case shall be by rotation, and the next

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[1]Tenure and Promotion Review Committee.

available referee shall be requested by the Chancellor to review the case.

* * *

K. CONFIDENTIALITY OF PROCEEDINGS

The integrity and confidential nature of the promotion evaluation process shall be maintained. Other than for the personal examination of the dossier, meetings as provided for in this Article, and the submission of materials as provided for in this Article, the Applicant shall not otherwise attempt to influence or communicate with persons engaged in the evaluation and review process.

The panel of referees was one of several procedures created to replace the grievance and arbitration process in disputes concerning promotion. The referee's function was designed to take the place of the arbitrator in matters concerning procedural violations in the promotional process. Tr. 11, 12.

UHPA members ratified the collective bargaining agreement on October 31, 1979. Tr. 13.

By letter dated November 8, 1979 to University of Hawaii President Fujio Matsuda, UHPA President Robert Alan Fox discussed the appointment of four panels or committees established by the bargaining agreement, among them the panel of referees, and suggested a meeting to exchange views on panel candidates. Bd. Ex. 1-A.

A meeting was subsequently held between Dr. Fox, Dr. Matsuda, Peter Dobson, a University vice-president, Harold Masumoto, the University's vice-president for administration (Tr. 50), and Kenneth Lau, who served as a consultant to the University administration during the formation of the contract (Tr. 73). According to testimony by Dr. Fox, Dr. Matsuda indicated at that meeting that he

was assigning Mr. Masumoto to handle the matter of referees. Tr. 14.

By March 1980 a list of five names for the panel of referees was agreed upon between Dr. Fox, Mr. Masumoto, and Dr. Lau. Tr. 16.

On March 28, 1980 Dr. Fox wrote the following letter to Mr. Masumoto (Bd. Ex. 1-E):

> This letter invites your confirmation of our understanding regarding communication with members (and potential members) of the Panel of Referees described in Article V of the 1979-81 UHPA/UH Agreement.
>
> Once an individual has been invited to join the Panel of Referees, neither UHPA nor the UH Administration will communicate with the individual on matters relating to service on the Panel (duties and responsibilities of Referees, interpretation of the Agreement or the promotion criteria or guidelines, etc. . . .) save in joint memoranda, except for:
>
> 1. The Chancellor's request for a review by the Referee (see the last paragraph of Article V-I and the first paragraph of Article V-J2). It is, of course, expected that the Chancellor will notify the Assembly when such a request if [sic] formally made.
>
> 2. The report from the Referee to the Chancellor (see Article V-J2).
>
> 3. The Referee's interview of "the Applicant and any person who had an official role in the evaluation process" (see Article V-J3).

Also on March 28, 1980 Dr. Fox sent a memorandum to Mr. Masumoto returning the latter's draft, with minor changes, of a memorandum of invitation to be sent to the five potential members of the panel of referees, and requesting a final copy prepared for signature. (Bd. Ex. 1-F)

On April 7, 1980 Mr. Masumoto wrote the following, in pertinent part, to Dr. Fox (Bd. Ex. 1-G):

This is in response to your memorandum of March 28, 1980 regarding communication with members and potential members of the Panel of Referees described in Article V of the 1979-81 UHPA/UH Agreement.

We concur with your suggestion that once an individual has agreed to serve on the Panel of Referees neither UHPA nor the administration should communicate with the individual on matters relating to service on the Panel (duties and responsibilities of Referees, interpretation of the Agreement or the joint promotion criteria or guidelines, etc. . . .) except through joint memoranda, or in the following situations:

1. The Chancellor's request for a review by the Referee (see the last paragraph of Article V-I and the first paragraph of Article V-J2). However, it is expected that the Chancellor will notify the Assembly when such a request is formally made.

2. Communication regarding administrative matters, e.g. meeting rooms, dates, etc., by the party responsible for providing administrative support to the Referees.

3. The report from the Referee to the Chancellor (see Article V-J2).

4. The Referee's interview of "the Applicant and any person who had an official role in the evaluation process" (see Article V-J3).

On April 11, 1980 Dr. Fox responded to Mr. Masumoto, in pertinent part, as follows (Bd. Ex. 1-H):

I have compared my memorandum to you (dated March 28, 1980) and your memorandum to me (dated April 7, 1980) on the above subject. It appears that, for the most part, we are in agreement. Your addition of a statement concerning communication regarding administrative matters, etc., is well taken and we are pleased to include it.

In our original memorandum we indicated that this understanding would take effect "once an individual has been invited to join the Panel of Referees". We note that <u>your</u> memorandum contains the phrase, "once an individual has <u>agreed to serve</u> on the Panel of Referees." If this difference in language suggests that the University intends to make unilateral representations to potential referees between the time that they have been invited to serve

and the time that they agreed to serve, then the Assembly must demur.

Rather than risk any misunderstanding, I am enclosing a formal statement which synthesizes our two memoranda and which, I hope, is acceptable to both parties. If that is correct, please sign a copy and send it back to us at your earliest convenience. (Emphasis added)

The "formal statement" Dr. Fox enclosed read as follows (Bd. Ex. 1-I):

COMMUNICATION WITH PANEL OF REFEREES

The Assembly and the UH Administration jointly agree that once an individual has been invited to serve on the Panel of Referees neither UHPA nor the Administration should communicate with the individual on matters relating to service on the Panel (duties and responsibilities of Referees, interpretation of the Agreement, or the promotion criteria or guidelines, etc. . . .) except through joint memoranda, or in the following situations; [sic]

1. The chancellor's request for a review by the Referee (see the last paragraph of Article V-I and the first paragraph of Article V-J2). However, it is expected that the chancellor will notify the Assembly when such a request is formally made.

2. Communication regarding administrative matters, e.g. meeting rooms, dates, etc., by the party responsible for providing administrative support to the Referee.

3. The report from the Referee to the chancellor (see Article V-J2).

4. The Referee's interview of "the Applicant and any person who had an official role in the evaluation process" (see Article V-J3).

/s/ R. Alan Fox — 4/11/80
FOR THE ASSEMBLY: — (Date)

_____ — _____
FOR THE UH ADMINISTRATION: — (Date)

By letter dated May 14, 1980 Dr. Fox wrote to Dr. Lau, in pertinent part, as follows (Bd. Ex. 1-K):

> A review of our (enclosed) exchange of correspondence on this matter and of the one meeting and two telephone calls which you and I have had suggests to us that it is your intention to continue to insist upon your right to confer privately with candidates for the Panel of Referees, at least during the time between their invitation to membership and their formal acceptance. During the course of our discussions, you have, variously, (a) asserted your right to share with Referees your unilateral and private view of their roles, (b) refused to sign any written understanding that might "tie you down", (c) indicated that, under no circumstances, would you agree to limit your conversation with Referees who were "old acquaintances" of yours, and (d) refused our suggestion that, in the interest of avoiding any possible misunderstanding or embarrassment, we jointly include a paragraph in our letter of invitation indicating our concern for the integrity of the process and requesting that invitees refrain from unilateral communication until the orientation meeting which both parties have agreed is the logical step following the invitation.
>
> The Assembly cannot understand your reluctance to enter into an agreement which, in our opinion, is absolutely inseparable from the good faith implementation of Article V-I. . . .
>
> In view of the fact that the personnel evaluation process is rapidly reaching the level at which Referees might be required (if, in fact, they are not already so required), we request your response by Monday, May 19, 1980 so that we may either jointly proceed with the process of selecting Referees consistent with the spirit in which they were created or seek external means whereby the implementation of both the letter and the spirit of our collective bargaining agreement can be accomplished.

* * *

By memorandum dated May 20, 1980 Mr. Masumoto forwarded to Dr. Fox, incorporating the latter's changes, final letters of invitation to the panel candidates, signed by Dr. Matsuda, for Dr. Fox to sign and forward to the candidates. Bd. Ex. 9-B, 9-C.

Dr. Fox's recollection was that he received said memorandum and attached letters one day after the instant

prohibited practice complaint was filed on May 28, 1980. Tr. 29, 30.

CONCLUSIONS OF LAW

Complainant filed the instant complaint alleging that Respondent is engaged in prohibited practices under HRS §§89-13(a)(1) and (8) which provide:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> > (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
> >
> > * * *
> >
> > (8) Violate the terms of a collective bargaining agreement.

The specific action complained of is Respondent's refusal to sign the statement of agreement prepared by Complainant which would bar private communications concerning service on the panel of referees with an individual who has been invited to serve on such panel.

Respondent counterclaimed that Complainant is engaged in prohibited practices under HRS §§89-13(b)(2) and (5) which provide:

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agency wilfully to:
>
> > (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required by section 89-9;
> >
> > * * *
> >
> > (5) Violate the terms of a collective bargaining agreement.

Respondent alleges that Complainant is engaged in the foregoing prohibited practices by (1) attempting to modify the collective bargaining agreement by imposing the above-stated condition of barring private communications with potential referees, and (2) by refusing to complete the last step in implementing the panel of referees--the signing of letters of invitation to potential referees--until said condition is agreed to by Respondent.

The Board agrees with Respondent as to both charges. The record before us presents no basis for Complainant's insistence on its condition for the panel's implementation nor for its resultant refusal to sign the letters of invitation. The Board finds that Complainant's actions constitute prohibited practices under HRS §§89-13(b)(2) and (5).

Article XVI, Entirety and Modification, of the bargaining contract states:

> This document contains the entire Agreement of the parties. No provision or term of this Agreement may be amended, modified, changed, altered, or waived, except by written document executed by the parties hereto.

Insofar as duties of UHPA and the University are set forth for the implementation of the panel, the contract requires only that the parties jointly select five referees. The joint selection having been accomplished in March 1980, the next logical step would be to invite the selected individuals to serve on the panel.

In Hawaii State Teachers Association v. Hawaii Public Employment Relations Board and Board of Education of the State of Hawaii, 60 Haw. 361 (1979), the Hawaii Supreme Court was faced with a question of contract interpretation similar to the matter before us. There the issue

involved a strike settlement agreement, concluding a teachers' strike, which contained the following provision:

> There shall be no discrimination of any kind by any of the parties against any participants or non-participants in the strike.

The Hawaii State Teachers Association (HSTA) contended that the application of the Board of Education's seniority credit computation formula to the striking teachers was discriminatory and therefore violative of the strike settlement agreement and of HRS §89-13(a)(8). The Court disagreed, stating:

> Strike settlement agreements are to be construed and enforced in accordance with contract law [cit. omitted], and the interpretation of the terms of the agreement, like other forms of contract, depends on the intent of the parties. [Cits. omitted.] Nothing in the agreement indicated the specific type of conduct which the nondiscrimination clause was intended to prohibit. It simply stated that there shall be "no discrimination of any kind by any of the parties against any participants or non-participants in the strike."
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> Thus, the intent of the parties became a question of fact to be resolved by the factfinder, and HSTA had the burden of proving that what was intended by the parties was its claimed version of the agreement. [Cits. omitted.] In HPERB's view, HSTA had failed to carry its burden, and the Board specifically found:
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> > "There was no evidence or testimony presented that the matter of seniority was discussed, or even thought about, by the parties when the nondiscrimination clause was included in the strike-settlement agreement."
>
> HPERB then went on to conclude that "the Board is of the opinion that the matter of withholding or granting service credit for the period of the strike was not covered by the nondiscrimination clause." (Footnote omitted.)
>
> Where reasonable minds may fairly differ as to whether certain evidence establishes a fact in issue, the factfinder is free to select that interpretation of the evidence which,

> in its sound judgment, most reasonably reflects the intent of the parties. 60 Haw. at 367-68.

While the factual context in the HSTA case above differs from the case before us, the Board finds the Court's rationale therein applicable to the interpretation of the agreement at hand. Applying the above criteria to the instant case, therefore, the Board must determine the intent of the parties as a question of fact, and whether Complainant, as the party seeking to enforce its view of an agreement, carried the burden of showing that what was intended by the parties was its claimed version of the agreement.

Complainant contends that its proposed condition is merely a memorialization of a previous understanding with the University, but Dr. Fox admitted that there was no explicit understanding to that effect.[2]

That UHPA's position is unilateral and not embodied in the contract as a mutual intent of the parties is also evidenced in the following excerpt from Dr. Fox's testimony relating to communications which took place after April 22, 1980:

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[2]Cross-examination of Dr. Fox by Respondent's attorney:

> Q. I'm just trying to get a good idea of what you are saying. Was it a real understanding; did one of the parties say, "It is our understanding that you are not going to communicate with these potential referees at the point where they are invited," and the other party says, "Yes, that is our understanding"?
>
> Was it that kind of understanding that you are referring to?
>
> A. I would not characterize it as that, explicitly. If it were that explicit, it would have been in the contract. Tr. 37-38.

> . . .I tried to indicate to (Dr. Lau) how integral we thought this was to the implementation of the contract and that we thought this really was quite important.
>
> Further, I tried to indicate to him that we could not understand what the problem was, and I urged him to use his good offices to bring about an agreement on this.
>
> Dr. Lau kept telling me how -- what a minor matter this was, and I kept telling him, "Well, if you guys think it is a minor matter, we kind of do, too, but it matters something to us, sign the darned thing."
>
> We were unable to reach agreement on the first telephone conversation, and we then had a meeting in my office attended just by Dr. Lau and myself, where we discussed at length, and the matter became more and more confused rather than more and more clear. Several times Dr. Lau indicated that he was not authorized to make any decisions, but rather that he had to convey this back to Mr. Masumoto.
>
> In other instances he indicated that there was perhaps no agreement, that it would ever be appropriate to bar communications with the referees; in other words, that even the partial agreement that Mr. Masumoto had signed, he wasn't sure, was still in existence.
>
> I told him at that meeting that I had discussed this matter with the people who had negotiated the contract and with my people in UHPA and that this was a matter of some concern to us and that between the two of us in a closed room I hoped very strongly that he could bring about a desirable outcome. Tr. 22-23.

The Board views the foregoing testimony as indicative of an attempt by Complainant to modify the collective bargaining agreement.

Complainant asserts that Respondent's refusal to agree to Complainant's conditional statement is violative of the spirit and intent of Article V-K of the agreement, Confidentiality of Proceedings, wherein the first sentence reads: "The integrity

and confidential nature of the promotion evaluation process shall be maintained." The Board finds no showing that Respondent intends to contravene the requirement of confidentiality. The Board views Respondent's refusal to sign Complainant's statement as merely an adherence to the express terms of the contract.

On another tack Complainant argues that since the referees are to substitute for arbitrators, it was assumed by the parties that the code of conduct applicable to arbitrators, encompassing impartiality and hence the barring of ex parte communications, would apply to the referees. Mr. Masumoto agreed with that assumption.[3]

No showing was made, however, that such mutual assumption of the parties implied a mutual intent to formalize the assumption as a prerequisite to the implementation of the panel of referees. Nothing in the contract indicates that the panel's implementation is conditioned on a collateral or supplementary agreement, and the Board finds no evidence in the record of such intent by the parties.

The Board holds that Complainant has not carried the burden of proving its claimed version of the bargaining agreement. We conclude therefore that, in attempting to modify the contract by imposing a unilateral condition and by refusing to sign the letters of invitation until Respondent agrees to said condition, Complainant is engaged in prohibited practices under HRS §89-13(b)(2) and (5).

In a footnote in its post-hearing memorandum, Complainant argues that Respondent's Counterclaim is improperly

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[3]Mr. Masumoto: ". . .we assumed the referee's conduct would be akin to the conduct of the arbitrators." Tr. 62.

before the Board as not being in compliance with Board Rule 3.02(b) which requires that a prohibited practice complaint be prepared on a form furnished by the Board. The Board agrees that Respondent's Counterclaim does not comply with Rule 3.02(b). However, as all other matters of due process were complied with--notice and hearing with full opportunity for presentation of evidence and cross-examination of witnesses--we do not believe that Complainant was prejudiced by the technicality complained of. In the future, however, since the Board does provide prohibited practice complaint forms, we advise that counterclaims be filed in compliance with Rule 3.02(b).

ORDER

Complainant is hereby directed to sign the letters of invitation to the individuals selected for the panel of referees. If no agreement can be reached as to the contents of the letters, the parties may come to the Board for a resolution thereof.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: October 14, 1980

Honolulu, Hawaii