

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

|                              |   |                          |
|------------------------------|---|--------------------------|
| In the Matter of             | ) |                          |
|                              | ) |                          |
| UNIVERSITY OF HAWAII         | ) | Case No. <u>CE-07-21</u> |
| PROFESSIONAL ASSEMBLY,       | ) | <u>CE-07-22</u>          |
|                              | ) |                          |
| Complainant,                 | ) |                          |
|                              | ) | Decision No. <u>67</u>   |
| and                          | ) |                          |
|                              | ) |                          |
| BOARD OF REGENTS, UNIVERSITY | ) |                          |
| OF HAWAII, and GEOFFREY      | ) |                          |
| ASHTON, Vice Chancellor,     | ) |                          |
|                              | ) |                          |
| Respondents.                 | ) |                          |
|                              | ) |                          |

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

These prohibited practice actions against the respondents, the Board of Regents, of the University of Hawaii (hereafter referred to as BOR) and Geoffrey Ashton, Vice Chancellor, Manoa Campus, was brought before the Hawaii Public Employment Relations Board (hereafter referred to as the Board) by the petitioner, the University of Hawaii Professional Assembly (hereafter referred to as UHPA), on November 7, 1975.

Pursuant to Chapter 89, Hawaii Revised Statutes (hereafter HRS), this Board sitting en banc held a hearing on December 22, 1975. The Board, having reviewed the entire record, exhibits and memoranda submitted by the parties, hereby makes the following findings of fact, conclusions of law, and order.

### FINDINGS OF FACT

1. The petitioner is and was at all relevant times the exclusive bargaining representative of the employees in unit 7 (faculty of the University of Hawaii and the community college system).

2. Respondents herein collectively constitute a public employer as defined under Chapter 89, HRS.

3. There is in effect a collective bargaining agreement between UHPA and the BOR for employees in unit 7.

4. Said contract was entered into and made effective as of March 18, 1975. The agreement will terminate on June 30, 1977.

5. The prohibited practice charges now before the Board stem from a series of grievances involving classification filed by UHPA against the BOR under the grievance procedure of the unit 7 contract. The charges before the Board relate to the failure of Vice Chancellor Ashton to formally convene Step 2 grievance meetings under said contract. The first grievance concerned a position within the Financial Aids Office (hereafter referred to as the Financial Aids grievance). The second involved a position within the Manoa Botany Department (hereafter referred to as the Botany grievance). The third grievance involved researcher positions, which are presently held by Walter Harada of the College of Tropical Agriculture and Virginia Greenberg of the Hawaii Institute of Geophysics (hereafter referred to as the Greenberg-Harada grievance). The last in the series involved three newly established positions; one in Chemistry, one in Oceanography, and one in Tropical Medicine and Microbiology.

Of the four grievances, only the second and third grievances, the Botany grievance and the Greenberg-Harada grievance respectively, were adverted to in the petitioner's complaint.

6. The Manoa Campus Bulletin, Volume 45, No. 52, announced a newly established Research Associate 3 position in the Manoa Botany Department (Job #APT 75-213) which would be classified in unit 8. The UHPA felt that this position belonged in unit 7, and attempted to grieve this alleged diminution of its bargaining unit. The UHPA proceeded to file a grievance alleging violations of Articles 1, 4, 15, and 20 and Salary Schedules A-1, A-2 and A-3 of the unit 7 Collective Bargaining Agreement.

A Step 1 grievance meeting was held on the matter before Dean Contois, who met with the union and, in accordance with the grievance procedure, issued a response in writing within ten days after the closing of that meeting. Thereafter, the UHPA submitted an appeal to Vice Chancellor Ashton (Step 2 of the grievance procedure).

The Step 2 grievance was filed by Jerome M. Comcowich, Executive Secretary of the UHPA, with Vice Chancellor Geoffrey Ashton, on October 16, 1975. On October 31, 1975, the parties on both sides met, but this Step 2 grievance hearing was never convened formally by the Vice Chancellor. However, Ashton did offer to meet informally on the matter pursuant to the Collective Bargaining Agreement's grievance procedure, Article XII b(2), which states in pertinent part:

"Faculty are encouraged to work out grievances with their immediate superiors on an informal basis, without resort to the formal grievance procedure, whenever possible . . . ."

Ashton would not convene the formal Step 2 meeting because he did not consider the subject of the grievance grievable since the matter concerned classification. Ashton based his



refusal on the definition of a grievance as set out in Article XII, Grievance Procedure, of the unit 7 contract. He stated at page 80 of the transcript:

" . . . I refer to the definition in Article XII, which defines a grievance. It is my position that the grievance is not a misinterpretation or misapplication of the express term of the agreement, because it is a matter of negotiation. Non-negotiation. It was a matter of classification, which was not subject to negotiation, would not, therefore, be a grievance."

This stand was previously expressed by Ashton in a September 23, 1975, memorandum letter to Comcowich. Since no meeting was held, Ashton did not feel it incumbent to issue a written decision.

On November 7, 1975, the UHPA filed a prohibited practice charge against Ashton and the BOR for failure to convene a Step 2 grievance hearing on the matter. (Case No. CE-07-21)

7. The Greenberg-Harada grievance involves two unit 7 Researcher positions which were reclassified into unit 8. However, Robert Prahler, the University's Associate Director of Personnel, in an October 2, 1975 memorandum to Manoa Chancellor Douglas Yamamura, requested that Greenberg and Harada be returned to the Jr. Researcher Classification. He stated that "in the absence of the required documentation, we must reverse the classification actions and institute a formal request per HPERB procedure." Harada and Greenberg were subsequently returned to the Jr. Research classification. In this case, no Step 1 grievance meeting was held. Pursuant to the Collective Bargaining Agreement, it proceeded directly to Step 2. On November 11, 1975, Ashton refused to convene a Step 2 grievance meeting on the matter because he again felt that there was no grievance under the terms of the Unit 7 Agreement. Again, because no

formal Step 2 meeting was held, Ashton issued no written decision. The union refused Ashton's offer to meet informally on the matter.

On November 17, 1975, the UHPA filed prohibited practice charge, CE-07-22, with the Board against Ashton and the BOR for the failure to convene the Step 2 meeting.

On December 16, 1975, Harold Masumoto, Director of Administration for the University of Hawaii, as the University President's designee for Step 3 grievances under the unit 7 contract conducted hearings on the Step 3 grievances which were filed on the above-mentioned matters. At the close of the hearing herein, Mr. Masumoto's decisions were still pending.

#### CONCLUSIONS OF LAW

On November 7 and 17, 1975, the UHPA filed these prohibited practice actions against the BOR and Geoffrey Ashton in his capacity as Vice Chancellor, Manoa Campus. In its petition, the UHPA alleges that the employer violated sections 89-13(a)(1), (5), and (8), HRS, which state:

"(a) 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;

\* \* \*

(5) Refuse to bargain collectively in good faith as required in Section 89-9;

\* \* \*

(8) Violate the terms of collective bargaining agreement."



Specifically, the petitions in each instance cite Ashton's refusal "to convene a Step 2 grievance hearing held under Article XII of the Collective Bargaining Agreement between the University of Hawaii and UHPA, said meeting called by UHPA to consider the unilateral removal of bargaining unit positions from UHPA by the University Administration" as the basis for the charges herein. The petitions also list the pertinent terms and conditions of the Collective Bargaining Agreement that allegedly have been violated as being Articles 1, 4, 15, 16, and 20 and Salary Schedules A-1, A-2, and A-3.

In their Answer, respondents admit that the UHPA is the exclusive representative of all employees in unit 7. They further admit that Geoffrey Ashton refused to convene the Step 2 grievance hearings under Chapter XII of the Collective Bargaining Agreement. However, respondents deny that said hearings were required under said chapter of the Collective Bargaining Agreement or any statutory authority or that they committed any prohibited practices. They further assert that:

"...Action of Respondents is not a matter of negotiation under Articles 1, 4, 15, 16 or 20 or Salary Schedules A-1, A-2 or A-3 of the Agreement between Respondent UNIVERSITY OF HAWAII and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY or under Section 89-9 (d), Hawaii Revised Statutes and thus is not subject for grievance under Chapter 12 of said Agreement or under Section 89-11, Hawaii Revised Statutes.

Respondents affirmatively allege that classification of positions is governed by Section 89-6, Hawaii Revised Statutes and HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD interpretation of said statutes."

The UHPA has alleged that the "U of H violated section 89-13(a)(5) in failing to convene a grievance hearing and failing to issue a decision". At the outset, the Board notes UHPA's citations of authorities on the grievances, the

convening of grievance hearings and the importance of these procedural steps in the grievance process. The Board is not only cognizant of the propositions for which they stand, but also agrees with their substance. However, the Board is of the opinion that they are not applicable to the cases at hand.

In the first instance, there must exist a grievance before the various grievance procedures in the collective bargaining agreement can be put into effect. In other words, there can be no violation of a collective bargaining agreement where the disputed action does not come within the parameters of the collective bargaining agreement.

Therefore, the threshold question the Board must determine is whether the actions of Vice Chancellor Ashton in refusing to convene the subject Step 2 grievance hearings on October 31, 1975 and November 10, 1975, constituted a grievance under Collective Bargaining Agreement between the BOR and UHPA. Article XII of the unit 7 Collective Bargaining Agreement, Grievance Procedure at subsection A, Definition, provides:

"A grievance is a complaint by a faculty member of the Assembly concerning the interpretation and application of the express terms of this Agreement."

There is a limiting factor as to what may be contained in collective bargaining agreement. This is set out in section 89-9(d), HRS. That section states in relevant part:

"Excluded from the subjects of negotiations are matters of classification and reclassification. . ."

Clearly, the cases involve matters of classification and reclassification. In the first prohibited practice charge, the underlying action of the grievance was a classification of



a newly created position, Research Associate 3 in the Manoa Botany Department, in unit 8. And the action underlying the second prohibited practice charge was a reclassification of the positions held by Greenberg and Harada into unit 8.

Section 89-5, HRS, which in relevant part spells out much of the Board's authority, states, in part:

"(b) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;"

Pursuant to the responsibility and authority given to the Board by this section, the Board issued an advisory memorandum on August 28, 1973 with respect to the subject of unit clarification, which covered the actions presently before the Board -- specifically, the areas of newly established positions and transfers. It states in relevant part:

"(1) Newly Established Positions. The requirement of a stipulation for inclusion and exclusion of a newly established position from a bargaining unit is hereby rescinded. If it is the employer's opinion that the newly established position should be included in a given bargaining unit, it shall do so unilaterally. However, the employer shall notify the union in writing that he has included the newly established position in a given bargaining unit. A written report of such inclusion shall be furnished to the union, as appropriate, on a weekly basis. The employer shall notify the appropriate fiscal officer of its action.

\* \* \*

(2) Transfers. If the employer decides to transfer a position from one bargaining unit to another bargaining unit, i.e., from white collar non-supervisory to blue collar non-supervisory bargaining unit, the employer



shall notify the appropriate union of its decision prior to the transfer. If the union does not object to the transfer, the position may be transferred without any written report to the Board. The employer shall notify the appropriate fiscal officer of its action.

If the union objects to the transfer, the employer shall forthwith petition the Board for a unit clarification decision. The position shall remain in the original bargaining unit until the Board has rendered its decision." (Emphasis added.)

The Board regards the above statements, especially the underlined portion thereof, as reflecting its statutory authority in the area of unit determination. The memorandum was designed to help all parties expedite the on-going process of unit determinations.

The Board is of the opinion that the actions of the Vice Chancellor in refusing to convene a Step 2 grievance hearing on the matter of classification and reclassification of the positions in question did not constitute a grievance under the Collective Bargaining Agreement. Classification and reclassification of personnel are matters excluded from the scope of contract negotiations, and are therefore not covered by the Collective Bargaining Agreement. Section 89-9(d), HRS. Pursuant to its statutory authority, it is for the Board to make ultimate decisions on the unit placement of employees. The Board's grant of authority is statutorily explicit, and no contract may usurp this authority or prevent the Board from exercising it.

Ashton's failure to convene hearings and to issue decisions under Step 2 of the grievance procedure were the sole actions complained of and the bases for the alleged violations of HRS, §89-13(a)(1), (5) and (8).

The Board is of the opinion that unit placement is a matter properly within its purview and not a negotiable matter nor a grievable matter under the terms of the contract.

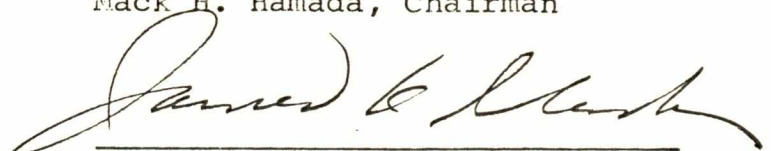
Hence the Board finds no violation of Subsection 89-13(a)(8). Moreover the Board finds that there is no evidence in the record to support a conclusion that the classification or reclassification on the refusal to convene meetings concerning them in any way constituted a violation of Subsections 89-13(1) or 89-13(5), HRS.

ORDER

It is hereby ordered that the Cases, CE-07-21 and CE-07-22, be dismissed. The Board further orders that the procedures that have been outlined by the Board in its August 28, 1973, Memorandum be complied with by all parties concerned in the future.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
James K. Clark, Board Member

  
John E. Milligan, Board Member

Dated: April 23, 1976  
Honolulu, Hawaii