

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-173
	)	
UNIVERSITY OF HAWAII PROFES-	)	DECISION NO. 335
SIONAL 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 August 19, 1992, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint against the BOARD OF REGENTS, University of Hawaii (BOR or Employer) with the Hawaii Labor Relations Board (Board). Specifically, UHPA alleges that Vice President for Student Affairs Dr. Doris Ching improperly appointed Special Assistant David Robb to the Director of Admissions and Records. UHPA alleges that the BOR's placement of an administrator into a bargaining unit position violates Subsections 89-13(a)(1), (3) and (5), Hawaii Revised Statutes (HRS).

At the hearing on the complaint held on October 20, 1992, UHPA moved to amend its complaint to correct a typographical error and replace its allegations of a Subsection 89-13(a)(5), HRS, violation with allegations of a Subsection 89-13(a)(7), HRS, violation. The Board granted the amendment of the complaint.

The parties filed posthearing briefs on November 25, 1992. On December 11, 1992, UHPA filed a motion to admit posthearing evidence and to request an expedited decision and order. By Order No. 924, dated February 26, 1993, the Board granted UHPA's motion to receive the requested exhibit into evidence and further requested further briefing by the parties.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

Complainant UHPA is the exclusive representative of employees in bargaining unit 7, the faculty of the University of Hawaii (UH) and community college system.

Respondent BOR is the public employer of employees in bargaining unit 7.

The Director of Admissions and Records at the UH, Position Number 82701, is included in bargaining unit 7. Transcript (Tr.) p. 36. The position became vacant on October 31, 1991 when the previous incumbent Donald Fukuda retired.

Richard Nishioka has been the Associate Director of the Office of Admissions and Records since July 1, 1975. Tr. p. 19. Nishioka is included in bargaining unit 7.

Vice President of Student Affairs Dr. Doris Ching, the Director's immediate supervisor, anticipated that Fukuda would retire at the end of the calendar year. Ching learned two weeks prior to the end of October that Fukuda would retire effective October 31, 1991. Tr. p. 47. Ching appointed her Special Assistant David Robb to assume the Director's duties. Tr. pp.

49-50. Robb was not transferred full-time to the position; he retained his position as Special Assistant to the Vice President, which is excluded from collective bargaining. Tr. p. 63. Ching decided to assign the Director's duties to Robb primarily because of budgetary considerations. Tr. p. 53. In addition, there was a movement at the UH towards a systemwide approach and Robb had the flexibility in responsibilities and knowledge to perform the job. Tr. p. 49. Robb was also considered because Fukuda had been the Director of Admissions and Records for twenty years and Ching had received complaints about the program. Ching felt Robb's appointment would provide a fresh perspective for the Office and would give him an opportunity to get to know the Office. Tr. p. 55.

With respect to cost factors, the Employer calculated that Fukuda's allocated salary was "encumbered" from November 1, 1991 to March 25, 1992 because Fukuda received a large cash payment for his accrued vacation time. Tr. pp. 48-49. As there were already budget reductions and indications that the reductions would continue, the Employer felt it was extremely difficult to fill the Director's position by temporary assignment. Tr. p. 49. In addition, the State Department of Budget and Finance (B & F) initially imposed a "hiring" freeze on all positions vacant as of June 30, 1992. Respondent's (R's) Exhibit (Ex.) 1. That date was later advanced to May 15, 1992. Tr. p. 56. As the Director's position was not filled by either date, the funding for the position was eliminated from the budget. Tr. p. 56. The BOR petitioned the B & F to release the funds. Tr. p. 53. At the time of the hearing the position was still vacant because no funds were available. Tr. p. 62.



Ching indicated that she could have temporarily assigned Nishioka into Fukuda's position, but it would have been a hardship for the Employer. Tr. p. 67. The temporary assignment would have resulted in additional salary costs because another employee would have to be temporarily assigned into the Associate Director's position. Tr. p. 70.

Robb served as the Special Assistant to Ching for a year-and-a-half and was Director of Universitywide Student Affairs since 1980. Tr. p. 72. He was the systemwide student services policy officer who administered the coordinated admissions program since 1980. Tr. p. 74. When the duties of the Director were assigned to him, he was aware that financially the Employer could not fill the position for several months. In the interim, Ching wanted to address problems in the Office in preparation for the new permanent director. Tr. p. 78. There were also complaints from students and other programs on campus. In addition, there were internal staff morale problems. Tr. p. 79. Robb was also to consider whether the position should remain a faculty position or be excluded from collective bargaining as a manager. Tr. p. 80.

Robb indicated that he was not the acting director of admissions. All internal UH correspondence was signed as Assistant to the Vice President for Student Affairs and only out-of-state inquiries were signed as Acting Director so as not to confuse the recipient. Tr. p. 85.

In September 1992, Robb was appointed as Director of Universitywide Student Affairs/Assistant to the Vice-President of Student Affairs which oversees Admissions and Records and Financial

Aid Services. Tr. p. 38. The position is excluded from bargaining unit 7. Tr. p. 52.

Richard Nishioka's position description indicates that he assumes the duties and responsibilities of the Director's position in the Director's absence. Complainant's (C's) Ex. 2. In the past, Nishioka was temporarily assigned to the Director's position in Fukuda's absence, most notably during Fukuda's sabbatical. Tr. p. 33. Nishioka would have earned approximately \$4,000 - 6,000 for the temporary assignment for the remainder of the fiscal year, i.e., November 1991 through June 1992. Nishioka, as Associate Director, is included in bargaining unit 7. Tr. p. 21. According to Nishioka, Robb announced to the staff of Admissions and Records in November 1991 that he was the Acting Director. Tr. p. 30.

UHPA's Associate Executive Director John Radcliffe was aware that Robb had been assigned to oversee the Office of Admissions and Records on November 5, 1991. UHPA sent a memo to the BOR stating its objections shortly after Robb's appointment as Acting Interim Director. C's Ex. 4; Tr. pp. 36-37. Paul Yuen, Acting President of the UH, indicated that he was in the process of obtaining information and a further response would be sent after consultation with the Attorney General's Office. C's Ex. 5. The BOR never responded. Tr. pp. 38-39. UHPA would have received \$41 per month in statutory dues if the Director's position had been filled by Nishioka's temporary assignment. Id.

#### DISCUSSION

The first issue before the Board is whether the prohibited practice complaint was timely filed.



Respondent BOR contends that the alleged violation occurred on or about November 1, 1991 when Ching temporarily assigned Robb to oversee the Admissions and Records program. The BOR argues that UHPA filed the instant complaint on August 19, 1992, which was seven months after the statute of limitations ran.

Section 377-9(1), HRS, made applicable to the Board by Section 89-14, HRS, provides:

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

In conformance with the foregoing provision, Administrative Rules Section 12-42-42(a) provides:

(a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest of their representatives within ninety days of the alleged violation.

Radcliffe confirms that UHPA was aware of the alleged violation in early November 1991. UHPA contends that it notified Respondent of its objections soon after the appointment of Robb. Tr. pp. 36-7, 39; C's Ex. 4. Acting University of Hawaii President Paul Yuen wrote UHPA that the BOR would respond after it obtained information from the Attorney General's Office. C's Ex. 5. The BOR did not respond to UHPA's objections and failed to take any corrective action. Tr. p. 39. In addition, UHPA contends that the BOR's violation is of a continuing nature since Robb continues to serve as Director of Admissions and Records to the present.

The Board agrees with UHPA that the complaint was timely filed. Since Robb continues to perform the duties and responsibilities of the Director's position even as he has been appointed to the position of Director of Universitywide Student Affairs/Assistant to the VP, the alleged violation is of a continuing nature. Moreover, the Board finds that the BOR is estopped from relying upon the statute of limitations defense since the BOR representative indicated that the matter would be investigated and a response would be forthcoming. The record indicates the BOR never formally responded to the Union and cannot now assert the statute of limitations to preclude a complaint before the Board when its inaction could have caused or contributed to the delay in the filing of the complaint.

As to the merits of the case, UHPA, in its Closing Brief, withdrew its charges that Subsections 89-13(a)(1) and (3), HRS, were violated. Thus, UHPA argues only that the BOR violated Subsection 89-13(a)(7), HRS, by appointing Robb, an excluded employee, to a bargaining unit position.

Subsection 89-13(a)(7), HRS, provides:

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

\* \* \*

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

UHPA argues that the BOR's actions violated Section 89-6(c), HRS, which provides, in part:

(c) No . . . top-level managerial and administrative personnel . . . shall be included in any appropriate bargaining unit or entitled to coverage under this chapter.



UHPA contends that Section 89-6(c), HRS, prohibits excluded managers from performing bargaining unit work. UHPA argues that the BOR is undermining the basic purpose of unit designations by assigning managers to perform the work of the unit positions.

UHPA contends that Ching could have temporarily assigned Nishioka to the Director's position since there were sufficient funds available. Although the lump-sum payment of Fukuda's vacation committed allocated personnel resources through March 25, 1992, Nishioka would only have been entitled to receive approximately \$4,000 - 6,000 for the fiscal year if he had been temporarily assigned to the Director's position on November 1, 1991.

It appears that there would have been approximately \$20,000 available for the fiscal year, which is the balance of the Director's salary less Fukuda's lump-sum payment. Ching testified that subsequently the funds were frozen as of May 15, 1992 which prevented the BOR from permanently filling the position. Tr. p. 56. Ching, however, testified that the hiring freeze would not have prevented the temporary appointment of Nishioka but it would have created a hardship. Tr. p. 67. Moreover, Nishioka had previously assumed the duties of the Director on various occasions, including a six-month period for Fukuda's sabbatical. Tr. p. 33.

UHPA contends that the wilfulness of the statutory violation can be presumed because it is the natural consequence of Ching's action. After being informed of UHPA's objections to Robb's appointment, the BOR failed to take any corrective action.



Tr. pp. 37-38; 39. UHPA argues that the BOR could have temporarily assigned Nishioka or included Robb in the bargaining unit.

The BOR maintains that there is no statutory proscription against assigning bargaining unit work to nonbargaining or excluded employees. The BOR contends that the Employer has the right to assign work to its employees pursuant to Section 89-9(d), HRS, and Article XXII of the Unit 7 Agreement, whether or not such work has been traditionally performed by one bargaining unit or another or by an excluded employee.

The Board finds that the BOR improperly assigned to Robb the Director's duties and responsibilities because Nishioka should have been temporarily assigned to the Director's position. Although the BOR perceived that there was a shortfall in available funds, this perception was illusory. While funds may not have been available to fill the Director's position on a permanent basis, the record indicates that there were sufficient funds for Nishioka's temporary assignment. Ching admitted that the temporary assignment could have been made but it would have created a hardship. While management retains the right to assign and direct its employees, the BOR here should have followed its existing policies and practices, reflected in Nishioka's job description and past practice, by temporarily assigning Nishioka to fill the Director's position in the Director's absence. The Board makes no finding as to whether the Director's position should be included or excluded from collective bargaining as that issue is not properly raised before it. The BOR's action in this case, not only deprived Nishioka of the anticipated temporary assignment pay but also the

opportunity for valuable job experience in the Director's position especially in view of the pending recruitment for that position. While Ching indicated that she wanted to have a fresh perspective to be taken at the Office of Admissions and Records and to address persistent complaints she had received, this could have been accomplished with Robb's oversight of the Office in his new position as Director of Universitywide Student Affairs/Assistant to the VP.

The Board further finds that the BOR's actions were wilful since the matter was brought to their attention by the Union and no corrective measures were taken.

#### CONCLUSIONS OF LAW

The instant complaint was timely filed.

Pursuant to Sections 89-5 and 89-13, HRS, the Board has jurisdiction over this complaint.

The Board concludes that the BOR committed a prohibited practice under Section 89-13(a)(7), HRS, by assigning the duties of an included position, the Director of Admissions and Records, to an excluded managerial employee rather than temporarily assigning the Associate Director to the position.

#### ORDER

The BOR shall cease and desist from assigning the duties and responsibilities of the Director of Admissions and Records to excluded managerial employees.

The BOR shall temporarily assign Richard Nishioka to the position of Director of Admissions and Records, retroactive to

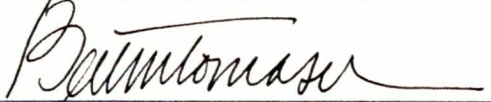
November 1, 1991 and reimburse Nishioka for the net loss of earnings and benefits from November 1, 1991 to the date the position is filled on a permanent basis.

The BOR shall deduct from Nishioka's reimbursement, the difference in the statutory dues equivalency of \$41 per month less dues amounts already paid by Nishioka as Associate Director, for the period from November 1, 1991 to the date his temporary assignment expires and shall remit that amount to the UHPA.


The BOR is directed to immediately post copies of this decision in conspicuous places on the bulletin boards at the work sites where the employees of the bargaining unit assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.

DATED: Honolulu, Hawaii, April 12, 1993.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member

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STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-173
	)	
UNIVERSITY OF HAWAII	)	ORDER NO. 953
PROFESSIONAL ASSEMBLY,	)	
	)	ORDER CLARIFYING DECISION
Complainant,	)	NO. 335
	)	
and	)	
	)	
BOARD OF REGENTS, University	)	
of Hawaii,	)	
	)	
Respondent.	)	
	)	

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ORDER CLARIFYING DECISION NO. 335

On April 12, 1993, the Board issued Decision No. 335 in Case No. CE-07-173. The Board found that the BOARD OF REGENTS, University of Hawaii (BOR or Employer) had committed a prohibited practice and ordered the BOR, inter alia, to temporarily assign Richard Nishioka to the position of Director of Admissions and Records, retroactive to November 1, 1991 and reimburse him for the net loss of earnings and benefits from November 1, 1991 to the date the position is filled on a permanent basis.

On June 18, 1993, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a motion for clarification and enforcement of Decision No. 335. In its motion, UHPA requests clarification of the Board decision as it pertained to the amounts owing to Nishioka.

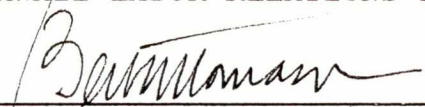
On July 13, 1993, the Board held a conference on this matter. The BOR, by and through its counsel, indicated that

Associate Director Nishioka was not entitled to any increase in salary from the temporary assignment because he had the same salary rank as Director Fukuda. The BOR indicated, however, that it was prepared to offer Nishioka a \$250 per month stipend retroactive to November 1, 1991 until the Director's position was permanently filled.

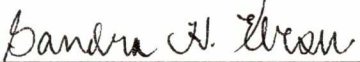
In Decision No. 335, the Board ordered the BOR to compensate Nishioka for the amounts which he would have received but for the prohibited practices committed by the BOR. As the Board is constrained by the record in this case, the uncontroverted testimony adduced at the hearing indicated that Nishioka would have earned an additional \$500 per month for a temporary assignment to the Director's position. Thus, the Board ordered the BOR to reimburse Nishioka an additional \$500 per month from November 1991 until such time as the Director's position was permanently filled. The BOR's subsequent discovery that its position was erroneous does not affect the Board's decision and order.

DATED: Honolulu, Hawaii, July 23, 1993.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
SANDRA H. EBESU, Board Member

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