

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
)
ANNE B. SAGE,) Case No. CE-07-8
) Decision No. 54
 Complainant,)
)
 and)
)
BOARD OF REGENTS,)
UNIVERSITY OF HAWAII,)
)
 Respondent,)
)
 and)
)
HAWAII FEDERATION OF COLLEGE)
TEACHERS, Local 2003,)
American Federation of)
Teachers,)
)
 Intervenor.)

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DECISION AFFIRMING IN PART AND
MODIFYING IN PART
HEARINGS OFFICER'S REPORT

On September 3, 1974, this Board's Hearings Officer, after conducting a formal hearing in the above-entitled case, rendered his Recommendations of Hearings Officer, Findings of Fact, Conclusions of Law and Recommended Order.

On September 17, 1974, the Respondent, Board of Regents, University of Hawaii, filed a Statement of Exceptions to Hearings Officer's Report and Recommendations and Respondent's Brief in Support of Exceptions to Hearings Officer's Report and Recommendations.

In his report,* the Hearings Officer found that the Respondent had committed a prohibited practice in violation of Subsection 89-13(a)(7), Hawaii Revised Statutes

* A copy of the report is attached hereto.

(hereafter HRS), in its promulgation of a seven-credit rule applicable to the teaching load of lecturers by failing or refusing to comply with the meet and confer requirements of Subsection 89-9(c), HRS.

The Hearings Officer further found that in promulgating and implementing said policy, the Respondent had not violated Subsections 89-13(a)(1), (2) and (3), HRS.

The Hearings Officer additionally recommended that no remedial order be entered against the Respondent.

Additionally, the Hearings Officer set forth under his recommended order a set of recommended guidelines to be followed in order to satisfy the meet and confer requirements of Subsection 89-9(c), HRS.

The Respondent in its exceptions took issue with the Hearings Officer's conclusion that it was required to, but had failed to, meet and confer with the Intervenor Hawaii Federation of College Teachers (hereafter HFCT) on the seven-credit rule and thus had violated Subsection 89-13(a)(7), HRS.

The Respondent also objected to the Hearings Officer's recommended guidelines for satisfying the requirements of Subsection 89-9(c), HRS.

This Board has reviewed the record of the case herein and hereby affirms the Hearings Officer's report except as hereafter modified.

FINDINGS OF FACT

The Hearings Officer's findings of fact are affirmed. However, the Board makes the following additional findings of fact.

1. On October 18 and 19, 1972, an initial representation election for employees of Unit 7 was held. The choices on the ballot were the following: College & University Professional Association (HEA-NEA); Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers; AAUP-UHFA Alliance; Hawaii Government Employees' Association, Local 152, HGEA/AFSCME; and No Representation.

2. The tally of ballots was held on October 20, 1972, and revealed that the choices in the runoff election would be the HFCT and AAUP-UHFA Alliance. The results were made known to the parties including the Respondent on October 20, 1972.

3. It had been stipulated during unit determination proceedings for Unit 7 that lecturers teaching less than seven-credit hours on the University of Hawaii community colleges and those teaching less than eight-credit hours at the community colleges would be excluded from Unit 7.

4. On October 24, 1972, Walter Chun wrote the following memorandum.

"MEMORANDUM TO: Provosts Glen Fishbach
Henry Kim
Ralph Miwa
John Prihoda
Mitsugu Sumada
Edward White
Clyde Yoshioka

"FROM: Walter Chun

"SUBJECT: INSTRUCTIONAL LOADS FOR LECTURERS

"A question has been raised as to the maximum teaching loads allowable for Community Colleges Lecturers. At issue is their eligibility

to fringe benefits should they teach more than half time (8 hours for the Community Colleges) or receive more than 6 months appointment.

"While it is true that funds used to provide fringe benefits are not taken from college budgets, they nevertheless come from the State Treasury; and in the true sense of the word, are a charge against us all. At a time of fiscal problems for the State of Hawaii, the Community Colleges have an obligation to economize whenever possible.

"To be consistent with University policy and with the fiscal policy of the State, the Community Colleges should appoint a Lecturer only on a semester by semester basis and for loads of not more than 8 credits per semester, including overloads."

5. On November 20 and 21, 1972, a runoff representation election was held for employees in Unit 7. The choices on the ballot were the HFCT and AAUP-UHFA Alliance.

6. On November 22, 1972, the tally of ballots cast in the runoff election was held. The winner was the HFCT. All parties, including the Respondent, knew of the results on November 22, 1972.

7. On November 24, 1972, Brett Melendy wrote the following memorandum:

"TO: Provosts Glen Fishbach
 Henry Kim (Acting)
 Ralph Miwa
 John Prihoda
 Mitsugu Sumada
 Edward White
 Clyde Yoshioka

"FROM: Brett Melendy

"SUBJECT: Instructional Loads for Lecturers

"Walter Chun sent out on October 24, 1972, memorandum regarding the issue of maximum teaching loads for community college lecturers. There are three issues involved that we were trying to cover.

- "1. As explained there is the matter of fringe benefits for those who teach more than half time or receive more than 6 months employment.
- "2. Our understanding from the University Personnel Office is that lecturers may not be appointed for more than one semester at a time.
- "3. Any lecturer who teaches 8 or more credit hours per semester in the Community College system is to be included in the bargaining unit. Each campus needs to consider the possible consequences of such appointments. [Emphasis added.]

"We were urging campuses to review carefully the existing situation, in terms of the fiscal situation, University regulations and the new definition of faculty when appointing lecturers. I gather that the October 24 memo was considered by some as a mandate denying the right to make appointments for more than 8 credits. The memo indicated, however, that it was our view that colleges should follow University procedure of appointing semester by semester and that implications for loads of more than 7 credits per semester, including overloads, be carefully scrutinized."

8. The HFCT was certified as the exclusive bargaining representative of employees in Unit 7 on November 30, 1972.

CONCLUSIONS OF LAW

The conclusions of law in the Hearings Officer's report are affirmed except as modified herein: It was assumed by all parties that the duty imposed by Section 89-9, HRS, upon the employer to meet and confer with the exclusive representative could not arise until the actual certification of the HFCT. With this conclusion, on the facts in this case, the Board disagrees. There appears to be a pattern in which the Chun and Melendy memoranda follow fast upon the heels

of the subject elections. Moreover, the Melendy memorandum demonstrates that collective bargaining's impact, particularly inclusion of lecturers in the unit, was a consideration in formulation of the policy expressed therein.

The timing of the memoranda is particularly suspect in view of the fact that the record in the instant case shows that there was no compelling need to promulgate the subject policy at the specific time it was fashioned since the policy was not intended to apply until the following fiscal year.

The Respondent incorrectly seeks to justify its failure to meet and confer with the HFCT on the grounds that its policy was formed during the hiatus between the election and the certification date.

The Board makes the following conclusions of law.

1. The policy enunciated in the Melendy memorandum was a matter affecting employee relations. Under Subsection 89-9(c), HRS, the employer was required to consult with the HFCT thereon.

2. The Respondent at no time attempted to consult with the HFCT on the policy until December, 1973, when the policy was applied to Anne Sage.

3. After it is clear that an exclusive representative has been chosen, the employer may not attempt to avoid its duty to meet and confer by formulating policies affecting employee relations during the hiatus prior to certification of the exclusive representative. The Board does not believe that the timing of the Chun and Melendy memoranda was sheer coincidence. There are a number of cases which have been decided in the private sector, dealing with the duty to bargain, in which the employer raised the defense that unilateral

actions taken by it after an election but prior to certification of the exclusive representative excused it from its duty to bargain. The defense was rejected. General Electric Co. v. NLRB, 400 F2d 713 (5th Cir. 1968), 69 LRRM 2081, 2084-2085; cert. denied, 394 U.S. 904, 70 LRRM 2828 (1969); NLRB v. McCann Steel Co., 448 F2d 277 (6th Cir. 1971), 78 LRRM 2237; Fleming Mfg. Co., Inc., 119 NLRB No. 55, 41 LRRM 1115 (1957).

Though we deal here with a case of refusal to meet and confer rather than the duty to bargain, we find the above cases, by analogy, to enunciate the proper course to be followed by an employer when a meet and confer situation arises during the period between election of an exclusive representative and its certification.

The Respondent has also sought to avoid its duty to meet and confer on the grounds that the policy it promulgated was not intended to apply until the following fiscal year and hence did not affect incumbent employees. This is no justification for a refusal to meet and confer. In the case of Laney & Duke Storage Warehouse Co., 151 NLRB No. 28, 58 LRRM 1389 (1965), enf'd, sub nom., NLRB v. Laney & Duke Co., 369 F2d 859 (5th Cir. 1966) 63 LRRM 2552, the NLRB adopted the following statement of the trial examiner:

"It is true that in the letter of February 7, 1964, to which reference has already been made, counsel for the respondent also declared that: 'None of the employment conditions would apply to the present employees even if the company insisted that the application be signed.' This declaration could not cure, however, the violation involved in the unilateral action. In the first place, quite apart from the specific conditions which were newly imposed, the applications themselves represented a change in the hiring practices of the respondents about which the union was entitled to be consulted.

In the second place, this hiring practice, once established would apply to future applicants for employment, and the union also had an interest in this matter.

"It would also seem to be immaterial that when the respondents acted unilaterally the Board had not yet certified the union, and the union itself had not yet requested the respondents to bargain. After the election the respondents knew that the union had won the election and represented a majority of their employees. They could act unilaterally thereafter only at their peril.²²

"²²See Tennessee Valley Broadcasting Co., 88 NLRB 895, 24 LRRM 1167; Sixteenth Annual Report of the NLRB at page 199, and cases there cited; Jordan Bus Co., 107 NLRB 717, 33 LRRM 1230; Cranston Print Work Co., 115 NLRB 537, 37 LRRM 1346; Fleming Manufacturing Co., Inc., 119 NLRB 452, 41 LRRM 1115; and Zelrich Company, 144 NLRB No. 120, 54 LRRM 1251."

4. The Respondent is guilty of a violation of the duty to meet and confer imposed by Subsection 89-9(c), HRS, and hence is guilty of the prohibited practice of refusing or failing to comply with a provision of Chapter 89, HRS. It thus has violated Subsection 89-13(a)(7), HRS.

5. The Respondent asserted in its Statement of Exceptions that the Hearings Officer had improperly applied the "duty to consult test set forth by this Board in its Decision No. 37 in Case No. CE-07-6 wherein this Board said at page 5:

'It is our opinion that the first sentence of section 89-9(c), H.R.S., 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.'
(Emphasis added.)"

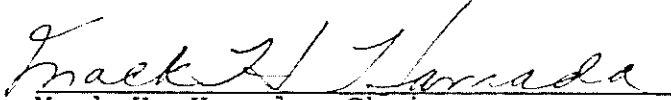
The Board notes that in view of its own conclusions of law set forth hereinabove, the language in the Hearings

Officer's report dealing with a "material modification or clarification" of the rule is superseded. However, even if the language were not superseded, we believe it is not inconsistent with or a modification of the test set forth in Decision No. 37. Certainly a material modification of a rule of a substantial and critical nature which affects employee relations is subject to consultation.


ORDERS

The recommended order of the Hearings Officer is adopted as the order of this Board with the following clarification. The suggested guidelines to be followed to satisfy the requirements of Subsection 89-9(c), HRS, are merely suggestions. They are not binding and leave the Respondent free to fashion such other methods of satisfying Subsection 89-9(c), HRS, as may be appropriate to the situation.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


John E. Milligan, Board Member


James K. Clark, Board Member

Dated: November 8, 1974

Honolulu, Hawaii

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
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ANNE B. SAGE,)	
)	
Complainant,)	Case No. <u>CE-07-8</u>
)	
and)	
)	
BOARD OF REGENTS,)	
UNIVERSITY OF HAWAII,)	
)	
Respondent,)	
)	
and)	
)	
HAWAII FEDERATION OF)	
COLLEGE TEACHERS,)	
)	
Intevernor.)	

RECOMMENDATIONS OF HEARINGS OFFICER
FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

This prohibited practice charge was brought before the Hawaii Public Employment Relations Board (hereafter Board) by Anne B. Sage (hereafter Complainant Sage¹) on March 20, 1974. Pursuant to Board Rule 1.08(g)(3) the case was assigned to the Hearings Officer. A pre-hearing was conducted on April 5, 1974. The parties represented to the Hearings Officer that a settlement was highly probable. However, after a long series of meetings, the parties were unable to fully resolve the dispute and a hearing on the merits was conducted on July 3 and 11, 1974. At the hearing the Hawaii Federation of College Teachers (hereafter Complainant HFCT²) made a motion to intervene

¹Complainants Sage and HFCT are referred to collectively herein as Complainants where appropriate.

²Ibid.

as a complainant. Said motion was granted. The parties submitted memoranda and final arguments were presented on August 7, 1974. Having reviewed the entire record, exhibits and memoranda submitted by the parties, the Hearings Officer hereby makes the following Findings of Fact, Conclusions of Law and Recommended Order.

FINDINGS OF FACT

The essential facts of this case, are:

1. Complainant Sage is an individual public employee and a member of unit 7 (faculty of the University of Hawaii and the community college system).

2. The Board of Regents, University of Hawaii (hereafter Employer) is a public employer within the meaning of Section 89-2(9), Hawaii Revised Statutes (hereafter HRS). The jurisdiction of the Employer extends to the University of Hawaii, Manoa Campus, and the community college system which includes Honolulu, Kapiolani and Leeward Community Colleges.

3. Complainant HFCT is the employee organization certified as the exclusive bargaining representative for unit 7.

4. The position of lecturer was created by the Employer to accommodate the increased student enrollment within the funding level appropriated by the Legislature, which was insufficient for the hiring of regular full-time tenurable employees. The lecturer position is basically part-time and non-tenured. Lecturers are hired only on a semester basis. As part-time employees, most lecturers are hired to teach less than seven credit hours at the University of Hawaii campuses and less than eight credit hours at the community college campuses.

Such part-time teaching loads exclude them from unit 7 and coverage under Chapter 89, HRS. Despite this part-time nature, some 30 to 40 lecturers were and are hired to teach seven or more credit hours at the University of Hawaii and eight or more credit hours at the community college system. Such teaching loads qualified them as non-tenured full-time employees includable in unit 7 and covered by Chapter 89, HRS.

5. The seven-credit hour cut-off point at the University of Hawaii campuses and eight-credit hour cut-off point at the community colleges for inclusions in unit 7 was set by stipulation of the parties and ordered by the Board in Hawaii Federation of College Teachers et al., HPERB Decision 21, Case R-07-12, September 15, 1972.

6. The seven-credit rule articulates the reluctance of the Employer to hire lecturers as full-time non-tenured employees teaching seven or more credit hours at the University of Hawaii campuses and eight or more credit hours at the community college campuses. The rule was based upon employee benefits cost saved by hiring part-time in lieu of full-time lecturers. (Complainants' Exhibits #5a, b, and c).

7. Complainant Sage was employed as a lecturer at Kapiolani and Honolulu Community Colleges teaching a full-time load of 12 credit hours during the fall semester of 1973.

8. On December 6, 1973, the division chairman at Kapiolani Community College expressed an interest in having Complainant Sage return as a lecturer for the spring semester of 1974. The chairman subsequently made a recommendation to the Kapiolani Community College Provost that Complainant Sage be hired to teach three credit hours. No offer was actually made.

9. On December 17, 1973, Honolulu Community College, which was considered to be Complainant Sage's home campus,

offered her six credit hours, English 100 and 40. Complainant Sage accepted the offer and signed the appropriate form. This teaching contract, like all Honolulu Community College lecturer contracts, was subject to cancellation in the event of scheduling or enrollment problems. (Employer's Exhibit #3).

10. On December 18, 1973, the University of Hawaii, Manoa Campus, offered Complainant Sage six credit hours, subject to the approval of Complainant Sage's home campus.

11. On or about December 21, 1973, Complainant Sage was advised that the Honolulu Community College Provost would not approve her additional six credit hours offered by the University of Hawaii, Manoa Campus, because of the seven-credit rule and that she had to choose either the six at Honolulu Community College or the six at University of Hawaii, Manoa Campus.

11. On January 3, 1974, Complainant Sage entered into a contract with University of Hawaii, Manoa Campus, to teach six credit hours despite the Honolulu Community College Provost's refusal to approve said offer.

13. Subsequently, the Honolulu Community College Provost canceled the contract with Complainant Sage to teach English 100 and 40 at Honolulu Community College. English 40 was then assigned to Sandra Hiroshi, a full-time instructor who was scheduled to teach a 15-credit hour load, but due to enrollment problems had only a 12-credit hour teaching load. The addition of English 40 gave Ms. Hiroshi 15 hours, the required load for an instructor. English 100 was assigned to Harold Driver, also an instructor who already had the required 15-credit hour load. The additional three credit hours gave Mr. Driver an academic overload.

14. On January 7, 1974, the Kapiolani Community College Provost refused to offer Complainant Sage the three credit hours recommended by the division chairman, citing the seven-credit rule.

15. After conferring with the Secretary of the University, Kenneth Lau, the officials of Honolulu Community college did offer English 100 to Complainant Sage. She accepted and taught a total of nine credit hours and consequently was a full-time lecturer for the spring semester of 1974.

ISSUES

I. Whether or not the Employer, in promulgating and implementing the seven-credit rule, committed a prohibited practice under Section 89-13(a)(7), HRS, by failing or refusing to comply with the meet and confer requirements of Section 89-9(c), HRS?

II. Whether or not the Employer, in promulgating and implementing the seven-credit rule, committed prohibited practices as defined by Section 89-13(a)(1), (2), and (3), HRS?

III. What remedies, if any, are warranted?

DISCUSSION AND CONCLUSIONS OF LAW

The entire dispute, in the present case, revolved directly around what has been repeatedly referred to as the seven-credit rule. As indicated in the Findings of Fact, this rule expressed the reluctance of the Employer to hire lecturers as full-time employees to teach seven or more credit hours at the University of Hawaii campuses and eight or more credit hours at the community college campuses. This reluctance was repeatedly and consistently predicated upon the cost-saving factors realized by hiring part-time, as opposed to full-time lecturers. The rule per se has undergone a series of modifications or clarifications. At its inception, the seven-credit rule appeared as a total prohibition against the hiring of lecturers on a full-time basis. In an October 24, 1972, memorandum to the community college provosts, the Director of Community College Services, Walter Chun, stated that:

"The community colleges should appoint a Lecturer for loads of not more than 8 credits per semester . . . "
(Complainants' Exhibit #5a)

In a subsequent memorandum dated November 24, 1972, to the community college provosts, Vice President for the Community Colleges, Brett Melendy, attempted to clarify the seven-credit rule by stating that although the Chun memorandum appeared to be a mandate denying the right to make full-time lecturer appointments, the provosts were urged instead to carefully review the then existing fiscal situation and carefully scrutinize all full-time lecturer appointments. (Complainants' Exhibit #5b).

A July 17, 1973, memorandum from University of Hawaii Secretary, Kenneth Lau, to Provost Ed White made clear the policy of the Employer. In reference to the two preceding memoranda, Dr. Lau stated that the Community College provosts are not necessarily prohibited from appointing a lecturer to teach eight or more credit hours, but they should keep in mind the additional cost incurred when full-time appointments are made. (Complainants' Exhibit #5d).

- I. Whether or not the Employer, in promulgating and implementing the seven-credit rule, committed a prohibited practice under Section 89-13(a)(7), HRS, by failing or refusing to comply with the meet and confer requirements of Section 89-9(c), HRS?

Section 89-13(a)(7), HRS, provides that it is a prohibited practice for an employer to: "Refuse or fail to comply with any provision of this Chapter."

Section 89-9(c), HRS, provides:

"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."

In Hawaii Federation of College Teachers et al., HPERB Decision 37, Case CE-07-6, October 9, 1973, the Board held that the second sentence of Section 89-9(c), HRS, requires the employer to consult with the exclusive representative prior to effecting changes in any major policy. The first sentence requires that the employer consult with the exclusive bargaining representative prior to or within a reasonable time after the employer's action on important or critical matters affecting employee relations.

The Employer has argued that since the very nature of the position of lecturer is part time, the promulgation of a policy expressing a reluctance to hire lecturers on a full-time basis is not in any way a major, important or critical rule, regulation or policy that affects employee relations, which would have been subject to consultation. The Employer's argument is without merit.

As the Findings of Fact reflect, lecturers are and were intended to be basically part-time employees. As part-time employees, a majority of the lecturers would not be directly affected by the seven-credit rule. However, the evidence shows that some 30 to 40 lecturers were hired and are still being hired to teach full-time loads. The seven-credit rule that expresses the reluctance of the Employer to hire lecturers for seven or more credit hours at the University and eight or more credit hours at the community colleges would effectively reduce

the employment status of these 30 to 40 full-time lecturers to part-time employees. Clearly, this is a matter affecting employee relations.

While the adoption of the seven-credit rule does not appear to be of the magnitude of a major policy change, the rule does involve an important or critical employee matter which is subject to consultation prior to or within a reasonable time after its effectuation.

The Employer further urges that even if the seven-credit rule were subject to consultation, the certification of Complainant HFCT as the exclusive bargaining representative a month after the initial promulgation of the seven-credit rule made the fulfillment of the consultation requirements of Section 89-9(c), HRS, impossible.

There is no dispute that the Chun memorandum predated the HFCT's certification by over 30 days. However, a review of Complainants' Exhibits #5a, b, and c, clearly shows that the seven-credit policy was not reduced to certain terms until well after the certification of the Complainant HFCT. Additionally, there is evidence that confusion over the actual meaning of the seven-credit rule persisted even after Dr. Lau's memorandum of July 17, 1973.

Although the first sentence of Section 89-9(c), HRS, can be interpreted as not to impose a duty to consult on the Employer on the matter of the seven-credit rule prior to the certification of Complainant HFCT, any material modification or clarification of that rule which occurred well after certification makes consultation not only possible but necessary under said section.

The Employer further argues that since the seven-credit rule was widely distributed to lecturers and discussed among administrators and lecturers and since Complainant HFCT failed to bring up the matter at some 40 formal negotiating sessions, the duty to consult does not appear to come into sharp focus.

Both of these arguments are without merit. Section 89-9(c), HRS, requires that consultation be conducted by the employer with the exclusive bargaining representative. Said section does not require consultation directly with the employees concerned. Therefore, the distribution of copies of the seven-credit rule to lecturers and discussion among administrators and lecturers does not satisfy the Employer's duty. Further, Section 89-9(c), HRS, requires that consultation be initiated by the employer. It is not incumbent upon the exclusive bargaining representative, but upon the employer to seek and request consultation. Moreover, in the instant proceeding there is no direct evidence that the Complainant HFCT knew of the seven-credit rule during the period of the 40 formal negotiating sessions.

The Employer has also maintained that consultation did take place for six months, beginning December, 1973, after the Complainant Sage brought the issue to the Employer's attention. Again, the first sentence of Section 89-9(c), HRS, requires consultation prior to or within a reasonable time after effecting changes in policy or matters that affect employee relations. Consultation prompted by a disgruntled employee and initiated by the employer a year after the promulgation of the rule in question is not "within a reasonable time after" effectuation.

Moreover, it is well to note that when Dr. Kenneth Lau was asked if prior to this case he ever consulted with any representative of the Complainant HFCT concerning the seven-credit rule, he replied that he had not. He further testified that he was not aware of any member of the University administration who had.

The Board in Hawaii Federation of College Teachers, et al., HPERB Decision 37, supra, stated that consultation does not require a resolution of differences. All that is required is that the employer inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or policy change take place. The basic tenet of our collective bargaining in public employment law is joint decision making coupled with the public policy to promote harmonious and cooperative relations between government and its employees. Consultation is a vital ingredient of this basic tenet.

In conclusion, it appears that the seven-credit rule was subject to the consultation requirements of Section 89-9(c), HRS. Although the seven-credit rule was not a major policy which required prior consultation, it is an important matter that affected employee relations that requires consultation prior to or within a reasonable time after effectuation. The evidence fails to reveal any good faith effort by the Employer to satisfy this duty.

II. Whether or not the Employer, in promulgating and implementing the seven-credit rule, committed prohibited practices under subsection 89-13(a)(1), (2), and (3), HRS?

The Complainants urge that the Employer violated Section 89-13(a)(1), (2), and (3), HRS, when it promulgated and implemented the seven-credit rule since the rule, allegedly, violates the Board's decision in Hawaii Federation of College Teachers et al., HPERB Decision 21, supra, and unlawfully allowed the Employer to dilute unit 7 and Complainant HFCT's membership.

Section 89-13(a), HRS, provides, in relevant part:

"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;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring tenure, or any term or condition of employment to encourage or discourage membership in any employee organization."

To determine if the Employer acted in violation of Section 89-13(a), HRS, it must first be determined whether or not the seven-credit rule does in fact violate Board Decision 21 and unlawfully allows the dilution of unit 7 and Complainant HFCT's membership.

A review of Board Decision 21 shows nothing to substantiate the claim of the Complainants. In that decision, the only reference to lecturers is made in the appendix where the Board directed the inclusion and exclusion of lecturers as stipulated by the parties. Lecturers teaching seven or more credit

hours in the University of Hawaii system and eight or more credit hours in the community college system were ordered included in unit 7. Lecturers teaching less than seven credit hours in the University of Hawaii system and less than eight credit hours in the community college system were ordered excluded from unit 7.³

Although the inclusion of full-time lecturers implies that lecturers have been hired in such a capacity, the representation determination in Board Decision 21 did not mandate that such a full-time position continue to exist. Board Decision 21 merely provides that all lecturers, if employed with a full-time load, must be included in unit 7. Said decision did not restrict the authority of the Employer to create new includable or excludable positions nor did it prohibit the elimination of existing includable or excludable positions.

Section 89-9(d), HRS, clearly reserves the employer's inherent managerial rights. That section articulates the employer's right to:

"(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 reason;

(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."
(emphasis added)

³Section 89-6(c), HRS, requires the exclusion of part-time employees working less than 20 hours per week. Converted to academic terms, this less than 20-hour cut-off point is less than seven credit hours in the University system and less than eight credit hours in the community college system.

This section leaves no doubt that the employer can eliminate any and all full-time or part-time lecturer positions for legitimate reasons. However, as the Complainants urge, the Employer's rights under Section 89-9(d), HRS, are not absolute.

As determined above, employer actions must be in consonant, when applicable, with the meet and confer requirement of Section 89-9(c), HRS. Additionally, employer action must not be in violation of Section 89-13(a), HRS. However, the seven-credit rule does not appear to be in violation of Section 89-13(a), HRS.

The exhibits and testimony clearly show that the seven-credit rule was promulgated and implemented as a means of reducing State expenditures. The State's fiscal crisis and resultant University budgetary cuts had a profound effect upon the Employer's managerial tactics. In Hawaii Federation of College Teachers et al., HPERB Decision 37, supra, the Board found that the Employer lawfully discontinued an entire series of University programs to reduce expenditures. The seven-credit rule appears to be one of several methods utilized by the Employer to reduce expenditures in a time of fiscal austerity.

The record as a whole fails to reveal any intent or motive of the Employer to reduce the number of full-time lecturers in an attempt to dilute the ranks of the Complainant HFCT's membership or to reduce the size of bargaining unit 7. The record is void of any pro- or anti-union motive or intent by the Employer.

The Complainants' further urge that the potential net effect of the seven-credit rule was to deny full-time employment to all lecturers and therefore, is an effective dilution of unit 7 and Complainant HFCT's membership.

Since the seven-credit rule had the potential effect of reducing both unit 7 and the Complainant HFCT's membership, an inference can be made that it was designed and motivated to accomplish such a goal. However, the evidence and testimony fails to support such an inference. To the contrary, the testimony of the witnesses shows that the seven-credit rule was solely motivated by the sound economic reason of cost savings.

In his testimony, Dr. Kenneth Lau stated that the seven-credit rule was adopted as a savings measure for the Employer. He further testified that although no in-depth cost-saving study was made at the time of the promulgation of the seven-credit rule, it was the opinion of the Employer, then, that approximately \$800 annually per lecturer could be saved by denying full-time loads to said employees.⁴

The Kapiolani Community College Provost stated that he was of the opinion that the intent of the seven-credit rule was to keep cost down in face of the State's rather precarious financial position.

Moreover, all three memoranda by Walter Chun dated October 24, 1973, (Complainants' Exhibit #5a), Brett Melendy dated November 24, 1972 (Complainants' Exhibit #5b), and Kenneth Lau dated July 17, 1973 (Complainants' Exhibit #5c), cite cost savings as the singular reason behind the seven-credit rule.

It is clear that the Employer was solely motivated by the desire to reduce expenditures in face of budgetary cuts and the State's austere fiscal condition. The record fails to reflect any material evidence to support a finding or inference

⁴A subsequent study by the Employer substantiated this estimated saving. (Employer's Exhibit #4).

of unlawful motive or intent in violation of Section 89-13(a) (1), (2), or (3), HRS.

III. What remedies, if any, are warranted?

A. As determined above, the Employer failed to satisfy its duty to meet and confer with the Complainant HFCT prior to or within a reasonable time after promulgating and implementing the seven-credit rule. Such a failure is a prohibited practice under Section 89-13(a)(7), HRS.

The fashioning of a remedy, appropriate for such a failure, is difficult. However, in view of the facts of this case and the subsequent circumstances, it appears that no remedial order by the Board is warranted.

First, as indicated above, the promulgation of the seven-credit rule is a clear example of the ineffective or inefficient channels of communication at the University. The memoranda circulated show general confusion as to what the seven-credit rule required (Complainants' Exhibits #5a, b, and c). Although the rule was fully and finally reduced to certain terms by the Lau memorandum, confusion seemed to have persisted. As a result, the seven-credit rule was not consistently enforced.

Additionally, the record is void of any evidence that the Complainant HFCT's membership was reduced or that any of the full-time lecturers lost their full-time status. The evidence tends to show that the total number of full-time lecturers did not decrease in the face of the seven-credit rule. Even Complainant Sage retained full-time status when Honolulu Community College reoffered English 100 to her. Absent any harm to either Complainants, a remedial order does not seem warranted.

Secondly, the Employer's duty to consult is apparent when readily identifiable major policy changes are involved. However, when important or critical conferrable employee matters are involved, as opposed to non-conferrable routine matters, the distinguishing of the two is quite difficult in many instances. Hawaii Federation of College Teachers, et al., HPERB Decision 37, supra, gave the Employer guidelines to determine if the matter is of the magnitude requiring consultation. However, that decision was rendered by the Board on October 9, 1973, almost a year after the initial memorandum stating the seven-credit rule was issued. Thus, the Employer promulgated the seven-credit rule in violation of Section 89-9(c), HRS, without the benefit of a Board interpretation of that section. Absent such guidelines at the time of the violation, a remedial order does not seem appropriate.

Thirdly, no longer faced with the austere fiscal situation that prompted the promulgation of the seven-credit rule, the Employer is presently preparing to rescind said rule. The Employer will also offer the Complainant Sage one additional three-credit course at the Kapiolani Community College for the fall semester. These actions exhibit the willingness of the Employer to remedy the situation itself prior to and without the necessity of a remedial order by the Board.

Although, singularly, the above considerations do not excuse a failure to consult, taken in total, remedial action against the Employer does seem inappropriate. However, it is recommended that the Employer, in this particular case, be reminded of its duty to consult as required by Section 89-9(c), HRS.

B. Inasmuch as it has been determined that the seven-credit rule is not in violation of Board Decision 21, and does not unlawfully allow the Employer to dilute the size of unit 7 or the Complainant HFCT's membership, prohibited practice charges under Section 89-13(a)(1), (2), and (3), HRS, are unsubstantiated.

There remains, however, the issue of back pay for Complainant Sage. Complainant Sage argues that since she was contracted to teach English 40 at Honolulu Community College, the denial of employment for that three-credit course due to the seven-credit rule warrants the award of back pay of \$840 per month less unemployment benefits received as provided for by Section 377-9(d), HRS, and Board Rule 3.10.

Although the Employer committed a prohibited practice by failing to meet and confer under Section 89-9(c), HRS, it is well to note that notwithstanding the seven-credit rule, all Honolulu Community College lecturer contracts are subject to a condition subsequent, i.e., enrollment or scheduling problems. (Complainants' Exhibit #3). The occurrence of that condition, i.e., the existence of enrollment or scheduling problems, extinguishes the Employer's duty under the contract. See L. Simpson, Handbook of the Law of Contracts, §144 (2nd. ed. 1965).

As the Findings of Fact indicate, the Honolulu Community College contract with the Complainant Sage to teach English 100 and 40 was canceled. English 100 was subsequently reoffered to the Complainant Sage and she accepted. However, English 40 was given to an instructor who, due to scheduling and enrollment problems, did not have the required instructional load. The addition of English 40 gave that employee the required load. Thus, under the provisions of the Complainant Sage's contract, the loss of the three-credit hours of English 40 was due to the occurrence of a condition subsequent under the contract. Back pay is therefore unwarranted.

RECOMMENDED ORDER

For the reasons set forth above, the following order is recommended:

I. That the Employer be found to have committed a prohibited practice as defined by Section 89-13(a)(7), HRS, by failing to meet its duty to consult as mandated by Section 89-9(c), HRS.

In view of the considerations cited above, no remedial order should be directed against the Employer. However, the Employer should be reminded that its duty to consult is a basic tenet of our collective bargaining law and its fulfillment of this duty is mandatory. In order that some guidance be given to the Employer and all other public employers, the following steps⁵ to satisfy the requirements of Section 89-9(c), HRS, are recommended:

(a) Written notification to the exclusive bargaining representative be given by the employer of matters affecting employee relations, including major policy changes and all critical or important matters including rules and regulations. In the case of major policy changes, notification must be made prior to the effectuation of the proposed major policy change. In matters not of a major nature, prior notification should be made whenever possible. However, if such prior notice is not possible, notification shall be made within a short time after the effectuation of the policy, rule or regulation. (b) The exclusive bargaining representative be given a reasonable

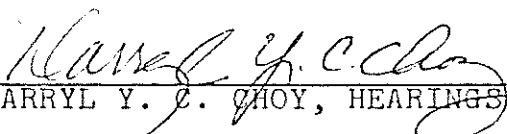
⁵See The Report and Recommendation on Labor-Management Relations in the Federal Service, August, 1969. Also 417 GERR A-14 (Sept. 6, 1971).

opportunity to meet personally with the employer in order that the impact of the policy can be discussed and a dialogue as to merits and disadvantages of the proposal take place. (c) The exclusive bargaining representative be allowed to make suggestions and provide relevant input, oral or written, and the employer give full and careful consideration to said suggestions and input.

II. The Employer, in promulgating and effectuating the seven-credit rule be found not to have violated the Board order in Decision 21 and not to have unlawfully diluted unit 7 and Complainant HFCT's membership. Therefore, the Employer was not in violation of Section 89-13(b)(1), (2), and (3), HRS, and accordingly the prohibited practice charges under these subsections should be dismissed.

III. That the Complainant Sage's prayers for back pay be denied.

Respectfully submitted,


DARRYL Y. C. CHOY, HEARINGS OFFICER
HAWAII PUBLIC EMPLOYMENT RELATIONS
BOARD

Dated: September 3, 1974

Honolulu, Hawaii