

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
UNIVERSITY OF HAWAII)	Case No. <u>CE-07-44</u>
PROFESSIONAL ASSEMBLY,)	
Complainant,)	
and)	
BOARD OF REGENTS, UNIVERSITY)	
OF HAWAII,)	
Respondent.)	
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In the Matter of)	
BOARD OF REGENTS, UNIVERSITY)	Case No. <u>DR-07-32</u>
OF HAWAII,)	
Petitioner,)	Decision No. <u>91</u>
and)	
UNIVERSITY OF HAWAII)	
PROFESSIONAL ASSEMBLY,)	
Intervenor.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECLARATORY RULING AND ORDER

The above referenced cases follow in the wake of Decision 83 of this Board which was issued on September 2, 1977.

The Orders in Decision 83, in relevant part, state:

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.

In Case No. CE-07-44 filed on May 22, 1978,^{*} the University of Hawaii Professional Assembly (hereafter UHPA) charged that the Board of Regents of the University of Hawaii (also referred to as BOR) violated Section 89-13, Hawaii Revised Statutes (hereafter HRS), by failing to cease and desist from implementing Appendix G of the Faculty Handbook. UHPA also charges that the BOR has refused to negotiate in good faith the question of back pay for all faculty members terminated by reason of the implementation of Appendix G notwithstanding that UHPA has repeatedly asked the Respondent for back pay. UHPA asks the Board to order back pay or, by way of alternative, to order negotiations on back pay.

In Case No. DR-07-32 filed by the BOR on June 28, 1978, the issue is whether under the provisions of Section 89-9, HRS, the age of retirement for University faculty must be changed from 65 to 70 while negotiations take place on a mandatory retirement age for Unit 7 personnel, pursuant to Decision 83. A mandatory retirement age of 70 is established for most employees by Section 88-73, HRS.

Hearings herein were held on July 17 and 18, 1978, and UHPA's brief was received on August 3, 1978. The brief of the BOR was submitted on August 7, 1978.

Based upon the entire record herein, this Board makes the following findings of fact, conclusions of law, declaratory ruling and order.

^{*}An amendment to the Complaint was permitted by Order No. 191 on June 2, 1977. The above statement of charges incorporates the amendments.

FINDINGS OF FACT

The Board of Regents of the University of Hawaii is a public employer under Chapter 89, HRS.

UHPA is the exclusive representative of employees in bargaining unit 7 (faculty of the University of Hawaii and the community college system).

Section 304-11, HRS, confers upon the Board of Regents the authority to appoint Unit 7 employees and to "prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment."

Pursuant to said statutory provision, the BOR adopted, in Appendix G of the Faculty Handbook, a mandatory retirement age of 65 for its appointees including persons in Unit 7. The present policy was adopted and implemented by the BOR on September 9, 1976.

As early as the year 1933, the BOR adopted a mandatory retirement age of 65. On February 24, 1976, the Supreme Court declared an earlier version of Appendix G which contained the age of 65 as a mandatory retirement age unconstitutional. Nelson v. Miwa, 56 H. 601 (1976). The Supreme Court decision was an affirmation of a decision by a Circuit Court which had struck down the policy as unconstitutional.

After the Circuit Court decision was rendered, the University abandoned the mandatory retirement policy contained in the earlier version of Appendix G and notified faculty members approaching age 65 that if they wished to stay on as employees on a year to year basis they could do so. This was the policy which was in effect when on September 9, 1976, the University unilaterally adopted its present Appendix G.

Decision 83 ordered the BOR to cease and desist implementing this policy and to negotiate the issue of a mandatory retirement age.

The persons terminated as a result of Appendix G whose reinstatement and claims to back pay are being pursued by UHPA in this matter were terminated after September 9, 1976 and prior to September 2, 1977, the date of issuance of Decision 83.

There have been negotiations between the BOR's designees and UHPA. The BOR's positions in these negotiations have been the following:

1. Decision 83 is prospective;
2. Reinstatement of the terminated employees is negotiable but unconditional, unqualified reinstatement with retirement credits for the period they were out of work is not;
3. The University is willing to negotiate the issue of back pay.

The University's conduct has been consistent with these positions.

CONCLUSIONS OF LAW

The order contained in Decision 83 commanding the BOR to cease and desist implementing the mandatory retirement age in Appendix G of the Faculty Handbook is prospective. Accordingly, persons terminated prior to the issuance of Decision 83 were not terminated in violation of this Board's cease and desist order. There being no violation, no remedy from this Board would be appropriate.

This Board agrees in this case with the statement of the NLRB in the case of Inland Steel Co., 77 NLRB No. 1, 21 LRRM 1310 (1948):

We agree with the Trial Examiner that it is not necessary, in order to effectuate the policies of the Act, to require the respondent to reinstate the retired employees with back pay. The merits of the Union's request for such reinstatement may well be determined through the procedures of collective bargaining which our order here assures the Union it may use. . .

There is no evidence that the BOR is violating that portion of the order which calls for negotiation of a mandatory retirement age.

There is evidence that the BOR is negotiating with UHPA on possible reinstatement and back pay for persons terminated before Decision 83 came out. That it is not making concessions does not take away from the fact that bargaining, albeit hard bargaining, is taking place.

As to Case DR-07-32, the BOR misapprehends the function of this Board if it believes this Board will create, in a declaratory ruling proceeding, a mandatory retirement age of 65 or 70 for it pending negotiations.

It is critical to the disposition of a portion of the declaratory ruling proceeding that the Board's power to issue declaratory rulings is restricted to interpreting statutes it administers. The Board does not administer the retirement system law of which Section 88-73(a), HRS, is a part. It does not have the power to issue a decision that Section 88-73(a), HRS, is applicable to faculty. That question is outside of the Board's jurisdiction.

A review of the salient parts of Decision 83 is in order. The BOR, in the case which resulted in said Decision, took the position that it was not governed by Section 88-73(a), HRS, which establishes, as part of the retirement system a 70 year old retirement age, but instead that it derived from

Section 304-11, HRS, a unique power to administratively establish a separate retirement age for faculty. In response to this position, the Board stated in Decision 83:

. . . "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" (Emphasis added)

Either the establishment of a mandatory retirement age at the University is governed by Section 88-73(a), HRS, or it is governed by Section 304-11, HRS.

If it is governed by Section 88-73(a), HRS, the age is 70 and because of Section 89-9(d), HRS, the matter is nonnegotiable. This Board, however, lacks jurisdiction in a declaratory ruling procedure to determine that the age contained in Section 88-73(a) applies to faculty. Section 91-8, HRS.

If the establishment of a mandatory retirement is governed, as the University contends, by Section 304-11, HRS, then the matter is, because of Section 89-9(a), negotiable. Pending negotiations, the BOR would have this Board declare the age to be 65 on the theory that this would restore the status quo ante existing prior to the unilateral change it made on September 9, 1976 when it adopted the present Appendix G. The facts show, however, that as a result of the Nelson case the practice prior to the unilateral change was to permit faculty members who reached 65 to remain at work on a year to

year basis. This policy, not the 65 year old mandatory retirement age, was the status quo ante prior to the unilateral change.

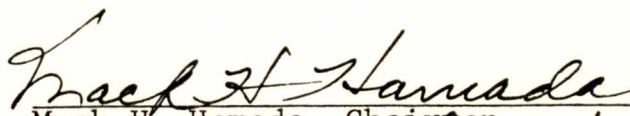
The University has chosen to function under Section 304-11, HRS, and has pursuant thereto established a mandatory retirement age of 65 and has been told that it was wrong for it to do so unilaterally. The matter must be negotiated.

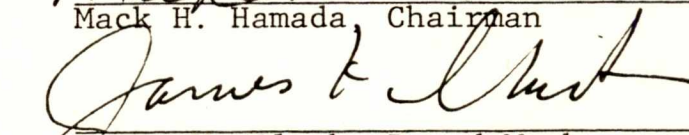
DECLARATORY RULING AND
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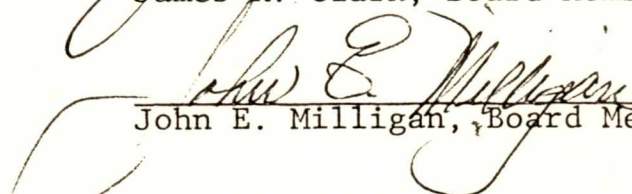
In response to the declaratory ruling petition filed by the BOR, the Board rules that the practice in effect immediately prior to the adoption of Appendix G was not to retire people at age 65 but to allow them to remain employed on a year to year basis. In view of this fact, the Board rules that it would be a violation of the duty to bargain for the BOR to retire people at age 65 pending negotiations. It would, however, be proper for the BOR to continue the practice of permitting persons to remain on a year to year basis to the extent permitted by Chapter 88, HRS, pending negotiations.

The prohibited practice charge filed by UHPA against the BOR is dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: September 14, 1978

Honolulu, Hawaii