

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-78
)	
UNIVERSITY OF HAWAII)	DECISION NO. 199
PROFESSIONAL ASSEMBLY)	
(UHPA),)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
Complainant,)	
)	
and)	
)	
BOARD OF REGENTS, UNIVERSITY)	
OF HAWAII,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On May 10, 1982, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY [hereinafter referred to as Complainant, Union or UHPA] filed a prohibited practice complaint with this Board against the BOARD OF REGENTS, UNIVERSITY OF HAWAII [hereinafter referred to as Employer or BOR].

UHPA alleged that the BOR unilaterally established and was currently implementing a workload policy on its various campuses which increased the average working hours of the faculty by one-third without a comparable increase in compensation or reduction in responsibilities.

UHPA also charged that the BOR unilaterally established and implemented a post-tenure review system which, in effect, modified or eliminated the tenure rights of faculty members as set forth in the collective bargaining agreement.

UHPA contends the unilateral implementation of these policies without negotiation constitutes prohibited practices.

A prehearing conference was conducted on June 7, 1982. After due notice, a hearing on the case commenced on June 28, 1982 and continued on June 29, 30, July 2, 13, 15, and 16, 1982. All parties were present and represented by legal counsel.

At the close of the hearing, both parties requested the opportunity to submit post-hearings briefs. UHPA submitted its Opening Brief on August 13, 1982; BOR submitted its Answering Brief on August 31, 1982; and UHPA filed its Reply Brief on September 10, 1982.

Based on the entire record and arguments, the Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

Complainant UHPA is and was, for all times relevant, the certified exclusive bargaining representative of the employees in Unit 07 (Faculty of the University of Hawaii and the community college system) as defined in Subsection 89-2(12), Hawaii Revised Statutes [hereinafter referred to as HRS].

Respondent BOR is and was, for all times relevant, the public employer within the meaning of Subsection 89-2(9), HRS, of the employees in Unit 07.

Complainant contends the adoption of both policies by the BOR without negotiation constitutes a prohibited practice under Subsections 89-13(a)(1), (2), (3), (5), and (8), HRS.

Complainant also contends the BOR violated Articles III A (Conditions of Service; Maintenance of Rights and Benefits), XIX E (Salaries; Overload), VIII A (Academic Freedom and Responsibility; Academic Freedom), IX (Tenure and Service) and XI (Promotion) of the 1981-1983 collective bargaining agreement between the UHPA and the BOR.

Respondent contends that BOR Policies 9-15 and 9-16 embody the exercise of the fundamental right of management to determine and carry out the mission of the University.

Policy 9-15, Evaluation of Board of Regents Appointees

On October 16, 1981, the BOR adopted a policy entitled Evaluation of Board of Regents Appointees [hereinafter referred to as Policy 9-15]. Comp. Ex. 11.

Policy 9-15 proposes that every faculty member be evaluated at least once every five years and provides an exemption for those faculty members who have undergone reappointment, tenure, promotion, and/or merit review within that time period.

Policy 9-15 reads as follows:

EVALUATION OF BOARD OF REGENTS' APPOINTEES

- a. Board of Regents' appointees will be evaluated periodically in accordance with the guidelines below and the specific procedures developed by the appropriate administrative offices to implement this policy. These performance evaluations shall be conducted in order
 - (1) to provide assurance to the University and its constituents that professional staff resources and particular areas of expertise are being used to the best advantage;

- (2) to provide for the systematic recognition of excellence and develop incentives for superior performance; and
 - (3) to provide means for the improvement of performance in furtherance of the University's mission.
- b. In recognition of the special role of the faculty in the academic mission of the University, procedures for periodic review of faculty performance must provide safeguards for academic freedom and shall provide the opportunity for participation of faculty peers in the review process. Accordingly, each Chancellor, in consultation with appropriate faculty governance organizations, shall develop procedures for such review which incorporate these principles. The procedure shall include a requirement for evaluation of every faculty member at least once every five years, and may provide for exempting faculty who have undergone a review for reappointment, tenure, or promotion, or who have received a merit salary increase during this period. Faculty review procedures shall be submitted by the Chancellor for approval by the President.
- c. Administrative, Professional, and Technical (APT) employees shall be evaluated at least once every three years according to procedures approved by the President.
- d. Employees in the Executive and Administrative/Managerial classification shall be evaluated annually as specified in Appendix 9-14.
- e. For any campus which does not have an approved faculty review procedure developed in accordance with section b. for implementation in academic year 1981-82, faculty shall be evaluated according to procedures approved by the President. These procedures shall remain in effect until procedures developed in accordance with section b. are approved and implemented.

By letter dated May 14, 1981, Harold S. Masumoto, Vice President for Administration [hereinafter referred to as Masumoto] transmitted the proposed evaluation policy to J. N. Musto, Executive Director of UHPA [hereinafter referred to as Musto]. The letter also stated that the policy would be transmitted to the BOR on or before June 5, 1981 and if UHPA wished consultation, it should notify Masumoto's office by May 20, 1981. Resp. Ex. 14.

By memorandum dated September 1, 1981, Masumoto transmitted the amended evaluation proposal to Robert Fox, President of UHPA. Resp. Ex. 15.

In a letter dated September 17, 1981, from Musto to Robert M. Fujimoto, Chairperson of the Board of Regents, Musto stated that UHPA was prepared to work with the BOR in the adoption and implementation of a policy concerning evaluation. However, it continued, should the BOR implement such a policy unilaterally, then UHPA would be "forced to take appropriate action." Resp. Ex. 16.

By letter dated September 22, 1981, Fujimoto responded to Musto's September 17, 1981 letter reiterating that the BOR welcomed the Union's cooperation in implementing the proposed policy and that the BOR would not be deterred from adopting what it believed to be in the best interests of the University. Resp. Ex. 17.

By letter dated January 13, 1982, Masumoto transmitted procedures for implementing Policy 9-15 in the community colleges. The letter also stated that UHPA should call Masumoto's

office as soon as possible if consultation was desired and that all consultation should be completed by January 31, 1982. Resp. Ex. 18.

By letter dated January 19, 1982, Musto conveyed to Masumoto that he thought negotiation rather than consultation was more appropriate with respect to the evaluation policy procedures. Resp. Ex. 19.

In a letter dated February 2, 1982 from Musto to Masumoto, Musto expressed a desire to meet with the administration to separate those matters which should be consulted on from those matters which required negotiation. Resp. Ex. 20.

By letter dated February 5, 1982, Peter N. Dobson, Acting Vice President for Academic Affairs [hereinafter referred to as Dobson] requested Musto contact his office to arrange a consultation meeting. Resp. Ex. 21.

By letter dated April 26, 1982, Dobson transmitted proposed procedures for evaluating faculty at University of Hawaii at Manoa [hereinafter referred to as UHM] and included three dates for possible consultation meetings. Resp. Ex. 22.

By letter dated April 29, 1982 from Musto to Dobson, Musto questioned the good faith of the University administration regarding consultation and indicated that UHPA would respond to the invitation to consult following its May 8, 1982 Board of Directors' meeting. Resp. Ex. 23.

By letter dated May 10, 1982, Musto made a formal request to Dobson to negotiate the procedures and the impact of

both BOR Policy 9-15 and 9-16 as they apply to all campuses in the University system. Resp. Ex. 24.

By letter dated June 3, 1982, Dobson transmitted the proposed implementation procedure for evaluation of faculty at the University of Hawaii at Hilo [hereinafter referred to as UHH] to Musto. Dobson also asked Musto to contact his office by June 18, 1982 if UHPA wished consultation on the procedures. Resp. Ex. 26.

In a letter dated June 10, 1982 from Musto to Dobson, Musto requested negotiation on evaluation procedures. Resp. Ex. 29.

By letter dated June 16, 1982, Dobson declined UHPA's request to negotiate. Resp. Ex. 28.

Musto testified that when a faculty member is tenured, there is a presumption that she or he is meeting the duties and responsibilities of a professor. However, he believes Policy 9-15 removes that presumption and the faculty member is again placed in a position of providing documentation and evidence that the duties and responsibilities of the position are being met.

Musto posits that after a faculty member is granted tenure, it is then management's responsibility to demonstrate that the duties and responsibilities of the position are not being fulfilled. In that instance, the collective bargaining agreement provides a mechanism (Article XV) by which disciplinary action can be taken. Vol. I, p. 62.

Musto testified that Policy 9-15 is aimed at destroying the basic tenets of tenure and academic freedom. Id. at 66.

The Union believes that it is the right and responsibility of the administration to engage in the evaluation process. But it is also their responsibility. If the administration makes the evaluation process a faculty responsibility, then it has fundamentally altered the employment relationship which has been historically and contractually established. Id. at 80.

The Union is also concerned that the preparation of material for the evaluation would be done on a faculty member's own time. Also, the Union believes Policy 9-15 would be a misuse of the time-honored tradition of peer review. Faculty members traditionally review other faculty for tenure, promotion, or reappointment. Faculty members also act as a jury in disciplinary proceedings. But the Union does not agree that the time-honored traditional and appropriate use of peer review includes using faculty members to ferret out other faculty members for discipline. Id. at 83-84.

Ernest Jackson, Professor of French, Department of European Languages, UHM, testified that over the years, he has encountered some faculty members who could "stand a little nudge." However, even as department chairperson, he didn't feel that he could do it because he had no authority to tell that faculty member, "you're not pulling your weight." Even if the chairperson had the authority to single out those faculty members, Jackson believes this would not be a functional proposition. Id. at 138.

Roy Fujimoto, Political Science Instructor at Windward Community College, testified that Policy 9-15 meant a faculty

member must reaffirm that she or he has the qualifications which were needed to be hired in the first place. This was also a concern expressed by Miyako Sugano. Vol. III, p. 36. Fujimoto testified that an "Evaluation for Community Colleges" form (Comp. Ex. 16) was distributed to faculty at Windward Community College. He testified that basically, it's a simple format which is not too onerous unlike that of the tenure process. However, the form states that "evidence" relating to the quality of contributions should be included. Fujimoto stated it is this "backing up" process which takes a lot of time away from other duties. In the community colleges where research is not emphasized, he interpreted "backing up" to mean substantiating every statement or contribution by documentation that the faculty member in fact performed the contribution listed on the evaluation form. From his experience in the tenure process, the administration would not accept any information which was not substantiated by a letter or something similar. If this is done for each activity, "then you are going to end up with a dossier like you would not believe." And, this process would repeat every five years. Vol. II, pp. 108-10.

Also, Fujimoto mentioned his fear that the policy might be interpreted differently by succeeding administrators. Id. at 124.

Darrow Aiona, Instructor at Leeward Community College, testified that the policy, as he understands it, is vague. At his campus, people are compiling dossiers and asking each other for letters or recommendations because of the evaluation policy requirement.

Aiona received a copy of the Evaluation procedures from the Provost as he was one of the faculty members selected for evaluation. According to the document, he was scheduled to be evaluated in December 1982. Id. at 147-48.

Aiona believes the requirements for tenure of his position now has been changed since he was tenured years ago. He feels that if he were to apply for tenure under the present requirements, he would not receive it. Id. at 148-49. Therefore, if the University applies the standards set forth in the evaluation procedure, he is uncertain of his tenure. He believes that 10-12 other faculty members are in the same position as they all were "brand new faculty" at Leeward Community College fifteen years ago. Id. at 148-53.

William J. Bonk, Professor of Anthropology at UHH, testified that the evaluation procedure would mean that faculty would be frustrated by spending "a good deal of time and energy" on the evaluation, thereby taking time away from other activities. Id. at 187-88.

Miyako Sugano, Assistant Professor of English, UHH, stated she had no objections to being evaluated. Her fear lay in the result of the evaluation. She feels the policy creates fear that a faculty member's tenure can be revoked. In turn, this would affect the focus of her teaching. Vol. III, pp. 40-41. She claims that no one has enunciated the purposes of the evaluation, and the policy appears to be a threat to job security. Id. at 42-43.

The BOR argues that the tenure process is a much different process from that envisioned by Policy 9-15. Testimony by administrators explained that the evaluation policy could not affect a faculty member's tenure as a tenured faculty member can only be terminated for the reasons set forth in the collective bargaining agreement and only after following those procedures set forth in the contract. As Dobson stated, "the concept of renewable tenure is basically a logical contradiction." Although the criteria used to evaluate the faculty member would be the same as that used in the tenure process, the purposes of each evaluation is different. And, the University points out, it is logical that the evaluation policy criteria be based upon tenure process criteria as it represents the duties and responsibilities the faculty is expected to perform. Vol. VI, p. 29.

Fujio Matsuda, President, University of Hawaii, testified that the evaluation policy does not question a faculty member's tenure. He believes there is a basic assumption that the faculty members are competent, diligent and productive. Nevertheless, he also believes that there is room for improvement in everyone, and the evaluation policy is intended to produce a better university for the people of Hawaii. He also pointed out the policy does not single out tenured faculty; it includes all BOR appointees including APT's (administrative, professional, and technical employees), another group of employees who have not been regularly evaluated in the past. Vol. V, pp. 22-25.

Dobson testified that procedures to implement Policy 9-15 have been developed and approved by the President for UHM.

Approval had been granted for procedures for UHH, but these were withdrawn and amended procedures have not as yet been approved. In neither procedure is peer review mandatory. Vol. VI, pp. 26-27.

Policy 9-16

On January 22, 1982, the BOR adopted a policy entitled Teaching Assignments for Instructional Faculty [hereinafter referred to as Policy 9-16]. Comp. Ex. 12.

Policy 9-16 establishes standard teaching assignments on each campus for full-time instructional faculty at the UHM, UHH, West Oahu College, University of Hawaii Community Colleges, and Hawaii Community College.

The policy reads as follows:

TEACHING ASSIGNMENTS FOR INSTRUCTIONAL FACULTY

The instructional faculty of the University of Hawaii has duties and responsibilities that encompass a number of professional activities in addition to teaching. The nature and scope of these additional duties depend on the particular mission of the unit and program and the relationship of that mission to the faculty member's professional qualifications. As instruction is the University's highest priority, however, teaching remains the most important duty of its faculty. This policy sets standards for the assignment of the instructional component of faculty responsibilities.

- a. Except as otherwise provided herein, the standard teaching assignments for full-time instructional faculty shall be as follows:

- (1) 24 semester credit hours per academic year at the University of Hawaii at Manoa,

- (2) 24 semester credit hours per academic year at the University of Hawaii at Hilo, excepting Hawaii Community College,
 - (3) 24 semester credit hours per academic year at West Oahu College, and
 - (4) 30 semester credit hours per academic year in the University of Hawaii Community Colleges, and at Hawaii Community College.
- b. The teaching assignments in section a. refer to classroom lecture instruction. For other modes of instruction (clinical practice, laboratory, thesis supervision, etc.), each Chancellor shall develop and recommend:
- (1) an appropriate measure of the instructional activity (contact hours, number of students supervised, etc.), and
 - (2) an equivalence relating the designated measure to semester credit hours.

It is expected that the development of appropriate equivalents will involve consultation of the appropriate faculty, department chairpersons, and academic deans.

Such equivalents shall be reviewed and approved by the President and reported to the Board of Regents upon their establishment or subsequent revision consistent with Board policy.

- c. In recognition of the diverse responsibilities of the University and its faculty, each Chancellor shall develop and recommend equivalents for specific non-instructional activities that are consistent with and in furtherance of the mission of the University unit and program.

It is expected that the development of appropriate equivalents will involve consultation of the appropriate faculty,

department chairpersons, and academic deans.

The definitions of these equivalents shall include:

- (1) a description of the professional activities for which they may be granted,
- (2) an explanation of the relationship of these activities to institutional and program mission and priorities, and
- (3) guidelines for determining the circumstances which warrant granting them.

Such equivalents shall be reviewed and approved by the President and reported to the Board of Regents upon their establishment or subsequent revision consistent with Board policy.

The implementation of this policy shall be the responsibility of the Chancellors of the respective units.

- d. Teaching assignments for part-time instructional faculty or for faculty paid less than full time from instructional funds shall be as in section a. pro-rated by their fractional full-time equivalent in instruction.
- e. Each unit shall ensure against discriminatory teaching assignments. In addition, Chancellors shall establish procedures to monitor the effectiveness of teaching reductions for non-instructional duties.
- f. During the spring semester of academic year 1981-82, equivalencies shall be developed by April 30, 1982 in accordance with this policy, and teaching assignments beginning in fall semester 1982-83 shall be determined as set forth herein.

Comp. Ex. 12.

The BOR contends Policy 9-16 will allow the University to regularize and assign teaching and other duties to faculty in a systematic method and in a manner which would provide information to people who have a legitimate interest in knowing how the University is utilizing its faculty.

The faculty in the University system are classified by various letter designations. "I" represents instructional faculty at the four-year institutions, i.e., Hilo, Manoa, West Oahu. "R" represents those faculty designated as research faculty. "S" represents specialists at four-year campuses, and "A" refers to agricultural extension agents. "C" faculty are teachers at the community colleges. Vol. I, pp. 13-15.

Policy 9-16 would apply to faculty classified as "C" or "I". Id. at 14.

The workload of "I" faculty at the four-year institutions is composed of teaching, university and community service, and research. The mix of these three activities varies greatly by department or discipline, and by individual faculty. Id. at 29-30.

On June 26, 1981, Masumoto sent a letter to Musto, transmitting the proposed policy and inviting consultation. Resp. Ex. 9.

In a letter dated July 2, 1981 from James D. Kardash [hereinafter referred to as Kardash] (on behalf of Musto) to Masumoto, Kardash expressed UHPA's willingness to discuss the proposed policy and reminded Masumoto that UHPA considered the matter negotiable. Resp. Ex. 10.

On July 8, 1981, B. W. Bender, Vice President of UHPA, presented testimony before the BOR Committee on Personnel Relations regarding proposed Policy 9-16. It is UHPA's position that working time and the amount of work required of unit members for a given rate of pay are matters for negotiation.

On November 13, 1981, Kardash presented UHPA's formal statement of its position regarding Policy 9-16 at a consultation meeting with the BOR Committee on Personnel Relations.

On December 4, 1981, another consultation meeting was held and Kardash again presented comments at that time.

Via letter dated December 18, 1981, Dobson transmitted the recommended teaching assignment policy to Musto. Resp. Ex. 12.

By letter dated January 6, 1982, Dobson indicated to Musto that there was still ample time for a formal consultation meeting on the teaching assignment policy if UHPA so wished. Resp. Ex. 13.

At the hearing on the prohibited practice charges conducted by this Board, Musto testified that the workload is part of wages, hours and working conditions and since Policy 9-16 would affect these conditions, the policy should be negotiable. His belief emanates from his understanding that "I" faculty are required to teach, do research and to engage in service [community and university] and that faculty will not be promoted or tenured if they do not engage in research and inquiry. Vol. I, p. 29.

Musto also testified as to his beliefs that if faculty do not fulfill their professional obligations, the administration would have cause under the provisions of Article 15 of the current collective bargaining agreement to take disciplinary action against the individual. Id. at 32.

Although research is a part of their professional obligation, "C" faculty and "I" faculty research differs. "C" faculty tend to engage in institutional research; i.e., research needed for the institution such as projects which tend to evaluate and measure methods of instruction or curricular program development. "I" faculty tend to do research involving the acquisition of new knowledge. Id. at 32-33.

When Policy 9-16 was articulated or started to be articulated through various implementation documents on the various campuses, Musto felt the policy would be interpreted in such a way that it was going to increase the actual teaching load for some people. His belief stemmed from his interpretation of the policy.

In January 1982, UHPA sent the BOR a list of 13 questions inquiring about changes in the criteria for promotion and tenure based on the proposed policy. Based on this exchange, UHPA concluded the BOR had made no changes in the criteria for promotion and tenure and that the BOR did not intend to make any changes. On that basis, UHPA assumed the service and research expectations of faculty members for reappointment, tenure, and promotion would remain the same, but potentially, the teaching load was going to be increased. Id. at 52.

Musto believed that equating the entire workload to credit hour equivalencies was a major shift. He testified that the policy directly implied that if a faculty member received a three-hour equivalency for research, then that three-hour research component must be approved by the chancellor. Further, he believed that even if a faculty member taught 12 [credit] hours, he or she would not be free from the research responsibility. Moreover, Musto stated the equivalencies were addressed differently by different departments and were significantly different from campus to campus. At that point, UHPA filed this prohibited practice complaint. Id. at 51-53.

Musto felt that the BOR's motive for implementing Policy 9-16 was to get certain faculty to teach more classes. Id. at 96.

Ernest Jackson testified that everyone in the department has always taught three courses or nine credits per semester with the exception of three people who were freed from one course to act as division chairperson. He had never heard of anyone in the department getting a reduction in workload for research purposes. Id. at 150. When he served as department chairperson, he discouraged such requests because he was not able to guarantee the same courtesy for everyone. Id. at 151.

Sidney Townsley, Professor of Zoology, UHM, testified his 1982 spring workload consisted of teaching six credit hours which averaged 39-40 hours of time per week. In addition, he served on the College of Arts and Sciences Program and Curriculum Committee, the Manoa Faculty Senate Executive Committee, and

other service activities which took about 14 hours of time per week. Also, he spent about six hours per week in research, for a total workload of approximately 61 hours per week. He testified that if he had to teach 12 credit hours per semester, he would cut back on his service hours to the University before he would cut back on his research time. Townsley estimated that most of the members in his department carried a similar workload. Vol. II, pp. 5-43.

Travis Summersgill, Professor of English and Chair of the English Department, UHM, testified the workload in the English Department is nine credit hours. His estimate of the average working time for faculty members is between 45-50 hours per week. However, preparation time for each course and research time would be variables which would account for major differences. He felt faculty members in his department are leaving because of the morale factor on campus and the low pay. Id. at 57.

Summersgill also testified that members in his department can apply to their Research committee for teaching load reductions in order to do research. They have as many as 17-18 faculty (out of 71 members) who teach only six credit hours. Id. at 58, 67.

Joel Weiner, Associate Professor in the Department of Mathematics, UHM, testified he taught, one undergraduate course and one graduate course totalling six credit hours. His preparation time ranged from one hour per credit hour for the undergraduate course to six hours per credit hour for the

graduate course. As an estimate, he spent about 25 hours per week in teaching and related ancillary activities. For research, seminars and colloquia, he averaged 23 hours per week. With respect to University service, he spent an average of one and one-half hours per week, totalling about 48-50 hours weekly workload. Weiner testified that the number of hours he spends in research is self-imposed. Id. at 71-72, 79-82, 87-88.

Weiner also mentioned the department has a Personnel Committee which decides if a faculty member's research is up to the divisional standards demanded by the department. If not, the committee assigns that faculty member additional hours. Id. at 84-85.

Weiner testified that the allocation of workload within the department has been handled by the department for as long as he's been there (eight years). If their faculty had to teach more than six hours per week, he feels the effect on the department would be disastrous. He also mentioned the standard number of teaching hours for a quality mathematics research department within the United States is six hours per week. He believes that if the teaching load is increased, the number and quality of job applicants would decline. Moreover, he feels that the best people would leave the department because they can go elsewhere to teach only six hours and yet do the research they want. Id. at 89-90.

Roy Fujimoto testified that the workload at the community colleges is 15 credit hours with no research requirement. This past semester, he taught nine credit hours and had six

credit hours of reassigned time for which he served as Acting Coordinator for Community Services for the college. On the average, he spent 66 hours per week at his job. This past semester, he was given three credits overload or added compensation for serving as Acting Coordinator. Fujimoto testified that Policy 9-16 would not affect the community colleges as much as it might affect other campuses because there would be no change in their present teaching workload. Id. at 94-120, 138-40.

Darrow Aiona testified he spent about 42-44 hours per week on teaching duties. In addition, he spent about two hours per week counseling students, two hours per week on various college activities, and seven hours per week doing community service. Id. at 140-47.

William Bonk testified that when he first started teaching in 1954, the faculty had a 12-hour workload. In the late 1960's, this was changed to a nine-hour workload. He has carried more than a nine-hour workload at his discretion. In his division, the Division Chair, Senate Chair, Counselor Chair or similar, has a reduction in workload.

Bonk estimated he spent 29-30 hours weekly for teaching activities. In addition, he spent about four hours each week in university activities such as UH Council, Social Science Division Personnel Committee and monitoring the archaeology laboratory. As far as community activities, he spent about five hours weekly as advisor and/or consultant for various projects. Research time averaged 13 hours per week. Id. at 175-84.

In his opinion, if faculty members had to carry a 12 credit hour teaching load, the work patterns would change. For those faculty members who might want to move out of the University system, Bonk felt they would concentrate more on their research and less on teaching. On the other hand, those faculty members who consider teaching significant may emphasize only teaching and not research. Id. at 185-88.

Miyako Sugano testified the typical credit load in her department or discipline is nine credit hours. Her total work time, as she estimates it, adds up to somewhere between 50-55 hours per week. Vol. III, pp. 8-19.

Joseph Halbig, Associate Professor of Geology at UHH, testified he teaches eight and one-half credit hours per week. For his teaching duties, he estimated that he spent 31 hours per week. In addition, he spent roughly two and one-half hours per week on University service and one and one-half hours per week in community service. Research time occupied 15 hours per week. If his teaching load is increased, he would spend less time in service areas or research. He is sure Policy 9-16 will increase the teaching load of faculty although not necessarily his because he has what the administration considers "equivalencies" and thus his workload would not change. Id. at 50-67.

Robert Potter, Professor of Education, UHM, testified that he drafted the Faculty Chairman's Handbook in 1968 because at that time, he as a department chairperson together with other department chairpersons didn't know the responsibilities of their position. He felt that much of his responsibility at that time

was dealing with questions which should have been solved at the departmental level. So, partly out of interest and partly out of desire to decentralize this responsibility as much as possible, he compiled a handbook of statements in loose-leaf form. These statements were extracted from the then existing Faculty Handbook, BOR Minutes, and University general operating procedures. He stated the Faculty Chairman's Handbook was never formally adopted by the Faculty Senate or the BOR, but had become an operating document nevertheless. Vol. VII, pp. 9-11.

The Faculty Chairman's Handbook, Section 2.13, Assignment of Faculty Load states:

Twelve credit hours or its equivalent is considered to be a maximum full semester load. Because of associated responsibilities of research, university or community service, student advising, or other activities expected of most faculty members, many departments assign six to nine credits per semester as a typical full-time load. When he wishes to free a faculty member from a large proportion of his time for other duties, a department chairman may assign lighter teaching loads. (See 2.21 and 2.34)

Comp. Ex. 8.

Dr. Potter testified that the word "standard" which appears in Board Policy 9-16 was approximately what he had in mind in terms of the word "maximum" which he utilized in the Faculty Handbook. Id. at 48-49.

Potter also testified that he envisioned 12 credit hours of teaching as the maximum workload, but six to nine credit hours of instruction was normally assigned as a preferred full-time load. Id. at 30-31. On the other hand, he did not envision

use of "maximum" as an absolute limit because there are times when faculty members might teach more than 12 credits for a crisis period. Id. at 48-49.

Walter Metzger, Professor of History at Columbia University, and a member of Committee A of the American Association of University Professors testified that he believed equivalencies as it related to university teaching is "a confession that the system you are starting with is not in touch with reality." He believes that teaching and research are inextricably intertwined and therefore cannot be quantified by number equivalencies. Vol. III, pp. 107-10.

When he sees an institution that requires its faculty to teach four courses instead of three, he feels that the institution is one which emphasizes fairly rudimentary instruction, not advanced instruction. Id. at 129. He believes that Policy 9-16 would serve as a negative in recruiting faculty members to the University system, as it would appear to be an institution requiring four teaching courses with a subtraction for research. Therefore, the institution would be perceived as not really valuing research. Id. at 131.

Fujio Matsuda testified that Policy 9-16 is a misnomer in the sense that it does not only deal with teaching assignments. The policy addresses the complete range of assignments for the instructional faculty, i.e., instructional service, research service and public service. Vol. V, p. 11.

He testified that the standard teaching load of 15 credit hours per semester for community colleges and 12 credit

hours per semester at other institutions have been in effect for a long time, as reflected in the Department Chairman's Handbook. However, he pointed out, at the Manoa Campus, the average [teaching] load is less than 12 credit hours, meaning most faculty have additional duties or assignments other than teaching. Id. at 14-15.

Matsuda believes the policy would allow the administration to regularize and assign teaching and other duties in a systematic way and to provide information to those persons having a legitimate interest in seeing how the University is utilizing the faculty. Id. at 17-19, 39.

He believes the policy would not significantly affect the average teaching load, in the amount of teaching at present or in the future. He testified that what faculty members do depends on their own professional competence and interest, and the mission of the unit. Therefore, if the mission of the institution does not change, then there should not be a radical change in what faculty members do or are expected to do. Id. at 37.

Dobson testified that Policy 9-16 provides for a system of equivalents to be developed at each campus of the University system. These equivalents are to be approved by the University president. So far, the president has not approved any equivalents. Vol. VI, p. 13.

CONCLUSIONS OF LAW

UHPA has charged BOR with violations of Subsections 89-13(a)(1), (2), (3), (5), and (8), HRS. In relevant part, Section 89-13 provides:

Prohibited practices, evidence of bad faith. (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;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

* * *

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

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

In essence, UHPA contends the BOR committed prohibited practices by refusing to negotiate the subject policies. The Union alleges that the policies change or modify existing terms and conditions of employment and are thus, negotiable. Further, UHPA alleges that Respondent BOR has attempted to deal with organizations other than itself as exclusive representative with regard to these matters in order to interfere with the Union's operation and existence.

In response, the BOR maintains the policies are non-negotiable because negotiation would substantially interfere with its right to establish institutional policy. It believes that consultation on the policies is sufficient to satisfy statutory requirements.

While UHPA contends that Policies 9-15 and 9-16 are negotiable, it has not asked this Board for a declaratory ruling as such. The instant complaint requests this Board to determine whether or not the BOR committed prohibited practices by adopting these policies. Therefore, we will examine the policies in that light.

Policy 9-15

In its complaint the Union charges the BOR with modifying or eliminating the rights of faculty members to tenure as defined in Article IX A1 and the procedures for the protection of such rights as set forth in Article XV, Disciplinary Actions, of the collective bargaining agreement by its "unilateral establishment and current implementation of a system of post-tenure review on the various campuses." Bd. Ex. 1. In its Opening Brief, UHPA argues that the evaluation policy modifies academic freedom and tenure, Articles VIII and IX of the contract, respectively. The Union asserts the Employer has refused to bargain over these "contractual changes" and as a result, it has violated the collective bargaining agreement thereby violating Subsections 89-13(a)(1), (5), and (8), HRS.

The BOR formally adopted Policy 9-15 on October 16, 1981. The policy provides for the periodic evaluation of Board

of Regents' Appointees, including faculty, administrative, professional and technical (APT) employees, and executive and administrative/managerial employees.

With respect to the development of evaluation procedures for faculty members, Policy 9-15 provides that each faculty member be evaluated at least once every five years, permitting an exemption for faculty who had undergone reappointment, tenure, promotion, and/or merit review within that time period. Safeguards for academic freedom must be provided as well as the opportunity for peer participation. Each Chancellor is directed to develop the procedures in consultation with faculty governance organizations.

The purposes of periodic evaluation as stated by the BOR are:

- (1) to provide assurance to the University and its constituents that professional staff resources and particular areas of expertise are being used to the best advantage;
- (2) to provide for the systematic recognition of excellence and develop incentives for superior performance; and
- (3) to provide means for the improvement of performance in furtherance of the University's mission.

The Union contends the net effect of Policy 9-15 is "post-tenure review" which would undermine a faculty member's tenure status. UHPA perceives the policy as having an adverse impact on tenure because it would shift the burden of proof

to the faculty member, causing the individual to prove that tenure should be continued. In effect, this is "post-tenure review." And, the Union believes that unsatisfactory ratings in this review would set up a form of disciplinary action which would not be grievable.

UHPA does not disagree that the administration has the right to discipline tenured faculty members, or to remove faculty members if the individual fails to perform duties. However, the Union vigorously maintains the burden to show such failure rests with the administration and other faculty peers should not be involved in the review process.

J. N. Musto characterized the policy as a tenure review process because it necessitated recreating a dossier-type document. He also felt the policy triggered connotations of tenure application together with the same ramifications attached. This view was echoed by faculty witnesses from the UHH and the community colleges, i.e., Roy Fujimoto, Darrow Aiona, William Bonk, and Miyako Sugano. Musto and Sugano testified there is an existing mechanism by which a faculty member can be discharged for failing to meet professional obligations. Hence, there is no need for Policy 9-15 which is viewed as an extension of the tenure process.

The Union has emphasized that a tenured faculty member has already demonstrated competency and has borne the burden of proof via documentation and evidence which need not be repeated every five years thereafter. UHPA has also strenuously objected to the policy's proposed procedure of peer evaluation, thus

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placing a faculty member in a position of passing judgment on a peer who had already been adjudged competent.

While the Union characterizes Policy 9-15 as a post-tenure review policy, the BOR emphasizes the proposed policy would affect all of its appointees and is not targeted at tenured faculty only. Dobson and Matsuda testified that Policy 9-15 proposes to evaluate the performance of all BOR appointees (which includes administrative, professional and technical employees, executive and administrative/managerial employees, and faculty members). It does not propose to evaluate their tenure.

Dobson also stated that the concept of renewable tenure is, by its terms, a logical contradiction. Tenure is a right to continuous and permanent employment which can only be terminated according to provisions enunciated in the collective bargaining agreement.

Both Dobson and Matsuda concurred that the proposed policy would not be a rating instrument per se, but an assessment tool to indicate strengths and weaknesses in an employee's work. It would promote the improvement and development of all staff, assist in the reordering of priorities and the redirection of the University consistent with the specific mission of each department or division, and function in consonance with the overall mission of the University.

The BOR supports the evaluation policy as it provides an instrument of qualitative information which would supplement the kinds of information currently solicited through the biobibliography form. The "biobib" is distributed to the faculty

annually so their files can be updated in terms of teaching data, research publications, and university and/or community service.

However, the BOR witnesses were not able to state with certainty that the periodic evaluation would never trigger disciplinary action. Matsuda surmised there could be a situation in which a faculty member's performance or competence is so clearly substandard that action should have been taken, but an administrator was either unwilling or unable to make a hard decision and ignored what was indicated earlier. Such a situation may be uncovered by a periodic evaluation as proposed but it is certainly not the primary purpose of the policy.

The University of Hawaii is a state institution of higher education. Pursuant to the Hawaii State Constitution, the university is governed by a Board of Regents appointed by the Governor. The constitutional grant of supervisory power to the BOR was implemented by the Legislature.

Article X, Section 6 of the Hawaii State Constitution provides in part:

The board shall have the power, as provided by law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board; except that the board shall have the exclusive jurisdiction over the internal organization and management of the university. . . .[AM HB 253 (1964) and election Nov 3, 1964; ren and am Const Con 1978 and election Nov 7, 1978]

Section 304-4, HRS, states, "the board of regents shall have general management and control of the affairs of the university."

The duty to negotiate certain matters is provided in Section 89-9, HRS, which reads in pertinent part:

Scope of negotiations. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other in writing, setting forth the time and place of the meeting desired and generally the nature of the business to be discussed, and shall mail the notice by certified mail to the last known address of the other party sufficiently in advance of the meeting.

* * *

(d) . . .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, which would be inconsistent with section 77-13.5, relating to the conversion to appropriate salary ranges, 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, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

It is undisputed that the University has the right to evaluate its employees. Under the management rights section of Subsection 89-9(d), HRS, the public employer has the right to determine standards for work and maintain the efficiency of government operations. Clearly, the Employer's evaluation systems fall within these parameters. The BOR's decision to establish an evaluation policy in which all BOR appointees would be evaluated is a policy decision related to its governance function. In fact, many of the Union witnesses (Ernest Jackson, Travis Summersgill, Miyako Sugano, and Joseph Halbig) have expressed no objection to management evaluating its employees. Thus, while the Union apparently concedes the University has the right to evaluate its faculty, the Union nevertheless maintains the proposed policy modifies the "terms and conditions of employment" of its members as embodied in the contract, with respect to its implementation and its results. Therefore, the Union argues the policy should be subject to negotiation.

One of the UHPA's primary objections to Policy 9-15 is that the evaluation procedures would require faculty members to evaluate their peers, in essence, allegedly performing management's job of evaluating its employees. Although Policy 9-15 specifically requires faculty members to participate in the evaluation process, we note that the implementation procedures formally adopted by the Employer for the community colleges and those under consideration by administration do not require peer participation. Comp. Exs. 14, 15, and 16. Hence, UHPA's objection is merely speculative on this point.

Another concern expressed by UHPA is that the tenured faculty would have to, in effect, requalify for tenure every five years. Anticipating the worst possible scenario, UHPA envisions the submission of dossier-like documentation in support of the faculty member's evaluation instrument requiring endless hours of preparation by the faculty members. Based upon the testimony presented and in reviewing the Employer's approved and proposed procedures, however, the Board is of the opinion that the actual procedures are not as complicated as UHPA would have us believe. There is nothing which requires the degree of documentation necessitating an inordinate amount of the faculty's time. Again, we believe UHPA's concerns to be unfounded.

Thus, we find that Employer's Policy 9-15 does not modify or change the existing language of the collective bargaining agreement with respect to tenure, disciplinary actions, or academic freedom. The Employer's adoption of Policy 9-15 does not violate the terms of the existing collective bargaining agreement. Thus, no prohibited practice occurred here. The Board hereby dismisses those charges alleging the BOR violated Subsections 89-13(a)(1), (5), and (8), HRS, with respect to Policy 9-15.

While we agree with the BOR that it may implement its evaluation procedures, we are not convinced that the impact of an "unsatisfactory" rating in and of itself would not affect working conditions to a degree so as to constitute a negotiable matter. It seems clear to us that a disciplinary action stemming from an "unsatisfactory" rating is grievable under the contract section

on Disciplinary Actions, Article XV. However, an "unsatisfactory" rating without the imposition of discipline presents a different problem. While there is no recognized discipline meted out, the employee is nevertheless adversely affected immediately and perhaps even for the future, and his or her working conditions may be altered dramatically in order to improve performance to the level expected by the Employer. Thus, we believe that consultation is insufficient to address the impact of an unsatisfactory performance rating.¹ Meaningful negotiations should take place on this matter prior to implementation by the BOR.

Policy 9-16

UHPA challenges Policy 9-16 on three theories. First, the Union alleges the BOR committed a prohibited practice by unilaterally establishing and implementing a workload policy which increases the average working hours of faculty members by approximately one-third without a comparable increase in compensation or reduction in responsibilities thereby violating Subsections 89-13(a)(1), (5), and (8), HRS.

Further, the Union alleges that the BOR, by its unilateral establishment of Policy 9-16, is exercising improper control over research conducted by faculty members and the time

¹While we believe that the impact of the unsatisfactory performance rating is subject to negotiations, we do not hold that a prohibited practice has been committed by the BOR's implementation of the subject policies and procedures. UHPA's formal request to negotiate, by letter dated June 10, 1982, did not separate the evaluation procedures from their impact for negotiation purposes. Resp. Ex. 24. Thus, we refrain from holding that BOR's subsequent refusal to negotiate was improper and a wilful violation of Chapter 89, HRS.

available to conduct research, thus interfering with their academic freedom and their right and means to achieve promotion and/or tenure which violates Subsections 89-13(a)(1), (5), and (8), HRS.

In addition, the Union alleges that by so implementing this policy, the BOR has refused to bargain with the Union over the terms and conditions of this additional work and has threatened to take disciplinary action against persons who refuse to comply with its requirements, thereby violating Subsections 89-13(a)(1), (3), (5), and (8), HRS.

Policy 9-16 establishes 12 credit hours of classroom lecture instruction or its equivalent as the standard teaching assignment for faculty at the University's baccalaureate granting institutions.

The proposed teaching assignment policy, as explained by President Matsuda, is to allow the administration to assign teaching and other duties to faculty in a systematic way and to provide information which will ensure the efficient use of faculty resources. The policy specifies the standard teaching load per academic year for each faculty member with a variance among institutions to encompass each institution's mission. For example, at the UHM, the UHH and West Oahu College, the standard is set at 24 semester credit hours per academic year. The policy, however, emphasizes that these standards refer to classroom lecture instruction. Recognizing that other modes of instruction are prevalent in a university setting, the policy also requires the development of:

- (1) an appropriate measure of the instructional activity (contact hours, number of students supervised, etc.) and
- (2) an equivalence relating the designated measure to semester credit hours.

Comp. Ex. 12.

And, the policy recognizes the diverse responsibilities of the University and its faculty and thereby mandates the development of "equivalents for specific non-instructional activities that are consistent with and in furtherance of the mission of the university program." Thus, faculty members would receive credit hour "equivalents" for their research and/or university/community service thereby reducing their standard classroom instruction workload by the appropriate semester credit hours.

The BOR submits that this would not alter the present practice at these institutions. Instead, the policy merely reflects the existing informal policy of 12 credit hours per semester for four-year institutions (as reflected in the Department Chairmen's handbook) and 15 credit hours per semester for the community colleges (from the Faculty Handbook).

While there was extensive testimony presented by faculty members as to his or her workload, the Board finds these faculty members competent to testify as to his or her own workload only. The testimony of these faculty members is not taken to be representative of his or her department or discipline.

UHPA nevertheless argues that the policy effectuates an increase in the faculty's workload without additional compensation. We find nothing in the evidence to support UHPA's contention at this stage. The policy is clear in stating that the

standard teaching load is 12 credits or its equivalent. The equivalents are to be developed to credit faculty for their non-classroom teaching activities by taking into account the particular mission of the institution. Thus, it is clear that research and community service activities will be recognized and properly credited.

Moreover, while there is arguably a difference in semantics between "standard" teaching load and "maximum" teaching load, President Matsuda's testimony clearly indicates that the average working hours of the faculty would not increase as a result of the teaching assignment policy. Vol. V, pp. 71 and 76. Moreover, the faculty members indicated that if they were assigned more teaching courses, they would lessen their research and/or community service so that there would be no increase in their working hours. The Board has no reason to doubt that President Matsuda's interpretation of Policy 9-16 is incorrect or will not be binding upon the BOR in his absence and finds that the average working hours of faculty members is not increased by Policy 9-16. The Board therefore dismisses UHPA's allegations of Subsections 89-13(a)(1), (5), and (8), HRS, violations based upon UHPA's perceptions of increased average working hours.

UHPA also alleges that the BOR's unilateral establishment of Policy 9-16 exercises improper control over faculty research thus interfering with their academic freedom and their right and means to achieve promotion and/or tenure which violates Subsections 89-13(a)(1), (5), and (8), HRS.

Here again, the Board finds nothing in the evidence before it which supports UHPA's contentions. While the Union contends that there is an infringement of academic freedom, we find nothing in Policy 9-16 which impacts upon the substance of the faculty member's research. Likewise, we are unable to discern any interference with the faculty members' right and means to achieve promotion by the adoption of Policy 9-16. Hence, the Board dismisses UHPA's allegations of Subsections 89-13(a)(1), (5), and (8), HRS, violations based upon a perceived interference with academic freedom, tenure and promotion.

Finally, as to Policy 9-16, UHPA contends that by implementing the policy, the BOR refused to bargain with the Union over the terms and conditions of the additional work and has threatened to take disciplinary action against persons refusing to comply with its requirements, thereby violating Subsections 89-13(a)(1), (3), (5), and (8), HRS.

The BOR presented evidence indicating it sought consultation on this policy with the Union. Resp. Ex. 9. The evidence also shows the Union was able to effect testimony and a formal statement before the BOR committee on Personnel Relations in addition to attendance at a separate consultation meeting. Resp. Exs. 10, 11, and 12.

Policy 9-16 was proposed by the BOR in June 1981 after both Employer and Union had reached agreement on a new contract. The policy was not a bargaining proposal at that point.

More importantly, as discussed above, we find that there is no increase in the faculty's working hours caused by

Policy 9-16. Prior to its adoption, the 1968 Department Chairman's Handbook set forth the maximum semester load as 12 credit hours or its equivalent for the four-year institutions. With respect to the community colleges, the Faculty Handbook set forth 15 credit hours per semester as the workload. Since Policy 9-16 does not present a change in the faculty's workload, the BOR did not improperly refuse to negotiate the matter prior to the policy's implementation. Further, the Union did not present any evidence establishing the BOR's purported threats to faculty members of disciplinary actions. Thus, UHPA's further contentions of Subsections 89-13(a)(1), (3), (5), and (8), HRS, are dismissed.

The Union also alleges the BOR attempted to deal with individuals and organizations other than the Union in order to undercut and interfere with the Union's existence and operation. The evidence shows the University asked the various Faculty Senates throughout the university system for its input regarding the subject policies. The Faculty Senate operates as an organization which deals with academic policies and makes decisions on behalf of management. Such an organization is widely recognized at most university systems. In this case, the Faculty Senates throughout the UH system declined to participate in discussion of the policies at the behest of the Union.

As the duty to negotiate these policies did not arise, we find no prohibited practices were committed in this regard. Moreover, the Union failed to establish any motive to undercut UHPA as the exclusive representative. Further, the concept of

collegiality or the sharing of responsibility and authority has traditionally been characteristic of the relationship between faculty and administration in higher education. In light of this fact, we find that the University did not commit a prohibited practice by soliciting input from the Faculty Senates throughout the University. Accordingly, the charge is dismissed.

The Board hereby dismisses those charges alleging the University violated Subsections 89-13(a)(1) and (2), HRS, by dealing with other individuals and organizations.

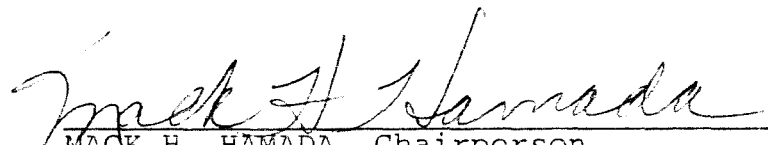
The Board is not unmindful that these proceedings could have been avoided if more meaningful dialogue had taken place during the consultation on the two policies. It appears that many of UHPA's concerns were unfounded and could have been resolved and the policies implemented had this dialogue taken place before the parties' positions hardened.

ORDER

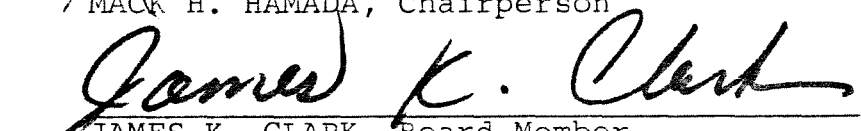
In accordance with the foregoing, the Board dismisses the instant petition.

DATED: Honolulu, Hawaii, October 5, 1984.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD



MACK H. HAMADA, Chairperson



JAMES K. CLARK, Board Member



JAMES R. CARRAS, Board Member

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) vs. BOARD OF
REGENTS, UNIVERSITY OF HAWAII; CASE NO. CE-07-78
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
DECISION NO. 199

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