

In the Matter of)
)
UNIVERSITY OF HAWAII)
PROFESSIONAL ASSEMBLY,)
)
Complainant,)
)
and)
)
BOARD OF REGENTS, UNIVERSITY)
OF HAWAII,)
)
Respondent.)

Decision No. 83

1977, the parties submitted their respective briefs; on July 14, 1977, the parties presented closing arguments orally before the Board.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

Petitioner UHPA is and was at all times relevant the exclusive representative, as defined in Subsection 89-2(10), HRS, for all employees of Unit 7 (faculty of the University of Hawaii and the community college system).

Respondent BOR is the employer of the employees in Unit 7.

The instant dispute involves the action of the BOR in adopting a mandatory retirement age policy for its appointees including persons in Unit 7. The policy was adopted and implemented by the BOR on September 9, 1976, as Appendix G of the Faculty Handbook. Appendix G provides:

- I. Service Beyond Age 65. No person who has attained the age of 65 shall be employed by the University, whether by appointment or contract, except when no one else is available and then for no longer than periods of one year at a time.
 - A. BOR employees who attain the age of 65 shall be terminated at the end of the academic year in which such age is attained.
 - B. In order to determine whether someone who is below age 65 is available, the following conditions must be met:
 1. The Chancellor or Systemwide Administrator identifies the services to be rendered and certifies that such services are essential.

2. The Chancellor or Systemwide Administrator certifies that advertising under appropriate University procedures has failed to produce a qualified applicant who is below age 65.

II. Service Beyond Age 70. No person who has attained the age of 70 shall be employed by the University, whether by appointment or contract, except when no one else is available and then for no longer than periods of six months at a time. In order to determine whether someone who is below age 70 is available, the following conditions must be met:

A. The Chancellor or Systemwide Administrator identifies the services to be rendered and certifies that such services are essential.

B. The Chancellor or Systemwide Administrator certifies that advertising under the appropriate University procedures has failed to produce a qualified applicant who is below age 70.

III. This policy does not apply to Without Compensation appointments where a person wishes to donate service which will be beneficial to the University. Such appointments may be submitted through regular procedures for BOR approval. (Pet. Ex. 4) (Res. Ex. 2-B).

UHPA contends that the adoption of Appendix G constitutes prohibited practices under the following provisions of Section 89-13(a), HRS:

[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:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

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

* * *

(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; or

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

It also asserts that the BOR's adoption of Appendix G is a violation of the following articles in the parties' collective bargaining agreement, the contents of which are summarized as follows:

Article I, Recognition.

Recognizes UHPA as the exclusive representative for Unit 7 members.

Article II, Non-Discrimination.

Provides that the University will not discriminate against faculty members.

Article IV, Section M, Termination of Tenure.

Provides reasons for the termination of tenure.

Article IX, Disciplinary Actions.

Provides that no faculty member can be disciplined except for proper cause.

Under Section 304-11, HRS, the BOR has the authority administratively to determine the salaries and the terms of service for the University faculty "where such salaries and terms of service are not specifically fixed by legislative enactment."

The BOR enacted the new Appendix G as a result of the decision issued by the Hawaii Supreme Court in Nelson v. Miwa, 56 Haw. 601, 246 P. 2d 1012 (1976), which declared, on grounds not here relevant, a previous BOR established mandatory retirement age unconstitutional and invalid. In its holding, the Court found the old Appendix G's provision allowing the

continued employment of certain faculty members beyond the mandatory retirement age to be arbitrary and so intertwined with the rest of Appendix G as to invalidate Appendix G in its entirety.

Following the Supreme Court's decision, Dr. Fujio Matsuda, President of the University of Hawaii, submitted a proposal to the BOR to replace the invalidated retirement policy. (Resp. Ex. 2a)

A copy of the proposed policy was also transmitted to the President of UHPA and the Executive Director of the Hawaii Government Employees' Association. Accompanying the transmittals was a memo dated May 20, 1976, from Harold Masumoto, Director of Administration for the University, asking the parties whether they desired consultation on the proposed new Appendix G. (Pet. Ex. 4)

UHPA notified Mr. Masumoto of its desire to meet to discuss the retirement policy, whereupon Masumoto asked the BOR to suspend further action on the proposed policy.

On or about June 11, 1976, Masumoto held a consultation meeting with UHPA's President, Dr. John Thompson, and UHPA's Executive Secretary, Helen Kronlein. At the meeting, UHPA stated its opposition to the retirement policy on the ground that it was not consistent with State law. (Tr. 68) Neither party made an offer to negotiate the subject of the mandatory retirement policy at that time. (Tr. 76, 128)

By letter dated October 7, 1976, the University notified all affected faculty members of the retirement age policy adopted by the BOR on September 9, 1976. (Pet. Ex. 6)

By letter dated October 13, 1976, addressed to Dr. Matsuda, Ms. Kronlein requested negotiations on the retirement age policy. (Pet. Ex. 7) Dr. Matsuda referred the matter to Mr. Masumoto.

A few weeks after October 13, 1976, Mr. Masumoto called Ms. Kronlein to clarify the intent of her letter. Ms. Kronlein expressed UHPA's wish to negotiate the retirement age. She also requested that the matter be negotiated separate and apart from negotiations for the Unit 7 contract reopening since the faculty members affected would have been terminated prior to July 1, 1977, when the new contract would take effect. (Tr. 72-73)

Mr. Masumoto told Ms. Kronlein that he would respond to her request in writing; however, no written reply was sent. (Tr. 71-73, 85-86) Mr. Masumoto testified that he assumed that UHPA was no longer interested in negotiating on the matter of the retirement age since UHPA, inter alia, had filed a complaint in the Circuit Court on December 20, 1976, challenging the constitutionality of the new retirement age policy as enacted by the BOR. In its complaint, UHPA also alleged that Chapter 91, HRS (the Hawaii Administrative Procedures Act), and other statutory provisions had been violated. No Chapter 89, HRS, violations were alleged in that action.

Mr. Masumoto explained to this Board that since he believed that the retirement policy could not be both a mandatory subject of negotiations under Chapter 89, HRS, and also a rule under Chapter 91, he interpreted the filing of the complaint as a withdrawal of UHPA's earlier request for negotiations under Chapter 89 and an assertion of its rights under Chapter 91. (Tr. 135, 149, 186) In any event, he did not believe the mandatory retirement age was a mandatory subject of bargaining under Chapter 89, HRS. (Tr. 135, 186)

At the hearing, Benjamin Sigal, chief spokesman for UHPA during negotiations for the initial Unit 7 contract, effective March 18, 1975 to June 30, 1977, testified that in

the past both UHPA and the BOR had treated the mandatory retirement age as a negotiable subject. Both parties had at various times sought to incorporate the existing Appendix G, which set forth the retirement policy, as part of the collective bargaining agreement. In the final agreement, however, Appendix G was not included, in part, because the Circuit Court had declared Appendix G unconstitutional and the matter was being appealed to the State Supreme Court. (Tr. 49-52, 114-117)

Kim Tet Lee, Executive Secretary of the State Retirement System, testified that all members in bargaining Unit 7 are required by law to become members of the State's employees' retirement system, pursuant to Section 83-42, HRS.

Mr. Lee testified that the retirement plan, established in Chapter 88, HRS, provides a joint contributory system which requires both the employer and the employee to make contributions into the system. By law, University faculty are required to contribute 7.8% of their gross salary to the retirement system while the State, as the employer, must contribute an amount based upon certain actuarial considerations. (Tr. 8-9) The level of retirement benefits is statutorily determined by a formula based on the employee's highest salary for three years and the number of years of employee service. Thus, the level of benefits to which the employee is entitled by this prescribed formula would not be affected by changing the mandatory retirement age. Raising or lowering the retirement age would, however, have an impact on the amount the employer is required to contribute since he must make up the difference between the amount of employee contribution and the level of benefits mandated by law. Thus, if the average age of retirement is lowered, the level of

employee contributions would be lowered and the employer's costs would increase. (Tr. 10-13)

The Employees' Retirement System referred to by Mr. Lee is the arrangement established in Chapter 88, HRS, by which retirement allowances and other benefits are provided for its members.

All members of the retirement system are classified into one of the following four groups, pursuant to Section 88-102, HRS: (1) general State employees, (2) teachers, (3) State county employees, and (4) policemen and firemen.

Mr. Lee stated that for all purposes of the Employees' Retirement System, University faculty members are treated as part of the teacher group. Since the University faculty is not classified as an entity in itself, Mr. Lee explained that he would not be able to measure the impact the faculty group alone would have on the Retirement System if their mandatory retirement age was raised from age 65 to 70.

Mr. Lee also testified that most of the members of the Employees' Retirement System are required to retire at age 70, pursuant to Subsection 88-73(a), HRS, which states, in relevant part:

(2) Any member who has at least five years of credited service and who attains the age of seventy years shall be retired on the first day of the calendar month next succeeding that in which he attains such age;

Section 78-3, HRS, also requires most State employees to retire at age seventy.

An exception to the age 70 retirement requirement exists as to public school teachers, who must retire at age 65 in accordance with Section 297-15, HRS.

There are no statutes which establish a retirement age specifically for the University faculty. This fact is critical in the disposition of this case.

CONCLUSIONS OF LAW

The issue in this case is whether the BOR of the University of Hawaii committed a prohibited practice when it unilaterally, through administrative action, established a mandatory retirement age for its appointees including members of Unit 7. The BOR's administrative decision was made pursuant to Section 304-11, HRS, which provides:

"Faculty. The faculty of the university shall be under the direction of a president who shall be appointed by the board of regents. The board shall appoint such deans, directors, other members of the faculty, and employees as may be required to carry out the purposes of the institution, prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment, make and enforce rules governing sabbatical leaves with or without pay, consistent with the practice of similar institutions on the mainland, and notwithstanding the laws of the State relating to vacations of the officers and employees of the State."

Acting pursuant to said section, the BOR set a mandatory retirement age of 65 for all persons in Units 7 and others. In doing so, it asserted that it was under no duty to negotiate with UHPA, the exclusive representatives of said employees, because of the language of Subsection 89-9(d) which states:

"Excluded from the subjects of negotiations are . . . retirement benefits"

This Board has determined that in its use of the term "retirement benefits" in Subsection 89-9(d), supra, the Legislature meant to exclude the entire employees' retirement system from the scope of negotiations. Decision 65 (December 16,

1975), affirmed sub nom, Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO v. Hawaii Public Employment Relations Board, et al, Civil No. 47243 (1st Circuit August 26, 1977).

It cannot be disputed that the minimum and mandatory retirement age which are a part of that system and which are established therein by Subsections 88-73(2), HRS, are, under Subsection 89-9(d), HRS, nonnegotiable. Subsections 88-73(1) and (2) state:

"(1) Any member who has at least five years of credited service and who has attained age fifty-five or any member who has at least twenty-five years of credited service or any member who has at least ten years of credited service, including service as a judge, an elective officer, or the chief clerk and the sergeant at arms of both houses of the legislature, may retire upon his written application to the board specifying on what date, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired.

(2) Any member who has at least five years of credited service and who attains the age of seventy years shall be retired on the first day of the calendar month next succeeding that in which he attains such age; provided, a member of the legislature may continue or be restored to active membership in the system after the age of seventy years during the period such member is serving in his elective capacity."

Our examination of Chapter 88 indicates that the Legislature established age 70 years as the mandatory retirement age for general employees and that this age is part of the retirement system created by the Legislature and as such is beyond the scope of negotiation. Between the ages of 55 and 70, provided certain other conditions are met, the Legislature, under Chapter 88, HRS, left the retirement date optional on the part of such employees.

The BOR in this case set a mandatory retirement age for employees in Unit 7 pursuant to Section 304-11, HRS, supra.

This retirement age, which was not established by the Legislature, in our opinion, is not part of the retirement system or the benefits thereunder upon which negotiations are forbidden. Were it, rather than being the creation of BOR administrative action, a part of the legislatively created and controlled retirement system, we would hold that it was nonnegotiable.

We note that the BOR's power under Section 304-11, HRS, is to set terms of service where such "are not specifically fixed by legislative enactment." It would appear that Subsections 88-73(1) and (2), HRS, are legislative enactments which specifically fix a mandatory retirement age for the subject employees. From this, it would arguably follow that the BOR itself had no power under Section 304-11, HRS, to fix, unilaterally or otherwise, a mandatory retirement age which differed from that contained in Section 88-73, HRS, and that its actions in establishing a mandatory retirement age pursuant to Section 304-11, HRS, were ultra vires. This issue, however, is not within the jurisdiction of this Board to decide.

The facts before this Board are that (regardless of whether it was on sound legal footing when it did so) the BOR did, pursuant to Section 304-11, HRS, administratively establish and implement a mandatory retirement age for employees in Unit 7 and that it took this action unilaterally.

In Decision 65, this Board said:

"This Board assumes that the Legislature was aware that fringe benefits such as health, dental and retirement plans are mandatory subjects of negotiations in the private sector. It is this Board's conclusion that when the Legislature enacted Section 89-9(d), HRS, to remove retirement benefits and the health fund from the scope of negotiations, it intended to keep full control over these subjects and did not intend to have any part of them open to

negotiations. Thus, the Legislature has pre-empted these subjects and excluded them from the scope of collective bargaining. Any other conclusion would seriously erode legislative control over the retirement system and the health fund." (Emphasis added)

Legislative preemption of the subject of the retirement system is, in our view, evinced whenever the Legislature has spoken specifically on the subject.

Regarding minimum and mandatory retirement ages, the Legislature has spoken as to most employees when it enacted Section 88-73, HRS. As to school teachers and educational officers, it has enacted Section 297-15, HRS.*

In Section 304-11, HRS, there is no express statement regarding retirement ages. If, as the BOR contends, Section 304-11, by its broad, general language, conferred upon the BOR the power to establish and change the retirement age for its appointees, then we believe this administrative power may not be exercised unilaterally without negotiations with the appropriate exclusive representative.

To hold, as we do, that the BOR must, if it attempts to establish or change a mandatory retirement age pursuant to Section 304-11, HRS, negotiate on said establishment or change does no violence to the proscription in Subsection 89-9(d), HRS, against negotiating on retirement benefits. This Board has viewed that proscription as being designed to prevent erosion of a legislatively established and controlled retirement system. The actions of the BOR under Section 304-11,

*Age limit. No teacher or educational officer in the department of education who has attained the age of sixty-five years shall be employed by the department of education, whether by appointment or contract, except when no qualified person is available and then only under contract for periods not to exceed one year at a time. No teacher or educational officer who has attained the age of seventy years shall be on appointment or contract.

HRS, are either in violation of the Legislature's enactments on the subject of mandatory retirement ages or have been taken by administrative fiat independently of Legislative enactment or control over the subject.

As stated in Nelson v. Miwa, supra:

"Appendix G is not a method of reinforcing the retirement system set up by our legislature. The faculty members at the University of Hawaii are required to become members of the Employees Retirement System of the State of Hawaii, HRS §§88-42, -43, -102(2) (Supp. 1975). The record in this case indicates that there are no physical characteristics attributable to college professors as a class which justify a departure from this statutory age ceiling. Indeed, the statutory seventy year age limitation coincides with the absolute age ceiling imposed by Appendix G. Since Appendix G is not part of the general statutory retirement system, we must look beyond whatever state interest is protected by reinforcing a retirement system with a compulsory retirement provision based on age." See, e.g., Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W. 2d 97 (1974). (Emphasis added)

The BOR has acted to set a new mandatory retirement age for its appointees. Because this action was an administrative one, taken outside of those statutes which delineate the retirement system, Subsection 89-9(d), HRS, does not bar negotiations on the subject. A mandatory retirement age, under these circumstances, is a term and condition of employment under Subsection 89-9(a), HRS, and as such is a mandatory subject of negotiations. Having refused to negotiate with UHPA on the subject, the BOR has committed a prohibited practice in violation of Subsections 89-13(a)(1), (5) and (7), HRS.

ORDERS

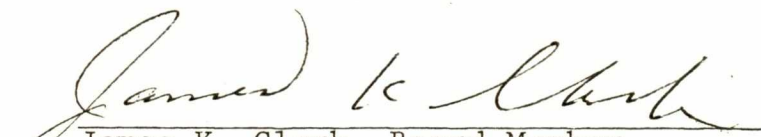
The Board of Regents of the University of Hawaii is ordered to cease and desist from refusing to negotiate the subject of mandatory retirement age for persons in Unit 7 with the University of Hawaii Professional Assembly and to cease and desist from implementing the mandatory retirement age it imposed in Appendix G of the Faculty Handbook.

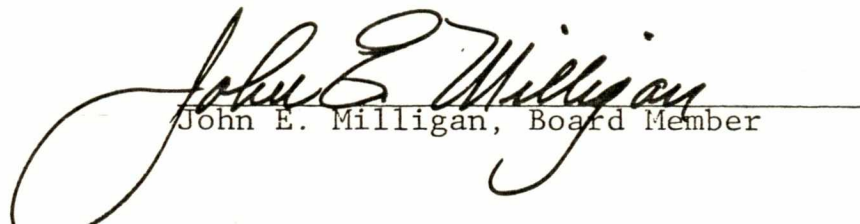
Affirmatively, the BOR is ordered to bargain on the subject of any mandatory retirement age it attempts to set which is different from the mandatory retirement age contained in Section 88-73, HRS, and to reduce any agreement which may be reached to writing.

The BOR also is ordered to post, for a period of sixty days after the date of this decision, in conspicuous locations at the work sites of employees in Unit 7, a signed notice which sets forth the terms and conditions of these Orders.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: September 2, 1977

Honolulu, Hawaii