

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-124
	)	
UNIVERSITY OF HAWAII,	)	DECISION NO. 303
PROFESSIONAL ASSEMBLY,	)	
	)	FINDINGS OF FACT, CONCLU-
Complainant,	)	SIONS OF LAW AND ORDER
	)	
and	)	
	)	
BOARD OF REGENTS, University	)	
of Hawaii,	)	
	)	
Respondent.	)	
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FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On May 15, 1989, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA), filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the BOARD OF REGENTS (BOR), University of Hawaii (UH).

In its complaint, UHPA alleges that the BOR has attempted to unilaterally promulgate and implement its UH Executive Policy E11.201, regarding illegal drugs and substance abuse. UHPA alleges that these actions violate Subsections 89-13(a)(1), (2), (5) and (7), Hawaii Revised Statutes (HRS), by interfering with Unit 7 members' rights to bargain through their designated collective representatives, by interfering with the administration of the UHPA, by refusing to bargain collectively regarding mandatory topics despite a direct demand

therefor, and by failing to comply with the requirements of Chapter 89, HRS.

A prehearing conference was conducted on June 19, 1989. After due notice, a hearing on the case was held on June 26, 1989. All parties were present and represented by legal counsel. Simultaneous opening briefs and reply briefs were filed by both parties on July 18, and July 25, 1989, respectively.

Based on the entire record and arguments, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

In July of 1988, UH President Albert Simone first notified the UHPA that a task force had been organized to formulate an anti-drug policy covering students, faculty and staff at the University. A draft of a preliminary policy was sent to UHPA and comments were invited. State Exhibit 1.

On November 18, 1988, the Drug-Free Workplace Act (DFWA) of 1988 (Public Law 100-690, Title V, Subtitle D; 41 USC 701 et seq.; 15 USC 634 (b)(6)) was signed into law. The new law would take effect on March 18, 1989.

Section 5153, in relevant part, and Section 5154 provide:

Section 5153. DRUG-FREE WORKPLACE  
REQUIREMENTS FOR FEDERAL GRANT RECIPIENTS

(a) DRUG-FREE WORKPLACE REQUIREMENT.

(1) PERSONS OTHER THAN INDIVIDUALS.  
No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by--

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about--

(i) the dangers of drug abuse in the workplace;

(ii) the grantee's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs;  
and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will--

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) INDIVIDUALS.--No Federal agency shall make a grant to any individual unless such individual certifies to the agency as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

(b) SUSPENSION, TERMINATION, OR DEBARMENT OF THE GRANTEE--

(1) GROUNDS FOR SUSPENSION, TERMINATION, OR DEBARMENT.--Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with

the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that--

(A) the grantee has made a false certification under subsection (a);

(B) the grantee violates such certification by failing to carry out the requirements of sub-paragraph (A), (B), (C), (D), (E), (F), or (G) of subsection (a)(1); or

(C) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1).

\* \* \*

#### Section 5154. EMPLOYEE SANCTIONS AND REMEDIES.

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 5152(a)(1)(D)(ii) or 5153(a)(1)(D)(ii)--

(1) take appropriate personnel action against such employee up to and including termination; or

(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

On January 31, 1989, the Office of Management and Budget promulgated interim final rules, interpreting the DFWA, in the Federal Register. Final rules have not been published as yet. BOR Opening Brief p. 3.

On February 13, 1989, Simone sent a revised draft of Executive Policy E11.201 to UHPA. UHPA was advised that the DFWA had been signed into law. State Exhibit 4. Transcript (Tr.) pp. 16-18.

J. N. Musto, Executive Director for UHPA, acknowledged, in testimony, being sent the draft of the University policy for consultation and comment. Tr. pp. 15-16, 17-18. Musto claimed that he did not know the effective date for compliance with the DFWA. Tr. pp. 41-42. UHPA did not offer any comments on the draft policies prior to the time of compliance. Tr. pp. 42-43. Musto also admitted receiving the February 13, 1989 letter transmitting the draft of Executive Policy E11.201 to UHPA. Tr. p. 19. The effective date for compliance with the DFWA is stated therein.

On March 30, 1989, Vice-President for Research, David Yount, and Director of Personnel, James Takushi, circulated to all chancellors, deans and directors a copy of the State Department of Personnel Services (DPS) drug policy with a cover memo requesting their compliance with the University policy and stating that DPS had stated that "we should not require employees to sign a form acknowledging receipt of the policy. . .". State Exhibit 5.

Takushi had given Musto a copy of the State Civil Service policies regarding drugs on the worksite. These policies had been the subject of consultation with the public employee unions representing civil service employees. Tr. pp. 21-22, 103-104.

Executive Policy E11.201, Illegal Drugs and Substance Abuse, is a six type-written page document prepared by the Office of the Vice-President for Student Affairs and the Office of Planning and Policy. In its entirety it provides:

UNIVERSITY OF HAWAII

EXECUTIVE POLICY - ADMINISTRATION

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E11.201 Illegal Drugs and Substance Abuse

I. INTRODUCTION

In the broadest sense, the mission of the University is to create and transmit knowledge. Therefore, the University encourages physical, mental and social behaviors which contribute to effective teaching, learning, research and community service.

Substance abuse of any kind, especially the use of illegal drugs, threatens the University in three ways: (1) it has a negative effect on individual performance; (2) it undermines the communal well-being of faculty, staff and students; and (3) it damages the relationship of the University to the broader community.

Substance abuse interferes with the physiological and abstract processes through which mental activity occurs and with social behaviors required

for research and learning. Consequently, the University expects that students, faculty and staff will carry out their responsibilities free of any substance abuse.

The University can best achieve its mission by creating a supportive working environment in which individuals encourage one another to pursue excellence in their professional and personal lives. Students, faculty and staff share a responsibility to help one another by learning to recognize the signs and behaviors associated with substance abuse and addiction, and by encouraging those with such problems to seek appropriate help and rehabilitation. Once an individual has undergone treatment for substance abuse or addiction, the University should extend support and encouragement during the recovery phase.

The University expects lawful behavior by students, faculty and staff during their presence on University premises and at University events. Within the constraints of its mission, the University encourages cooperation with law enforcement agencies in enforcing statutes regarding the use of illegal drugs. In addition, the University should take a leadership role in the acquisition and transmission of knowledge regarding substance abuse issues and problems.

## II. UNIVERSITY EXPECTATIONS REGARDING SUBSTANCE ABUSE AND ILLEGAL DRUGS

- A. Students, faculty and staff are expected to perform their duties free of intoxication by any illegal drugs.
- B. Students, faculty and staff are expected to observe laws regulating illegal drugs and may be



subject to investigation and/or prosecution for illegal drug use.

- C. Faculty, staff, and students are expected not to manufacture, distribute, possess, use, dispense or be under the influence of illegal drugs as prohibited by State and Federal law, at University-sponsored or approved events or on University property or in buildings used by the University for education, research and recreational programs.
- D. Students, faculty and staff are expected to share responsibility for the well-being of each other, for recognizing the behaviors associated with substance abuse, and for encouraging those in need to seek assistance or treatment.
- E. The University community should expect support services and supportive attitudes by its members for students, faculty and staff re-entering the community after treatment for or during recovery from substance abuse.
- F. The University expects its students, faculty and staff to share responsibility for preventing substance abuse and addiction and for providing education about the subject through studies, research and special programming.
- G. The University should expect to assume a leadership role in the acquisition and transmission of knowledge related to substance abuse and addiction, and to collaborate with the broader community in activities related to prevention of drug abuse including training of professional workers in this area.

### III. OBJECTIVES

The objectives of this policy are to:

- A. Establish the University's values and its expectations of all faculty, staff, and students regarding substance abuse and, in particular, the use of illegal drugs.
- B. Provide a positive context for the provision of education, assistance, and rehabilitation directed toward prevention of or intervention in substance abuse behavior on the part of faculty, staff, and students.
- C. Comply with the provisions of the federal Drug Free Workplace Act of 1988, as may be amended from time to time.
- D. Provide guidelines under which each campus may determine appropriate substance abuse programs for its students, faculty and staff.

### IV. APPLICABILITY

This policy applies to all members of the university community except civil service and exempt civil service employees who are subject to policies and procedures issued by the Hawaii State Department of Personnel Services.

### V. DEFINITIONS

"Addiction" means a compulsive physiological need for an illegal drug;

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both,

by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

"Criminal drug statute" means a criminal drug statute involving manufacture, distribution, dispensation, use or possession of any illegal drugs;

"Employee" means any person, including a student, who is employed in a permanent or temporary capacity on a full or part-time basis and directly engaged in the performance of work under a Federal contract or grant;

"Federal contract or grant" means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to the University, and all block grant and entitlement grant programs;

"Illegal drugs" means a controlled substance in schedules I through V of section 202 of the Controlled Substance Act (21 U.S.C. 812), and any other illegal or controlled substance as defined in chapters 329 and 721, Hawaii Revised Statutes, provided the term "illegal drugs" shall not mean the use of a controlled substance pursuant to a valid perscription (sic) or other uses authorized by law; and

"Substance abuse" means the misuse of a substance or the use of a substance to an extent deemed deleterious or detrimental to the user, to others, or to society.

## VI. POLICIES

- A. All members of the university community are responsible for the

satisfactory performance of their responsibilities as employees or students. University employees are evaluated on a regular basis in conformance with Section 9-15 of the Board of Regents' Bylaws and Policies, and evaluations of student performance are a regular part of the instructional process. A variety of well-established actions may be taken against employees and students for unsatisfactory performance. No exceptions shall be made for unsatisfactory performance that is caused by substance abuse.

- B. In conformance with the existing law, University faculty, staff and students are not permitted to manufacture, distribute, possess, use, dispense or be under the influence of illegal drugs as prohibited by State and Federal law, at University-sponsored or approved events or on University property or in buildings used by the University for education, research or recreational programs. Consistent with its mission, the University will cooperate with law enforcement agencies responsible for enforcing laws related to the use of illegal drugs. Students found in violation of this part shall be subject to the provisions of the student conduct code. Faculty and staff found in violation of this part are subject to disciplinary action as provided in collective bargaining agreements, University policy, and other applicable state laws and rules.
- C. Students and employees who are believed to engage in substance abuse will be actively encouraged to seek appropriate help and treatment. Students, faculty and

staff who undergo substance abuse treatment will be provided with a positive and supportive environment when re-assuming their University related responsibilities.

- D. Chancellors and Vice Presidents at Manoa shall design and implement education, counseling and referral programs as needed, in order to carry out the intent of this policy.
- E. As opportunities present themselves, appropriate units of the University are called upon to collaborate with the community-at-large on ways that the resources of the University may be used to assist in addressing substance abuse problems outside the University.
- F. The University shall comply with the provisions of the federal Drug Free Workplace Act of 1988, which sets forth drug related requirements for the continued receipt of federal funds.

#### VII. ADMINISTRATIVE PROCEDURES

- A. Each Chancellor and Vice President at Manoa shall provide annual notification to all employees by such means as are reasonably likely to inform them of the following:
  - 1. Substance abuse or the use of illegal drugs shall not provide an excuse for work related performance that is deemed unsatisfactory.
  - 2. University employees are not permitted to manufacture, distribute, possess, use, dispense or be under the

influence of illegal drugs as prohibited by law at University sponsored or approved events or on University property or in buildings used by the University for education, research or recreational programs. Employees found in violation of this part are subject to disciplinary action as provided in collective bargaining agreements, University policy, and other applicable state laws and rules.

3. Consistent with its mission, the University will cooperate with law enforcement agencies responsible for enforcing statutes related to the use of illegal drugs.
  4. The University actively encourages employees who are engaged in substance abuse to seek appropriate help and treatment. Employees who undergo such treatment will be provided with a positive and supportive work environment.
- B. Each Chancellor and the Vice President for Student Affairs at Manoa shall provide annual notification to all students by such means as are reasonably likely to inform them of the following:
1. Substance abuse or the use of illegal drugs shall not provide an excuse for student behavior or performance that is deemed unsatisfactory.
  2. University students are not permitted to manufacture, distribute, possess, use, dispense or be under the

influence of illegal drugs as prohibited by law at University sponsored or approved events or on University property or in buildings used by the University for education, research or recreational programs. Students found in violation of this part shall be subject to appropriate federal or state law and disciplinary provisions contained in the campus Student Conduct Code.

3. Consistent with its mission, the University will cooperate with law enforcement agencies responsible for enforcing statutes related to the use of illegal drugs.
  4. The University actively encourages students who are engaged in substance abuse to seek appropriate help or treatment. Students who undergo such treatment will be provided with a supportive learning environment.
- C. The University Personnel Office shall establish a drug awareness program to inform employees of the dangers of drug abuse in the workplace and the availability of drug counseling and treatment programs. Each Chancellor and Vice President at Manoa shall determine if any additional programs or services in their units are necessary to carry out the intent of this policy.
- D. In accordance with the requirements of the Drug Free Workplace Act of 1988, the Vice President for Research and Graduate Education and the Director of Personnel, in cooperation with the

Chancellors and UH-Manoa Deans and Directors shall see to it that:

1. All employees engaged in the performance of a federal contractor grant are provided a copy of this policy;
  2. All such employees agree, as a condition of employment, to abide by this policy and further to notify the University within five days of any conviction for a criminal drug statute offense occurring in the workplace;
  3. The University shall inform the federal agency making the procurement or grant of all such convictions within 10 days of learning of same; and
  4. Within thirty days after receiving notice from an employee of a conviction under subparagraph D.2. above, the University shall (a) take appropriate personnel action against such employee, up to and including termination; or (b) require such employee to satisfactorily participate in a drug abuse or rehabilitation program approved for such purposes by a federal, state, or local health, law enforcement, or other appropriate agency.
- E. The Vice President for Research [sic] and Graduate Education and the Director of Personnel may develop additional administrative procedures in order to ensure compliance with the requirement of the Federal Drug Free Workplace of 1988.



- F. Chancellors and Vice Presidents at Manoa are called upon to actively explore ways in which the educational and research resources of the University may be used to assist the community in addressing the problems and attitudes which contribute to the use of illegal drugs.
- G. The President shall appoint a substance abuse advisory council. This council, which shall be broadly representative of the entire University, will monitor the implementation of this policy and shall offer advice on related matters. This advisory council shall serve as a liaison between and among university units and the community at large on drug related issues.

Sometime in May 1989, Dean Noel Kefford of the College of Tropical Agriculture and Human Resources (CTAHR) circulated to his faculty a packet consisting of his memorandum directing compliance with Executive Policy E11.201, a form for signature by employees receiving the packet, plus other memoranda above noted and a copy of the policy itself. Complainant Exhibit 6. The form for signature by employees, presented on CTAHR letterhead, appears as follows:

INSTRUCTION: PLEASE SIGN AND RETURN THIS FORM TO YOUR DEPARTMENT CHAIRPERSON, COUNTY ADMINISTRATOR, COLLEGE ADMINISTRATOR OR SUPERVISOR.

MEMORANDUM

TO: Dr. N. P. Kefford  
Dean, CTAHR

SUBJECT: COMPLIANCE WITH THE UH EXECUTIVE  
POLICY E11.201

The undersigned hereby acknowledges receiving a copy of the Executive Policy E11.210 [sic], Illegal Drugs and Substance Abuse, of the University of Hawaii (UH), which I am told is in compliance with the requirement of the Drug-Free Workplace Act of 1988.

I understand that this policy sets forth the responsibilities of the employer (UH) and the employee (myself).

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Your Name

\_\_\_\_\_  
Name of Department/  
County/Unit

In late April and early May 1989, Musto became aware that compliance documents concerning the subject policy requiring signatures of faculty members were being circulated. Tr. p. 28. Musto testified that he became concerned about details of implementation upon seeing Dean Kefford's packet. Tr. p. 69. Between late April and May 9, 1989, Musto talked with Takushi about these documents. Tr. pp. 28, 104.

On November 14, 1988, Deputy Attorney General Harriet Lewis of the UH legal section sent a memo to UH Vice President Doris Ching, with copies to Takushi, stating, in pertinent part, that the DFWA requires UH employees "to agree to abide by the employer's policy against drug abuse and to report drug convictions. Inasmuch as most UH employees have selected unions to be their representatives [sic], this agreement can be secured through the employees representatives and not through

individual contracts with each separate employee". Complainant's Exhibit 2 at p. 4.

On May 9, 1989, Musto contacted Takushi by letter, and also possibly by faxing or telephone, noting in the letter that although he had previously received a draft of the Executive Policy, "it was not clear how the University intended to implement this policy. . .". He further stated in the letter that in light of Lewis' memo, compliance should be sought through the union and not individually as required in CTAHR documents. The letter is headed, "Compliance and Implementation; Demand to Bargain". Complainant's Exhibit 7. Musto testified that he felt the requirements in the CTAHR packet went beyond requirements of the DFWA itself and that he wanted to put the BOR on timely notice that UHPA felt they were negotiable questions concerning implementation of the policy. Tr. p. 27.

On May 10, 1989, Musto circulated a notice to all faculty which stated in part, "you do not need to sign any forms or waivers". The notice states that failure to comply with the Federal Act can jeopardize the receipt of federal contracts and grants but that the compliance and implementation requirements placed upon individuals exceeds the minimum requirements of the Act. Complainant's Exhibit 10. The notice was distributed to all faculty. Tr. p. 35.

Musto wrote a letter, dated May 10, 1989, to President Simone in which he reiterated the demand for bargaining on

implementation of the policy. Complainant's Exhibit 8. He also called the President's office to advise him of the letter. Tr. p. 31. In that letter, Musto stated his belief that implementation is a mandatory subject of bargaining but that since the document promulgated in February did not specify requirements for individual compliance, UHPA was not prepared to make a fully informed response.

Musto wrote again to the President on May 12, 1989 stressing the urgency of the request for bargaining. Complainant's Exhibit 9.

At some point during Musto's written communications, he received a call from Takushi who stated that the BOR's position would be that matters raised by Musto were not mandatory subjects of bargaining. Tr. pp. 31-32. Also on May 12, 1989, Takushi wrote back to Musto in response to Musto's May 10 letter, stating that "this subject need not be negotiated". Complainant's Exhibit 11. Therein Takushi also reminded Musto that he had received a draft of a policy before implementation and he also asked Musto to respond to the State's DPS drug policy mentioned above. Takushi states therein that, "I am sure you are aware that this policy is based on Federal requirements that have been imposed on the University".

On May 15, 1989, UHPA filed the instant prohibited practice complaint with the Board. At the time of the filing of the subject complaint, no written proposal had been given to the BOR by UHPA.

On June 19, 1989, Musto submitted a written proposal to the BOR. Respondent's Exhibit 12. Musto testified that the proposal was not submitted earlier because UHPA had wanted to resolve the fundamental question as to negotiability, but as that was not possible, UHPA felt it was essential to demonstrate to the State that one could implement the DFWA through the collective bargaining process without jeopardizing federal funding. Musto testified to various examples of matters of implementation that he felt could be negotiated; e.g., handling discipline under the contractual grievance procedure, timing of discipline pending appeal, and the form on which reports would be made. Tr. pp. 66-70.

Skip Bittenbender, Associate Specialist in the Department of Horticulture, CTAHR, testified that he refused to sign the memo issued by Kefford despite several calls from administrators in his college. A few days before the hearing in this case, he received a call from Pua Fisher, a fiscal officer in the college indicating that because of his refusal to sign, certain accounts containing federal money would be frozen. Fisher gave no indication of the authority by which the funds were frozen and did not indicate that the federal government itself had imposed any such requirement. Bittenbender did not grieve under the contract. Tr. pp. 47-52.

Donna Ching, Assistant Extension Specialist in community leadership in the CTAHR also testified that she refused

to sign the document issued by Kefford on a few occasions. However, she received a call from Pua Fisher indicating that if she did not sign, funds from which Ching expected to pay employees for services already rendered would be frozen. Ching thus felt that she had no choice since she had to pay the employees. Though the funds had previously been received by the UH, Fisher did not disclose the authority by which she froze these funds. Ching did not grieve on the issue. Tr. pp. 57-62.

Musto testified that no one from the UH administration has told him why any funds are being impounded or frozen in the CTAHR. Tr. p. 65.

James Oshiro, UH Personnel Officer in charge of the technical services program testified on behalf of the BOR. He was designated as the technical resource person for the DFWA. Oshiro testified as to the BOR's interpretation of the DFWA, and that Section 5153(a) spells out seven requirements with which the BOR must be in compliance. Tr. pp. 77-80.

Oshiro testified that final regulations will be published on or about the ending of August 1989. Tr. p. 81. The regulations contained in Respondent's Exhibit 2 are interim rules, Oshiro stated. Tr. p. 81.

On cross-examination, Oshiro stated that "the policy does go a little further in terms of what are the minimum requirements of the Federal Act." Tr. p. 85. On his cross-examination, Oshiro offered his opinions on implementation of the DFWA, i.e., employer's discretion to apply discipline or

rehabilitation counseling, the permissibility of filing grievances regarding discipline, selection of rehabilitation programs, manner of notice of conviction, and the definition of a conviction. Tr. pp. 85-92.

Oshiro could not state on behalf of the UH whether its intention is to unilaterally promulgate and implement any rules that may be required by final Federal regulations. Tr. p. 92. Oshiro stated that discipline for convictions is subject to the grievance procedure. Tr. pp. 94-95. Oshiro testified to hearing unofficial word that the UH would be one of the first obvious sites that the Federal Government would be checking for compliance. Tr. p. 93. He also stated that nobody from the Federal Government has told him that the UH is not in compliance to date. Tr. p. 94.

In his testimony, Takushi stated that the draft of the UH drug policy had been sent to UHPA as a matter of consultation and not bargaining in February 1989. Tr. p. 98. Takushi stated that Harriet Lewis was not the UH's labor relations attorney and that her opinion was not "official". Tr. p. 101. However, Takushi agreed that Simone had sent the Lewis letter to UHPA. Tr. pp. 112-113.

Takushi further agreed with Oshiro that the DFWA may permit a wide range of discipline that the DFWA does not specify

what rehabilitation is to be offered, nor the manner of notice of conviction. Tr. pp. 109, 122-124. He stated that under the prevailing system matters of discipline are grievable. Tr. p. 120. Takushi would not agree that grievability of discipline can be bargained into the contract, stating that it would depend on how it was presented. Tr. p. 120.

Takushi testified that UHPA did not respond to the request for comment or consultation prior to March 18, 1989. Tr. p. 98. Takushi testified that the first response he received from the UHPA on the University's Drug Free policy was the May 9 letter from Musto. Tr. p. 100; Respondent's Exhibit 6. Takushi also testified that the first proposal from the UHPA was received on June 19, 1989. Tr. pp. 104-105. Takushi informed the Union at the negotiating table that according to Section 89-20, HRS, no negotiations need to take place where federal funds were affected. Tr. p. 105.

Takushi testified that Dean Kefford promulgated the packet concerning DFWA compliance pursuant to his own decentralized authority and that if promulgation were improper it would be corrected upon the grievance of an employee. Tr. pp. 117-119.

#### CONCLUSIONS OF LAW

Complainant UHPA is and was, for all times relevant, the certified exclusive bargaining representative of the



employees in Unit 7 (Faculty of the University of Hawaii and the community college system) as defined in Section 89-2, HRS.

Respondent BOR is and was, for all times relevant, the public employer within the meaning of Section 89-2, HRS, of the employees in Unit 7.

In its prohibited practice complaint, UHPA charges the BOR with violations of Subsections 89-13(a)(1), (2), (5) and (7), HRS. The complaint states:

The UH, through its Deans, in the period aforesaid, has circulated among the employees of the unit a variety of forms, supposedly to be signed individually by faculty members and returned to the UH, which

- 1) request individual agreement to modified terms of employment, circumventing the UH's obligation to bargain over terms with the UHPA;
- 2) impliedly condition continued employment at the UH on prompt individual assent to the modified terms;
- 3) specify drug conviction, use, or possession as a basis for termination from employment;
- 4) require an employee to report drug conviction for an offense occurring in the work place to the UH;
- 5) require attendance at a rehabilitation program at employee expense as a condition of continued or resumed employment following conviction.

The UHPA has in writing demanded bargaining on E11.201. The UH has failed or refused to consent to bargaining as of the date of this complaint.

In its Opening Brief, UHPA mounts arguments regarding allegations of violations of Subsections 89-13(a)(5) and (8), HRS, for a refusal to bargain over details of implementation and breach of contract, and allegations of breaches of Subsections 89-13(a)(1) and (5), HRS, for interference with the exercise of employees' rights and "direct dealing" with individual employees. The allegation of a violation of Subsection 89-13(a)(2), HRS, is withdrawn. UHPA's Opening Brief pp. 12-14.

In relevant part, Subsection 89-13(a), HRS, 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;

\* \* \*

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

\* \* \*

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

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

UHPA, in its Opening Brief, does not incorporate any arguments encompassing Subsection 89-13(a)(7), HRS. Hence, those charges are hereby dismissed.

In its Opening Brief, UHPA includes a discussion of Subsection 89-13(a)(8), HRS, violations (breach of agreement), but states that UHPA did not specifically charge such a violation in the instant case. Since the filing of the initial prohibited practice complaint, UHPA has not entered a motion to amend its complaint to include allegations of Subsection 89-13(a)(8) violations. The Board thus considers the issues solely on the bases of allegations of violations of Subsection 89-13(a)(1) and (5), HRS.

In its Opening Brief, UHPA divides its charges of prohibited practices into two allegations; i.e., 1) that the BOR's refusal to bargain over the details of implementation of the DFWA, specifically over questions of the range of discipline which can be applied, and when; the manner of notification of the employer; the types and costs and timing of rehabilitation which can be required; and the integration of compliance procedures with the rest of the contract amounts to a violation of Subsection 89-13(a)(5), HRS (refusal to bargain collectively in good faith); and 2) that by going directly to employees in the CTAHR seeking to obtain individual faculty signatures on forms supplied by Dean Kefford, the Employer has attempted to bypass the collective bargaining process with the Union which attempt amounts to a refusal to bargain collectively in good faith in contravention of Subsection 89-13(a)(5), HRS; further, that such alleged direct dealing is not only a

refusal to bargain, but also a violation of the right of employees to bargain collectively through a representative of their choice as secured by Sections 89-3 and 89-8, HRS, in violation of Subsection 89-13(a)(1), HRS (the interference with employee's rights guaranteed by Chapter 89). UHPA's Opening Brief pp. 12-14.

The BOR argues that as each of UHPA's charges contained in its complaint deals with an explicit or essential requirement of the DFWA, none of the subjects are negotiable. Opening Brief of Respondent Board of Regents, University of Hawaii [hereinafter referred to as BOR opening brief] pp. 16-20.

Both parties rely on Decision No. 242, Hawaii Fire Fighters Association, Local 1463 and George Ariyoshi, Frank Fasi, et al., 4 HLRB 164 (1987) to support their respective arguments. The United States Supreme Court in 1985 found the Fair Labor Standards Act (FLSA) applicable to State and municipal employers. The FLSA regulates the minimum wage, maximum hours, overtime pay, child labor and other similar topics. The Firefighters sought negotiations "with respect to the application of the FLSA and the resulting effect upon the existing collective bargaining agreements between the parties." 4 HLRB at 166. The State and county employers refused to negotiate on those topics, in part, because of purported "uncertainties on interpretation and implementation

of the decision. . ." 4 HLRB at 169. The employers put their plans into effect without negotiations and in the face of existing collective bargaining agreements. The Board held there that:

Cases make clear that compliance with federal statutes as such is not a negotiable issue, but cases implicitly recognized a distinction between negotiation over compliance and negotiation over implementation of federal statutes. Based on this distinction, it appears that though compliance is not negotiable, where the employer has discretion under federal law, the duty to bargain applies. 4 HLRB at 194.

The Board also noted:

It is clear that an employer cannot refuse, during negotiations, to discuss wages and economic benefits based on the mere fact that the employer's operations are covered by the FLSA. Such a stance constitutes an unlawful refusal to bargain. 4 HLRB at 195.

The Board thus went on to conclude that the only topics upon which bargaining was not required regarding FLSA implementation were matters of "mandatory or essential compliance". 4 HLRB at 197.

As asserted by both Complainant and Respondent, the instant controversy revolves around the fundamental inquiry as to whether policies promulgated under Executive Policy E11.201 merely comply with the express mandates of the DFWA or whether they address discretionary matters which, under Decision No. 242, would be subject to negotiation.

Executive Policy E11.201, Illegal Drugs and Substance Abuse, is a six-page document prepared by the Office of the Vice-President for Students Affairs and the Office of Planning and Policy. It is broken down into seven parts, i.e., introduction, University expectations regarding substance abuse and illegal drugs, objectives, applicability, definitions, policies, and administrative procedures.

The Executive Policy in general terms asserts that substance abuse threatens the University and the fulfilling of its mission. It states that the University can best achieve its mission by creating a supportive working environment, encouraging individuals to seek appropriate help and rehabilitation for substance abuse, and that the University should extend support and encouragement during the recovery phase. It further states that lawful behavior by students, faculty and staff during their presence on University premises and at University events is expected, in part I, Introduction.

In part II, University Expectations Regarding Substance Abuse and Illegal Drugs, the expectation that students, faculty and staff are to perform their duties free of intoxication by any illegal drugs is stated. It is further stated that students, faculty and staff are expected to observe laws regulating illegal drugs and may be subject to investigation and/or prosecution. It is stated that faculty, staff and students are expected not to manufacture, distribute, possess,

use, dispense or be under the influence of illegal drugs and that they are expected to share in responsibilities for the well-being of each other.

In part III, Objectives, four objectives are identified: to establish the University's values regarding substance abuse, to provide a positive context for education, assistance, and rehabilitation in regard to substance abuse, to comply with the provisions of the DFWA, and to provide guidelines for substance abuse programs.

In part IV, Applicability, it is stated that this policy applies to all members of the University except civil service and exempt civil service employees who are subject to DPS procedures and policies.

Part V, presents definitions of terms used in the policy.

Part VI, Policies, states general policies to the effect that all members of the University are responsible for satisfactory performance as employees or students, and that no exceptions shall be made for unsatisfactory performance caused by substance abuse. It is stated that the University will cooperate with law enforcement agencies responsible for enforcing laws related to the use of illegal drugs. It is stated that faculty and staff found in violation of this part are subject to disciplinary action as provided in collective bargaining agreements, University policy and other applicable

state laws and rules. Substance abusers are to be encouraged to seek help and treatment. Education counseling and referral programs shall be formulated and appropriate units of the University are called upon to collaborate with the community to assist in addressing substance abuse problems outside the University. It is stated that the University shall comply with the DFWA.

Part VII is entitled Administrative Procedures and contains policies promulgated pursuant to enactment of the DFWA. This part is broken down into seven alphabetically headed sub-parts, A through G. Sub-parts B, F and G deal with notice to students, chancellors and vice-presidents role in developing assistance to the community in addressing drug problems, and creation of a substance abuse advisory council, respectively.

An examination of Executive Policy E11.201 shows that this lengthy document establishes many policies in the form of expectations or the reiteration of pre-existing restraints and requirements of law and regulations, but that as far as concrete and affirmative duties are addressed this document substantially mirrors the language and requirements of the DFWA. Every requirement in the DFWA finds a like requirement in some provision of Executive Policy E11.201. Taking DFWA requirements in series, a comparison with Executive Policy E11.201 shows:



1. The DFWA requirement that each "person" receiving a grant from any federal agency shall publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the grantee's workplace, and specifying the actions that will be taken against the employees for violation of such prohibition, is addressed in Executive Policy E11.201 in part VII, Administrative Procedures, subpart (A)(2). The language therein adopts the substance of Section 5153(a)(1)(A) and generally conforms with the requirements thereof.

2. The language of Section 5153(a)(1)(B) is adopted in part in Executive Policy E11.201, part VII, subpart (C). The Executive Policy provision, however, neglects mention of provisions in Section 5153(a)(1)(B)(ii) and (iv). Provisions therein, however, are addressed in part VII, subpart (A)(2) of the Executive Policy.

3. The requirement of Section 5153(a)(1)(C) is mirrored in part VII, subpart (D)(1) of the Executive Policy, which provides that all employees engaged in the performance of a federal contract or grant are provided a copy of the subject policy.

4. The requirements of Section 5153(a)(1)(D) are mirrored in part VII, subpart (D)(2) of the Executive Policy, providing that all employees agree as a condition of employment to abide by the subject policy and further to notify the

University within five days of any conviction for a criminal drug statute offense occurring in the work place.

5. The requirement of Section 5153(a)(1)(E), requiring notification to the granting agency within ten days after receiving notice of a conviction under subparagraph (D) (ii) from an employee or otherwise receiving actual notice of such conviction, is mirrored in part VII, subpart (D)(3) of the Executive Policy.

6. Sanction and rehabilitation provisions contained in Section 5153(a)(1)(F) and Section 5154 are mirrored in part VII, subpart (D)(4) of the Executive Policy.

Such an examination of the adoption by the Executive Policy E11.201 of the requirements of the DFWA shows that the Executive Policy in essence merely adopts the requirements of the DFWA in a manner which indicates that the BOR is in fact merely complying with the dictates of the DFWA rather than adding discretionary terms of implementation to the policy such as would require negotiations.

UHPA argues that such details as the range of discipline which can be applied, and when; the manner of notification of the employer; the types and costs and timing of rehabilitation which can be required; and the integration of compliance procedures with the rest of the contract--subjects mentioned in the Executive Policy--should be open to negotiation. While such topics do require that the Employer herein

institute various apparatus to administer related procedures, the mere promulgation of policies providing for procedures mandated by federal law does not require negotiation. The range of implementation is built into the federal statute itself. The promulgation in the Executive Policy of the mandate which itself contains the range of choices does not give rise to the duty to negotiate.

However, the Board recognizes that as the apparatus making the DFWA functional at the University is established, the various provisions for implementation, including those over which negotiations are now sought by UHPA, will be subject to consultation or negotiation, as the case may be, in particular instances. The Board further recognizes that, as both parties agree, the grievance procedure is available to pursue issues of discipline.

Because the policy is limited to compliance with the DFWA, no harm can be found in the CTAHR dean's attempts to gain individual consent to compliance with the DFWA through signature on forms presented to employees. The clause contained in the form, "I understand that this policy sets forth the responsibilities of the employer (UH) and employee (myself)" skirts the edge of negotiable terms and conditions but does not pass over this line for the above stated reason that the policy only presents terms of essential compliance with the DFWA and contains no items or details which require negotiation.

At page 14 of its Opening Brief, UHPA cites various provisions of Executive Policy E11.201 which it asserts exceed the minimum requirements of the DFWA:

The faculty member's responsibility for "recognizing the behaviors associated with substance abuse" among peers and students. Policy E11.201, Section II D; part of Un. 6.

The faculty member's responsibility for preventing substance abuse and addiction. Policy E11.201, Section II F; part of Un. 6.

The faculty members' responsibility for providing education about substance abuse and addiction through studies, research and special programming. Policy E11.201, Section II F; part of Un. 6.

The faculty members' liability for failure to satisfactorily discharge these new responsibilities. Policy E11.201, Section IV A; part of Un. 6.

The UH Vice President for Research and Graduate Education (Dr. Yount) and Director of Personnel (Mr. Takushi) are authorized to develop further compliance procedures, presumably of the sort that UHPA contends have to be bargained. Policy E11.201, Section VII E; part of Un. 6.

These provisions, excepting the last item, are phrased in language of mere expectations [part II (D) and (F)] or restate pre-existing restraints [part IV (A)]. They do not materially alter conditions of employment and so do not give rise to any duty to negotiate.

However, the provision in part VII, subpart (E) reading, "the Vice President for Research and Graduate Education and the Director of Personnel may develop additional

administrative procedures in order to ensure compliance with the requirement [sic] of the Federal Drug-Free Workplace Act of 1988" potentially encompasses subjects which may give rise to the duty to negotiate. Since it is phrased in prospective language, however, it does not form the basis of any present violation of the duty to negotiate.

Because the Board holds that promulgation of Executive Policy E11.201 merely complies with the DFWA and does not give rise to the duty to negotiate, the Board need not address the issue of whether Section 89-20, HRS, comes into operation.

The Board concludes that promulgation of Executive Policy E11.201 amounts to implementation of essential terms of the DFWA. Because this promulgation does not exceed the mandates of the DFWA, the Board concludes that the BOR's refusal to bargain over implementation of the essential terms of the DFWA is not a prohibited practice contravening Subsection 89-13(a)(5), HRS. The Board also concludes that, given the propriety of DFWA implementation through promulgation of Executive Policy E11.201, the seeking of individual consent to compliance with the policy in the CTAHR is not a prohibited practice in contravention of Subsections 89-13(a)(1) and (5), HRS.

However, the Board notes that the testimony of Bittenbender and Ching indicates that within the CTAHR, the

signing of consent forms occurred under questionable circumstances. The testimony indicates that Bittenbender and Ching were informed by fiscal officer Fisher that federal funds allocated to projects on which they were working would be frozen if they refused to sign the consent forms. Absent any evidence of federal action to withhold or terminate such funding, the threat by Fisher to freeze the funds was of questionable propriety. While refraining from finding a prohibited practice in the actions of the employer's agent, the Board expresses its concern regarding this high-handed and arbitrary action.

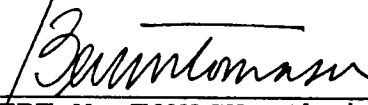
The Board reiterates, however, that actual implementation of the apparatus required for the execution of the mandates of the DFWA, as opposed to the mere publishing or promulgation of those mandates in policy statements, may give rise to the duty to bargain.

ORDER

The instant prohibited practice complaint is dismissed.


DATED: Honolulu, Hawaii, June 22, 1990.

HAWAII LABOR RELATIONS BOARD

  
\_\_\_\_\_  
BERT M. TOMASU, Chairperson

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY and BOARD OF REGENTS,  
University of Hawaii; CASE NO. CE-07-124  
DECISION NO. 303  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member

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