

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-177
)	
UNIVERSITY OF HAWAII)	DECISION NO. 345
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 September 18, 1992, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint against the BOARD OF REGENTS, University of Hawaii (BOR). UHPA alleges that the BOR unilaterally implemented a system of student evaluation of faculty members at the University of Hawaii, Hilo campus (UHH), without bargaining. UHPA alleges that the UHH's refusal to bargain constitutes violations of Sections 89-13(a)(5) and (8), Hawaii Revised Statutes (HRS).

On December 9, 1992, the parties filed a Stipulation of Parties whereby respective counsel stipulated to submit facts to the Board upon affidavits and responsive affidavits. The parties further stipulated to waive their rights to a hearing and thereafter submitted written briefs on December 21 and 22, 1992 respectively.

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

FINDINGS OF FACT

Complainant UHPA is the exclusive bargaining representative, as defined in Section 89-2, HRS, of employees who are included in bargaining unit 7, faculty of the University of Hawaii and community college system.

Respondent BOR is the public employer, as defined in Section 89-2, HRS, of employees of the UH who are included in bargaining unit 7.

Complainant UHPA and Respondent BOR are parties to a collective bargaining agreement covering employees in bargaining unit 7 for the period July 1, 1989 to June 30, 1993.

In early January 1992, UHH College of Arts and Sciences (CAS) Dean Ellen Boneparth and Associate Dean Jeffrey Crane drafted a course evaluation policy in response to complaints by various faculty regarding the lack of a uniform practice of course evaluations by the four divisions within the CAS. Complainant's (C's) Exhibit (Ex.) 1; Responsive (Resp.) Aff. of Boneparth, p. 2.

In the past, two of the CAS' four divisions, Business Administration and Economics and Social Sciences, required student course evaluation forms. The Business Administration and Economics Division required that course evaluations be submitted by faculty to demonstrate teaching effectiveness as a criterion for contract renewal, promotion and tenure and the Social Sciences Division did

not. While the other two divisions, Humanities and Natural Sciences, did not require the distribution of a common student course evaluation form, faculty in these divisions chose a variety of forms to demonstrate their teaching effectiveness as a criterion for contract renewal, promotion and tenure. Resp. Aff. of Boneparth, p. 3.

The draft of the policy was reviewed by the four Division Chairs in the CAS and revised. Dr. David Miller, professor of English, received copies of the drafts for review and transmitted them to Dr. J.N. Musto, Executive Director of UHPA. Aff. of Musto, p. 2. Musto met with Miller and Boneparth in February 1992 where the student evaluation policy was discussed. Musto indicated that the matter was bargainable and that the Union should be involved in it prior to implementation, and that there could be no implementation without prior bargaining. Id.

Boneparth nonetheless sent the second draft (C's Ex. 2) to the CAS Senate for review and approval since the Senate is responsible for setting academic policy. Resp. Aff. of Boneparth, pp. 3-4. On April 8, 1992, the UHH CAS Senate unanimously approved a policy requiring student evaluations of each CAS course. Respondent's (R's) Ex. 12.

The policy states:

Faculty shall be required to use a designated instrument for student evaluations in their classes and follow a common procedure for administration of the instrument with individual information from classes to be kept confidential at the faculty member's discretion; the aggregate information, however, will be used for the purpose of generating college and

division norms. Other evidence of teaching effectiveness may substitute for or supplement these evaluations in reviews of faculty performance.

Id.

Bob King, then CAS Senate Chair, stated the rationale for establishing a mandatory course evaluation policy as:

One of the responsibilities of the Senate is to ensure academic quality and standards. It was felt that the approved policy would not only help ensure but provide a vehicle to improve academic quality on this campus. This would be done by developing and providing realistic teaching norms at the college and division level for use by individual faculty for comparative purposes. The policy was designed to protect the privacy of individual faculty. Additionally, the Dean's Office has been requested to allow the Senate to review any procedures associated with implementing this policy.

R.'s Ex. 17.

Dean Boneparth approved the policy and informed the faculty of the procedure to distribute the evaluation forms to the students by letter dated April 13, 1992. Id.; R's Ex. 13; Aff. of Boneparth, p. 2. Boneparth indicated that a common evaluation instrument (R's Ex. 14) would be administered in each class at the close of the Spring 1992 term. The results of the evaluations would be used to generate Division and CAS norms. The individual results would be returned directly to the faculty member who had the option of including them in their personnel file. Boneparth designated a person in her office to tabulate the results and return the forms directly to the faculty. R's Ex. 13.

According to Edward J. Kormondy, Senior Vice President and Chancellor of UHH, the administration has no plans to use the

norms generated by the division or for the college as a whole. Aff. of Kormondy, p. 2.

Musto filed a grievance by letter dated April 23, 1992, seeking an informal adjustment. Id., p. 2; C's Ex. 3. Boneparth replied to Musto by letter dated May 12, 1992 (C's Ex. 4) and Musto thereupon demanded bargaining over the adverse impact of the evaluations by letter dated May 22, 1992. R's Ex. 1. Musto later demanded bargaining over the impact of mandatory student evaluations at UHH by letter dated June 24, 1992 to James H. Yasuda, Chief Negotiator, State Office of Collective Bargaining. R's Ex. 6.

Subsequently on August 5, 1992, Musto, Yasuda, Chancellor Kormondy of UHH, and others met and the UHH denied any formal obligation to bargain on the topic. Although the parties agreed to meet on an informal basis, no agreement was made regarding bargainability of the topic. Aff. of Musto, p. 3.

DISCUSSION

UHPA contends that the UHH's implementation of the course evaluations without negotiation violates Subsections 89-13(a)(5) and (8), 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;

* * *

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

UHPA contends that the adverse impact of a mandatory evaluation is bargainable and the UHH's implementation of the policy without prior negotiation constitutes a prohibited practice. The Union relies on Decision No. 199, University of Hawaii Professional Assembly, 3 HLRB 562 (1984), where the Board, in dicta, held that BOR Policy 9-15 requiring periodic review of its appointees was negotiable because of the adverse impact of an "unsatisfactory" rating.

UHPA also contends that evidence of teaching effectiveness is required in rehiring, promotion and tenure applications and the inference is that anybody who doesn't put the rating in their dossier received a poor rating. The Union believes that a poor evaluation would lead to an unsatisfactory rating. Thus, the UHPA argues that the evaluation policy is bargainable.

Musto specifically objects to the policy, inter alia, because the questionnaires go to the Dean's secretary and thus become known to the administration; because the questionnaires will become the de facto standard of proving teaching effectiveness contrary to the criteria provided by contract; and are inapplicable in many circumstances.

The affidavits in evidence, however, clearly indicate that the evaluations will not be reviewed by the administration nor the Dean. Boneparth indicated that the information will be input by a clerical or data entry employee and the evaluations will be

returned to the affected faculty member. Kormondy confirms this. Moreover, the mere fact that the evaluation forms may be inapplicable or may not work well for some courses is irrelevant for the Board's consideration.

The BOR contends that the CAS policy on mandatory course evaluations does not require bargaining before implementation because the policy only requires faculty to use a common course evaluation form and does not significantly affect the terms or conditions of employment or alter the terms of the collective bargaining agreement. Since there is no impact on working conditions and no modification of the contract, the matter need not be bargained.

The Board agrees with the BOR that UHPA failed to establish that the BOR had a duty to bargain over the implementation of the policy at issue. In addition, the Board finds that UHPA failed to establish that the policy in question violates or alters the collective bargaining agreement.

The Board has previously held 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. Hawaii State Teachers Association, 1 HPERB 253 (1972). 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 63 (1977).

The policy at issue requires the use of a common evaluation form by the students taking CAS courses at UHH. The purpose of the common evaluation form is to generate aggregate teaching norms for use by the faculty rather than the administration. This policy is unlike the policy in the prior UHPA case because Policy 9-15 required all BOR appointees to undergo periodic performance evaluations by the administration at least once every five years unless another review is conducted within that time period. In the previous UHPA case, the faculty member could be given an "unsatisfactory" rating which would adversely affect his or her working conditions in order to improve their performance. In this instance, UHPA has failed to show any impact on the working conditions of the faculty as a consequence of the policy. There is no comparable "unsatisfactory performance rating" which may adversely affect the working conditions of the faculty in order to improve

performance. The policy does not require the submission of results by the individual. The information is confidential to the affected faculty member. The information is not transmitted to the administration, rather the use of the aggregate norms will establish the norms for each division and the college. In addition, the faculty member may choose to include other types of documents in his or her dossier to demonstrate teaching effectiveness. Thus, the policy does not significantly or materially affect the faculty's working conditions.

With respect to the contract violations, UHPA contends generally that the policy alters the terms regarding tenure and promotion. However, UHPA failed to identify any specific contractual provisions which are altered or affected as a result of the CAS policy. Despite UHPA's general charges that the policy changes promotion and tenure criteria and procedure in the contract, we find that the mandatory course evaluation policy does not alter or amend any contractual provisions. The Board thus concludes that UHPA failed to establish by a preponderance of evidence that the UHH violated Subsection 89-13(a)(8), HRS.

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.

UHPA failed to prove by a preponderance of evidence that implementation of the mandatory course evaluation policy at the UHH CAS has a material and significant impact on terms and conditions of employment to require negotiation prior to implementation.

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.

UHPA failed to prove by a preponderance of evidence that the implementation of the mandatory course evaluation policy at the UHH CAS alters or modifies existing terms of the collective bargaining agreement.

ORDER

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

DATED: Honolulu, Hawaii, October 8, 1993.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

Copies sent to:
T. Anthony Gill, Esq.
Kathleen Racuya-Markrich, Deputy Attorney General
Joyce Najita, IRC
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