

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
HAWAII FEDERATION OF)	
COLLEGE TEACHERS,)	Case No. <u>CE-07-6</u>
)	
Petitioner,)	Decision No. <u>37</u>
)	
vs.)	
)	
BOARD OF REGENTS,)	
UNIVERSITY OF HAWAII,)	
)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

This prohibited labor practice charge against the respondent, Board of Regents, University of Hawaii, comes before the Hawaii Public Employment Relations Board (hereinafter Board) upon a filing by the petitioner Hawaii Federation of College Teachers (hereinafter HFCT).

The prohibited labor practice charge was filed on December 15, 1972. The Respondent's request for particularization of the complaint was granted. Thereafter the parties requested that the hearing be continued. Subsequently, the parties were successful in settling two of the three issues.

With respect to the remaining issue, the HFCT alleges that the Respondent, without consultation as required by Section 89-9(c), Hawaii Revised Statutes (hereinafter HRS), issued notices of non-renewal to 20 instructional personnel in four innovative programs.

Pursuant to Chapter 89, HRS, this Board sitting en banc held a hearing on June 14 and 15, 1973, at Honolulu. The Board, having reviewed the entire record, exhibits and briefs

submitted by the parties, hereby makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The HFCT is the exclusive bargaining representative of Unit 7 (faculty of the University of Hawaii and the Community College System).

The Respondent University is a public employer within the meaning of Chapter 89, HRS.

The facts in the instant proceeding include the following. On October 18, 1972, the Respondent's Vice President of Academic Affairs, Stuart Brown, issued a memorandum. On November 27, 1972, the HFCT was elected the exclusive representative for Unit 7. On the same day, HFCT's executive secretary, William Abbott, requested a meeting with the Respondent's representatives. He renewed and continued his request until December 15, 1972. On November 30, 1972, the HFCT was certified by this Board as the exclusive bargaining agent of Unit 7.

On December 15, 1972, the Dean of College of Arts and Science, David Contois, issued notices of non-renewal to 20 instructional personnel in the Respondent's innovative programs. The prohibited labor practice charge against the Respondent was filed the same day.

The HFCT's theory is twofold. First, that the letters of non-renewal were based upon a memorandum issued by Vice President Brown which announced a major change of policy and, therefore were subject to the meet and confer requirement of Section 89-9(c), HRS. Secondly, that the letters of non-renewal, together with the Brown memorandum, had an affect on employee relations further requiring consultation, notwithstanding any major policy change.

In the instant case this Board is faced with determining whether or not the Brown memorandum or the letters of non-renewal set forth a major change in policy and, alternatively, if they involved any matter affecting employee relations within the provisos of Section 89-9(c), HRS. That section states:

"Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations."

The crux of the HFCT's first theory is that Vice President Brown's memorandum did in fact effectuate a major policy change and this change was implemented by the issuance of notices of non-renewal by Dean Contois. The Board does not agree. The basis of the controversy is the actual status of the innovative programs, Freshman Seminar, Survival Plus, New College and Ethnic Studies. These programs were created on a provisional basis. Throughout the entire hearing, witnesses called by both parties continually referred to the innovative programs as experimental, pioneering, probationary, as well as provisional and innovative. (Tr. I, 67.) (Tr. II, 88, 16.) The Board finds that the basic intent of the Respondent in establishing the innovative programs was not to create permanent programs. To the contrary, the evidence is clear that the Respondent's innovative programs were experimental and provisional.

The Respondent's policy in staffing the innovative programs closely follows an experimental course. The evidence indicates, and the Board finds, that it has been the policy of

the Respondent that the instructors of the innovative programs shall not gain tenure track status. Additionally, it was Respondent's purpose, in order to assure the quality of instruction, that all appointed instructors should be qualified faculty members. (Tr. II, 143, 144.) Despite the HFCT's contention that this policy was only recently promulgated by the Brown memorandum and, therefore, evidenced a major policy change within the meaning of Section 89-9(c), HRS, the Board finds to the contrary. Vice President Brown testified that his memorandum did not change any policy, but rather restated the long standing so-called common law of the University. (Tr. II, 143, 145.)

The HFCT further argues that the fact that letters of non-renewal were sent to the personnel of the innovative programs clearly shows that some change in policy or in matters affecting employee relations occurred.

Appendix A, Academic Tenure, Policy and Procedures of the Faculty Handbook for Manoa and Hilo Campuses sets forth the Board of Regents' regulation requiring written notification of non-renewal to be sent to full-time probationary employees. (Respondent's Exhibit 1. See also Tr. II, 16.) Although this has been the policy of the Respondent, such written notices of non-renewal were not required for non-tenure track part-time employees. Rather, the general policy has been not to send letters of non-renewal since these employees would be automatically terminated at the end of their contracts unless their contracts were renewed. Upon these facts, the Board finds it is quite clear that when the letters of termination were issued on December 15, 1972, such an action was not required of Dean Contois. As administrator of the innovative programs, he issued written notices of non-renewal not as a requirement of the

Respondent's policy but rather as a matter of fair play. (Tr. II, 35, 92.) The HFCT further argued that the non-renewal notices, per se, constituted a major change in policy. However, it does not appear to this Board to be such a change. Clearly, although Dean Contois's action was not required by the Respondent's policy, it benefited the faculty and cannot be construed to be a prohibited practice.

The HFCT's second theory is based upon the first sentence of Section 89-9(c), HRS. This sentence requires the employer to consult with the union on all matters affecting employee relations. The HFCT advocates a broad interpretation of this sentence.

Section 89-9, HRS, covers the scope of employee-employer negotiations. Section 89-9(c) deals with the duty of the public employer to meet and confer with the union on matters other than those related to negotiations. The second sentence of Section 89-9(c), HRS, requires consultation, initiated by the employer, prior to effecting changes in major policy. On the other hand, the first sentence appears to be a catch-all since it states, "except as otherwise provided herein. . ." The HFCT urges that this first sentence be broadly interpreted to require consultation on any and all matters affecting employee relations. The Board does not agree with this interpretation. The first sentence of Section 89-9(c), HRS, appears to be requiring consultation in important or critical matters that affect employee relations, though such matters do not reach the magnitude of a major policy change. It appears most unlikely that any and all matters affecting employee relations are subject to consultation. It is our opinion that the first sentence of Section 89-9(c), HRS, was not designed to hobble the employer with the duty to meet and confer on all

matters, but rather consultation was mandated to apply to substantial and critical as opposed to routine matters affecting employee relations.

In view of our interpretation of Section 89-9(c), HRS, the issues are then whether or not the restatement of existing University policy by the Brown memorandum or the issuance of letters of non-renewal to 20 instructional personnel are matters affecting employee relations within the meaning of Section 89-9(c), HRS.

First, as stated above the Board found that when the Brown memorandum directed that all appointments to the innovative programs would not gain tenure track status, this directive was a mere restatement of the Respondent's existing policy. Such a rearticulation of a long-standing rule does not appear to be a matter subject to consultation as directed by the first or second sentence of Section 89-9(c), HRS.

Secondly, the non-renewal of personnel clearly appears to be within the right of the employer as preserved by Section 89-9(d)(3), HRS. When such a management right is exercised in a manner involving a small number of personnel, it does not appear ordinarily to be a matter affecting employee relations within the meaning of Section 89-9(c), HRS. However, when this management right is exercised and results in 20 terminations which effectively dismantled a series of programs, the duty to consult comes into sharper focus. Clearly, as stated above, the Respondent has the right to discharge an employee for legitimate reasons. However, when the majority of instructional personnel in four innovative programs are terminated, such a matter is one affecting employee relations and subject to consultation.

The Board must now determine if the Respondent's duty to consult was satisfied. In the case at hand, the testimony reveals that the Respondent did not send a copy of the Brown memorandum to the HFCT nor did it otherwise notify the union of the contents of the memorandum. (Tr. I, 20, 26, 27.) Moreover, the evidence is clear that requests for consultation were initiated by the HFCT in spite of the fact that the duty to consult rests upon the employer. (Tr. I, 17, 18, 19, 20.) However, even in face of this inadvisable lack of cooperation by the Respondent, a meeting between the HFCT and Respondent's officials was held after certification but before December 15, 1972. (Tr. I, 18.) HFCT's executive secretary testified that during this time he had been made "unofficially" aware of the existence and content of the Brown memorandum. (Tr. I, 22, 25.) When asked "whether any discussion was had of laying people off or not renewing people in the programs?" Mr. Abbott answered affirmatively. (Tr. I, 21, 22.) He further testified that the meeting prior to December 15 was a general discussion about their concern about layoffs in general. (Tr. I, 22.)

The transcript further reveals that a second meeting took place. The date of that meeting is not certain but Mr. Abbott was of the opinion it was approximately a week after the first meeting. Mr. Abbott testified that the status of the innovative programs was brought up at the second meeting by the HFCT and discussed with the Respondent. (Tr. I, 23.)

Thus, it appears that meetings did take place either before or after the issuance of letters of non-renewal. Did these meetings satisfy the Respondent's duty to consult?

In the private sector of labor law, Section 8(a) of the Labor Management Relations Act has been interpreted to encompass the duty of the employer to consult with the exclusive

bargaining agent. When faced with a similar question of whether or not an employer was required to consult with the bargaining agent prior to laying off employees, the National Labor Relations Board held that such a duty of prior consultation existed. Southern Coach & Body Co., 141 NLRB, 52 LRRM 1279 (1963). However, this case was subsequently reversed and enforcement denied, NLRB v. Southern Coach & Body Co., 336 F.2d 214, 57 LRRM 2102 (5th Cir. 1964). The present view now appears to reject prior consultation in matters involving non-discriminatory discharge. Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964). Subsequently, in Quality Motels, 189 NLRB No. 49, 76 LRRM 1589 (1971), the NLRB held that the employer did not violate the Act when it unilaterally abolished the position of bar boy and discharged the employee occupying that position, when the employer later explained to the union the economic reasons behind the conduct.

The first sentence of Section 89-9(c), HRS, requires consultation. Unlike the second sentence which requires prior consultation in matters involving major policy change, nothing is stated as to the timing of the consultation in matters affecting employee relations. The Board, therefore, holds that consultation prior to or within a reasonable time after the employer's action on matters that affect employee relations is required by the first sentence of Section 89-9(c), HRS.


In view of the facts in the case, the Board holds that the meetings held prior to and preceding December 15, 1972, satisfied the Respondent's duty of consultation. The mere fact that the parties were in disagreement and were unable to resolve their differences does not diminish the fact that the requisite consultation took place.

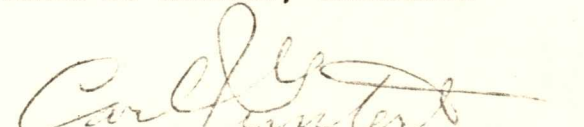
ORDER


For the reasons set forth above, this Board finds that the Respondent did not make any major policy change, though it acted upon matters affecting employee relations within the meaning of Section 89-9(c), HRS. The Board further finds that the Respondent did consult with the Petitioner as to matters affecting employee relations. Accordingly, the Respondent did not violate the duty to meet and confer imposed by Section 89-9(c), HRS.

The prohibited labor practice charge by the HFCT against the Respondent is hereby dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


Carl J. Guntert, Board Member


John E. Milligan, Board Member

Dated: October 9, 1973

Honolulu, Hawaii