

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-164
)	
UNIVERSITY OF HAWAII)	DECISION NO. 341
PROFESSIONAL ASSEMBLY,)	
)	FINDINGS OF FACT, CONCLU-
Complainant,)	SIONS OF LAW AND ORDER
)	
and)	
)	
BOARD OF REGENTS, University)	
of Hawaii,)	
)	
Respondent.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 14, 1992, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondent BOARD OF REGENTS, University of Hawaii (BOR or Employer) violated Sections 89-13(a)(5) and (7), Hawaii Revised Statutes (HRS), by unilaterally implementing the University of Hawaii (UH) Manoa Complaint Procedures for Executive Policy E1.203 on Sexual Harassment (Complaint Procedures) effective August 1, 1992. Specifically, the UHPA objects to the inclusion of an investigative panel upon which Unit 7 faculty may sit in the investigation process.

A hearing was held before the Board on July 22, 1992, at which time the parties were afforded full opportunity to call and

cross-examine witnesses and submit exhibits. Closing briefs were submitted by the parties on August 14, 1992.

On July 22, 1993, UHPA filed a Motion for Interlocutory Order requesting an order prohibiting the BOR from convening an investigative panel for a sexual harassment complaint on or about August 3, 1993. On July 27, 1993, Respondent BOR submitted a Memorandum in Opposition to UHPA's Motion for Interlocutory Order. Thereafter, the UHPA withdrew its motion because the Respondent BOR agreed not to include a faculty member on its investigative panel and the issue was moot.

Based upon a thorough review of all exhibits, testimony presented at the hearing and arguments, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The UHPA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 7, as defined in Section 89-6(a)(7), HRS.

The BOR is the public employer, as defined in Section 89-2, HRS, of employees in bargaining unit 7.

The BOR and the UHPA are parties to a collective bargaining agreement effective July 1, 1989 to June 30, 1993. Joint Exhibit (Ex.) 3.

Sometime in 1990 or 1991, University of Hawaii (UH) President Albert Simone asked Dr. Madeleine Goodman, Interim Vice President for Academic Affairs, to chair a committee to develop a set of procedures to implement a 1990 Task Force report on sexual

harassment complaints. Transcript (Tr.) pp. 110-112. Goodman was the principal drafter and editor of the Complaint Procedures for Executive Policy E1.203 on Sexual Harassment (Complaint Procedures). Joint Exhibit (Ex.) 2.

The Complaint Procedures include the use of a panel to assist in the investigation of the complaints. The panel was proposed by the 1990 Task Force. Tr. pp. 92, 123. Students perceived that the existing UH complaint investigation procedures were inadequate and there was a perception that the EEO/AA director who was charged with the investigation would be biased towards protecting the reputation of the UH. Tr. pp. 123, 150. Thus, the panel was developed to assure the students of an objective review of the facts by an investigative body composed of the peers of the complainant and respondent and another neutral person. Tr. p. 123.

After drafting the Complaint Procedures, Goodman sought comments and input from the three labor unions, the Faculty Senate, the Manoa Commission on the Status of Women, the Office of Civil Rights, the State personnel office, etc. Tr. p. 112. Goodman revised the procedures in response to the comments received. Employer Ex. 4.

By letter dated August 30, 1991 to Simone, J. N. Musto, UHPA Executive Director, requested that matters affected by the implementation of the Complaint Procedures constituting the alteration of working conditions be bargained. Employer Ex. 5. The Hawaii Government Employees Association (HGEA) also raised objections to the Complaint Procedures.

Although Simone intended to implement the Interim Complaint Procedures in September 1991, he postponed their implementation, by Memorandum dated September 20, 1991, in order to meet with the unions and discuss their concerns. Employer Ex. 6; Tr. pp. 85-86.

On October 1, 1991, the parties met to discuss the Complaint Procedures. At the end of the meeting, the UHPA and the HGEA agreed to submit their written comments to the Interim Complaint Procedures. Tr. p. 154. Dr. Goodman circulated the draft, and redrafted the procedures. Tr. p. 115.

By letter dated October 25, 1991, UHPA submitted written comments to Simone, including objections to the voluntary participation of the investigating panel as provided for in the Complaint Procedures. Employer Ex. 7.

On April 15, 1992, Dr. Goodman, EEO/AA Officer Mie Watanabe, UH Personnel Director James Takushi and Deputy Chief Negotiator Henry Kanda met with Musto, UHPA President Sinikka Hayasaka, and HGEA representative Dale Osorno to discuss the procedures. Tr. p. 120. UHPA was "unalterably opposed" to the participation of UHPA members and students in the panel option, even though changes were made to the procedures to restrict the panel to fact-finding. Tr. pp. 122, 142-143.

Goodman advised Simone that the unions were against the panel option, and that he had to determine whether to keep the panel option in the procedure. Tr. pp. 140-141. Simone was convinced that only a fraction of people violated come forward with sexual harassment complaints because of the fear of retaliation or

embarrassment. Simone was convinced that a panel of peers to hear the complaints should be available for those people who need it. Tr. pp. 89-90. Thereafter, Simone decided to keep the panel option in the Complaint Procedures as a fact-finding body composed of volunteers.

By Memorandum, dated May 6, 1992, Simone distributed the Complaint Procedures indicating that the procedures would be effective on a pilot basis from August 1, 1992 to June 30, 1993. Joint Ex. 1.

The Complaint Procedures, as finalized, provide the complainant who has filed a formal complaint of sexual harassment with the University of Hawaii EEO/AA Office with two options in the investigation of the complaint. The complainant may have the complaint investigated by the EEO/AA Office alone or to have a panel hear the matter after an investigation by the EEO/AA Office. The EEO/AA Office or the panel submits its findings of fact to the appropriate Vice-President who reviews the case and renders a "cause" or "no cause" determination as to whether or not the record supports the allegations of the complaint. The Vice President then determines the remedial action to be taken and a written decision is issued. Joint Ex. 2.

The Complaint Procedures provide that the Senior Vice President selects an investigating panel of three members from a pool of 30 members to review the investigative file, question witnesses and report its findings of fact to the appropriate Vice President. The pool of panel members consists of five undergraduate students, five graduate students, five faculty, five

Administrative, Professional, and Technical personnel, five executive and managerial personnel, and five civil service staff. Members of the pool are selected annually and serve on a voluntary basis. The panel is constituted with one member from the peer group of the complainant, one member from the peer group of the respondent, and one member from another category in the pool who serves as the presiding officer. Id.

The UHPA filed the instant complaint on May 14, 1992.

DISCUSSION

UHPA contends that the BOR's unilateral implementation of the Complaint Procedures with the investigative panel without negotiation violates Subsections 89-13(a)(5) and (7), HRS. Those sections provide:

89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

- (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; . . .

The BOR, by the testimony of its witnesses and the correspondence, indicated that it was only consulting with the Union over the Complaint Procedures and not negotiating. Thus, the

only issue in this case is whether the BOR has a duty to negotiate over the panel option of the Complaint Procedures.

UHPA contends that the panel option violates or alters the Unit 7 contract provisions regarding discipline or grievance procedures. In addition, the UHPA argues that it imposes additional duties or assignments for the faculty and must be negotiated into the contract. UHPA's central theme, however, is that the panel performs traditional administrative duties which should not be performed by bargaining unit members.

In Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253 (1972), the Board recognized that all matters affecting wages, hours and working conditions are negotiable and bargainable subject only to the limitations set forth in Subsection 89-9(d), HRS. Subsection 89-9(d), HRS, is the management's rights clause which excludes from the subjects of negotiations matters which would interfere with the rights of the 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 reasons; (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.

The test as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of

employment, i.e., whether it has a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 763 (1977).

The panel at issue here investigates the sexual harassment complaint by reviewing the material of the EEO/AA office and makes findings of fact for the Vice President who then determines cause or no cause to mete out any discipline. The evidence clearly establishes that service on the panel is entirely voluntary; no penalties are assessed for refusing to volunteer. No benefits are derived from volunteering to serve on the panel. Further, service on the panel is like service on any other committee which is not compensated. Given the parameters of the panel's function and the nature of service on the panel, the Board finds that the evidence falls short of proving that the panel option has a material or significant effect on the terms and conditions of employment.

UHPA argues that the panel process is inextricably intertwined with the discipline and grievance articles of the collective bargaining agreement and therefore requires negotiation prior to implementation. After reviewing the pertinent provisions of the contract, it is clear that the panel option does not alter or modify the discipline or the grievance articles. The provisions of these articles remain intact and in force and are not altered by the Complaint Procedures. Thus, the Board concludes that UHPA failed to establish that negotiation is required prior to implementation of the panel option in the Complaint Procedures.

In this case, the Employer had a diligent and thorough dialogue with UHPA over a two-year period, including several

meetings with the unions to discuss the aspects of the procedures in contention. The Board finds that the BOR fulfilled its obligations under Chapter 89, HRS, to consult regarding the implementation of the Complaint Procedures.

CONCLUSIONS OF LAW

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

An Employer commits a prohibited practice when it unilaterally implements a policy which has a material and significant impact on terms and conditions of employment, and fails to negotiate the policy with the exclusive representative.

Complainant failed to prove by a preponderance of evidence that the implementation of the panel option of the Complaint Procedures has a material and significant impact on terms and conditions of employment.

An Employer commits a prohibited practice when it unilaterally implements a policy which alters or modifies the terms of a collective bargaining agreement without negotiation.

Complainant failed to prove by a preponderance of evidence that the implementation of the panel option alters or modifies existing terms of the collective bargaining agreement.

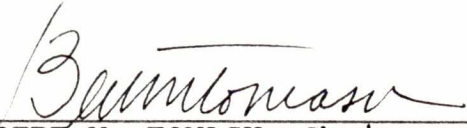
ORDER

The prohibited practice charges in the instant complaint are hereby dismissed.

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY v. BOARD OF REGENTS;
CASE NO. CE-07-164
DECISION NO. 341
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, August 4, 1993.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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