STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii and CAROL M. EASTMAN, Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii, Respondents.	CASE NOS.: CE-01-362a CE-10-362b ORDER NO. 1888 ORDER GRANTING COMPLAINANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING COMPLAINANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

On August 22, 1997, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against the BOARD OF REGENTS, University of Hawaii, State of Hawaii and CAROL M. EASTMAN (EASTMAN), Senior Vice President and Executive Vice Chancellor, University of Hawaii, State of Hawaii (collectively BOR or Employer) with the Hawaii Labor Relations Board (Board). The UPW alleges that the BOR unilaterally implemented the University of Hawaii at Manoa Sexual Assault Policy and Procedure (Policy), without negotiating with the UPW and failed to provide full and complete responses to the requests for information by the UPW. The UPW contends that the unilateral implementation of the Policy constitutes mid-term modifications of the existing Units 01 and 10 collective bargaining

agreements (collectively contracts) and is a violation of §§ 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On September 26, 1997, the BOR filed a motion for summary judgment with the Board. In its motion, the BOR contends that the establishment and implementation of the Policy does not trigger the duty to bargain. The BOR contends that there are no genuine issues of material fact and it is entitled to judgment as a matter of law.

On September 29, 1997, the UPW filed a Cross-Motion for Summary Judgment with the Board. The UPW submits that the Union is entitled to judgment for the following reasons: (1) Univ. of Hawai`i Prof. Assem. v. Tomasu, 79 Hawai`i 154, 900 P.2d 161 (1995) (UHPA v. Tomasu) is dispositive on the duty to bargain over federal mandates which give discretion to the Employer on how to implement its requirements; (2) new disciplinary policies and procedures are mandatory subjects of bargaining; and (3) Respondents violated their duty to bargain by engaging in unilateral action.

On October 2, 1997, the BOR filed a Memorandum in Opposition to Complainant UPW's Cross-Motion for Summary Judgment with the Board.

On October 6, 1997, the Board held a hearing on the instant motions. All parties were represented and had full opportunity to present evidence and arguments to the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The BOARD OF REGENTS is the representative of the public employer as defined in § 89-2, HRS, of employees of the University

of Hawaii and community college system included in bargaining unit 01.

CAROL EASTMAN was for all times relevant, Senior Vice President and Manoa Campus Executive Vice Chancellor, University of Hawaii and represented the employer within the meaning of § 89-2, HRS.

The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees included in bargaining unit 01. The UPW has represented Unit 01 employees of the University of Hawaii, Manoa since on or about 1972. There are more than 300 employees on campus in Unit 01.

The Higher Education Act of 1965, as amended (HEA or Act), more pertinently, 20 U.S.C. § 1092(f), originated as § 485(f) of the HEA and was added to the HEA by the Student Right-to-Know and Campus Security Act. These provisions were later amended by the Higher Education Amendments of 1992 (Public Law 102-325). The 1992 Amendments added the provisions which are presently codified as 20 U.S.C. § 1092(f)(7)(A)-(C) which provides in part as follows:

> (A) Each institution of higher education participating in any program under this title shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding -
>
> (i) such institution's campus sexual assault programs, which shall be aimed at prevention of sex offenses; and
>
> (ii) the procedures followed once a sex offense has occurred.
>
> (B) The policy described in subparagraph (A) shall address the following areas:
>
> (i) Education programs to promote the awareness of rape, acquaintance rape, and other sex offenses.
>
> (ii) Possible sanctions to be imposed following the final determination of an on-campus disciplinary procedure regarding rape,

acquaintance rape, or other sex offenses, forcible or nonforcible.

(iii) Procedures students should follow if a sex offense occurs, including who should be contacted, the importance of preserving evidence as may be necessary to the proof of criminal sexual assault, and to whom the alleged offense should be reported.

(iv) Procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that -

(I) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceedings; and

(II) both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceedings brought alleging sexual assault.

(v) Informing students of their options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the student so chooses.

(vi) Notification of students of existing counseling, mental health or student services for victims of sexual assault, both on campus and in the community.

(vii) Notification of students of options for, and available assistance in, changing academic and living situations after an alleged sexual assault incident, if such changes are reasonably available.

(C) Nothing in this paragraph shall be construed to confer a private right of action upon any person to enforce the provisions of this subparagraph.

The foregoing provisions require institutions of higher education to develop a policy statement regarding sexual assault programs aimed at the prevention of sex offenses and procedures to be followed once a sex offense occurs. The Policy must address, inter alia, possible sanctions to be imposed following the final determination of an on-campus disciplinary procedure and procedures for disciplinary action in cases of alleged sexual assault which

include a statement that the accuser and the accused are entitled to have others present during a campus disciplinary proceeding and be informed of the outcome of any disciplinary proceedings.

The BOR drafted a Policy pursuant to the HEA and by letter dated October 30, 1996, EASTMAN transmitted a copy of the initial draft Policy and explanation as to its federally mandated enactment to UPW's State Director Gary W. Rodrigues (Rodrigues). EASTMAN explained that the Higher Education Reauthorization Act of 1992 mandated institutions of higher education receiving federal funds to develop a sexual assault policy and in order to comply with the mandate, the University developed and sought to implement a sexual assault policy. In accordance with § 1.05 of the Unit 01 contract, the Employer sought to consult with the Union regarding the Policy and procedures. EASTMAN also indicated that if no response was received by November 30, 1996, she would assume the Union had no objections to adopting the policy and procedures on December 1, 1996.

The initial draft provided, in part:

> VI. Procedures for Filing Complaint
>
> * * *
>
> Efforts to maintain confidentiality will be exercised to the greatest extent possible; however, appropriate members of the campus community will be informed that an incident of sexual assault has been reported. Additionally, certain information may be disclosed to appropriate administrators, the Respondent, and witnesses, among others, in order to conduct the investigation or resolve the complaint. Information may also be disclosed if required by law, rule, regulation or by order of court or arbitrator under the University's collective bargaining agreement.

Decisions involving disciplinary proceedings relating to suspension or discharge of University employees will be disclosed pursuant to Section 92F-14(b)(4)(B), Hawai`i Revised Statutes, which provides that the decision will be disclosed thirty days after a written decision sustaining the suspension or discharge is issued by the highest non-judicial grievance adjustment procedure.

* * *

VIII. Sanctions and Remedies

Members of the campus community will be sanctioned for proper and just cause. Engaging in any act constituting sexual assault or attempting to engage in acts which constitute sexual assault shall subject the member to sanctions.

Sanctions that are available for disciplinary purposes include oral reprimand, written reprimand, suspension, expulsion, and termination. Because sexual assault is a serious offense, expulsion from school or termination from employment can and will be considered even though the sexual assault is the first offense committed by the individual.

Additional sanctions that may be imposed concurrently include appropriate counseling such as substance abuse, anger management, etc., and appropriate restrictions or limitations such as prohibiting the Respondent from contacting the victim, working in the same campus department, living in the same residence hall, and/or from enrolling in the same class as the victim.

Complainants may also be assisted in accommodating and/or changing academic, employment, and/or living situations after an alleged sexual assault. The University retains the flexibility to tailor the appropriate sanction/remedy in each case.

Members of the campus community alleged to have violated the Sexual Assault Policy may also be subject to interim suspension or transfer during the investigation of the alleged offense, according to applicable collective bargaining agreements and depending on the nature of the threat which the

> Respondent's alleged actions pose to the complainant and/or campus community. As a temporary measure pending final resolution of a complaint, a member of the campus community accused of sexual assault will ordinarily be prohibited from contacting the Complainant and witnesses.

By letter dated November 26, 1996, Rodrigues responded that the Union considered the draft Policy to be a "mandatory subject of bargaining, because it materially and significantly impacts on job security, wages, and other terms and conditions of employment" of UPW employees. UPW thus requested bargaining over the subject matter and that the University cease and desist from unilaterally implementing the policy until bargaining in good faith has occurred and other legal requirements are met. Rodrigues asked that EASTMAN's representative contact him within seven days to schedule bargaining and in addition, the UPW also requested responses to its information request within the same time frame.

By letter dated December 2, 1996, EASTMAN acknowledged receipt of Rodrigues' November 26, 1996 letter requesting negotiations. EASTMAN indicated that the University was reviewing his comments and questions and once all comments were received, she would contact him to schedule a meeting. EASTMAN also assured Rodrigues that the UH would not proceed with the December 1 implementation date until they had met.

By letter dated May 13, 1997, EASTMAN transmitted a revised draft of the Policy to the UPW. EASTMAN indicated that the draft represented revisions to address the union's concerns. EASTMAN also indicated that because of the need for a sexual

assault policy for the University, she wanted to proceed with implementation.

On July 15, 1997, the BOR enacted the Policy which provides as follows:

I. Introduction

Sexual assault is a serious crime which violates the basic standards of behavior expected of members of the University community. The University of Hawai`i at Manoa ("Manoa Campus") will not tolerate acts of sexual assault. This policy is promulgated in compliance with the Higher Education Reauthorization Act of 1992 ("Act").

II. Charge

The Senior Vice President and Executive Chancellor is charged with the responsibility and authority to implement this policy at the Manoa Campus.

III. Definition

Sexual assault is defined by the Act, which refers to "Sex Offenses" defined by the National Incident-Based Reporting System, Uniform Crime Reporting Program System (Appendix E, 454 CFR Part 668 (7-1-94). Basically, the law defines sexual offense as "any sexual act directed against another person, forcibly and/or against that person's will where the victim is incapable of giving consent, and includes the following:

1. Forcible Rape;
2. Forcible Sodomy;
3. Sexual Assault With An Object;
4. Forcible Fondling;
5. Incest; and
6. Statutory Rape.

IV. Information/Education

The Manoa Campus is charged with providing activities and programs aimed at informing and educating its campus constituencies on matters of sexual assault. Campus units including, but not limited to, campus security, housing, health and counseling services shall provide education and training aimed at sexual assault prevention.

V. Procedures

In the event a member of the University community is sexually assaulted, the following steps should be taken:

Medical treatment for injuries, sexually transmitted diseases and pregnancy should be sought from the UHM Student Health service or at the emergency room of any local hospital.

A medical exam to preserve evidence of rape can be performed but must be done within 72 hours of a sexual assault for evidence to be valid should criminal proceedings be pursued. To preserve as much evidence as possible, victims should not perform personal hygiene until the exam is done.

Any member of the campus community who has been a victim of an on-campus sexual assault is strongly encouraged to file a police report. Victims are also strongly encouraged to file a campus report via the Dean of Students, Equal Employment Opportunity/Affirmative Action ("EEO/AA") Officer, or Campus Security. If desired, these offices will assist victim in notifying police.

Incidents reported to the University under this policy will be addressed promptly. The University has the right to proceed with an investigation of the complaint at any time. University proceedings need not await the disposition of any related criminal investigation or prosecution.

Formal complaints of sexual assault are investigated by the Dean of Students under procedures provided in the Student Conduct Code when the alleged assailant is a student. The EEO/AA Office investigates reported instances of sexual assault when the alleged assailant is an employee.

In all instances, both the accuser and the accused are entitled to have a representative present. If the accused is an employee, any disciplinary action will be conducted in accordance with the appropriate collective bargaining agreement.

Appropriate predispositional relief may be granted the victim in altering academic, employment or living situations after an alleged sexual assault.

Efforts to maintain confidentiality will be exercised to the greatest extent possible; however, appropriate members of the campus community will be informed that an incident of sexual assault has been reported. Additionally, certain information may be disclosed to appropriate administrators, the respondent, and witnesses in order to conduct the investigation.

Information may also be disclosed if required by law, rule, regulation, or by order of the court or arbitrator pursuant to the appropriate collective bargaining agreement.

VI. Right to Alternative Procedures

It is the right of any individual to pursue other avenues of recourse which may include initiating civil action or seeking redress under state criminal statutes and/or federal law.

VII. Victim Assistance and Support

The Manoa Campus is charged with identifying and developing a protocol for on-campus units to provide assistance and support to victims of sexual assault. The Manoa Campus shall also develop and make available a list of appropriate off-campus resources for sexual assault victims.

VIII. Sanctions and Remedies

Student sanctions shall be imposed after due process as provided by the Campus Student Conduct Code. Sanctions include, but are not limited to, suspension or dismissal from campus.

Employee sanctions shall be in accordance with appropriate University policies and/or collective bargaining agreements.

IX. Retaliation

Retaliation against any person or persons involved in a sexual assault complaint is expressly forbidden.

X. Policy Dissemination

This policy shall appear in the student handbook and be posted in campus areas accessible to students, faculty and staff.

By letter dated July 16, 1997, EASTMAN transmitted a final draft of the Policy to the UPW and thanked Rodrigues for his input.

By letter dated July 21, 1997, Rodrigues objected to the Employer's unilateral implementation of the proposed Policy. Rodrigues reminded EASTMAN that the Union had requested bargaining in November and she had promised to schedule a meeting prior to implementing the Policy. Rodrigues indicated that EASTMAN had not scheduled a meeting nor submitted any information requested by the Union by letter dated November 30, 1996. The Union requested that the University immediately cease and desist from implementing the policy until the parties had bargained in good faith. The Union also requested that the Employer immediately furnish the information which the Union requested on November 30, 1996.

By letter dated August 7, 1997, EASTMAN responded to Rodrigues' July 21, 1997 letter. EASTMAN explained the history of the Policy, indicating that the original draft or the Policy was sent to the unions with a letter inviting consultation in October 1996. The Policy was redrafted by staff pursuant to comments received from the unions and the final Policy tracked "federal requirements for higher education institutions to provide for a prompt determination of whether a sexual assault had occurred and programs to prevent and address such problems when they occur." EASTMAN assured Rodrigues that there were "no new procedures which impact existing terms and conditions of employment under the collective bargaining agreements." As such, the University believed that the Policy was not subject to negotiation but rather

consultation. Since the other exclusive representatives, the University of Hawaii Professional Assembly and the Hawaii Government Employees Association, had concurred with the draft, the University would proceed to implement the Policy. EASTMAN also enclosed responses to the UPW's information request.

The UPW filed the instant complaint on August 22, 1997.

Based upon a review of the record, the Board finds that the University drafted a sexual abuse policy and procedure to comply with the HEA in November 1996 and distributed the policy to the UPW, the Hawaii Government Employees Association, and the University of Hawaii Professional Assembly to comply with consultation obligations. The UPW requested bargaining over the subject and also requested information. EASTMAN responded that the University was reviewing comments from the other unions and that after the comments from the other unions were reviewed, she would meet with Rodrigues. EASTMAN assured Rodrigues that the University would not promulgate the Policy until she met with him.

Thereafter, the University staff reviewed the comments from the other unions and revised the Policy by, inter alia, amending provisions relating to confidentiality and employee sanctions. Rather than specifying sanctions for discipline, the new draft deferred to the applicable collective bargaining agreements. In addition, with respect to confidentiality, the Policy provided that efforts to maintain confidentiality would be exercised however, appropriate members of the campus community would be informed and certain information could be disclosed in order to conduct the investigation. Information could also be

disclosed if required under the collective bargaining agreement. In May, EASTMAN transmitted a revised draft of the Policy to Rodrigues indicating that the Policy was modified in accordance with comments from the unions and that the University wanted to proceed to implement the Policy. In July 1997, the BOR promulgated the Policy and EASTMAN distributed the Policy to Rodrigues by letter dated July 16, 1997. The Union thereupon objected to the implementation of the Policy because of EASTMAN's earlier representations and requested negotiations over the Policy. The UPW further requested that the University cease and desist from unilaterally implementing the Policy and to immediately submit responses to its information request. The University provided the information to the Union but proceeded to implement the Policy.

DISCUSSION

The UPW contends that the BOR unilaterally implemented the Policy without negotiating with the Union and failed to provide complete responses to its information request. The Union argues that the implementation of the Policy constitutes mid-term modifications of the existing Unit 01 contract and the BOR thereby violated §§ 89-13(a)(1), (5), (7), and (8), HRS,

> Section 89-13(a), HRS, provides as follows:
>
> (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 with the exclusive representative as required in section 89-9;

(7) Refuse or fail to comply with any provision of this chapter;

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

In its motion for summary judgment, the BOR contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. The BOR contends that in previous Board decisions, the Board held that the employer could establish a policy to comply with federal statutes, however, implementing the apparatus to effectuate the policy where the federal law affords discretion is subject to bargaining. University of Hawaii Professional Assembly v. Tomasu, 4 HLRB 689 (1990). The BOR contends that in the present case the federal law mandates that the University develop and distribute as part of the report a statement of policy regarding the University's sexual assault programs and the procedures followed once an offense has occurred. In its analysis of the Policy provisions, the BOR concedes that Section V, Procedures and Section VIII, Sanctions and Remedies, may implicate union members. The BOR argues that the federal statute does not specify the kind of sanctions available and the Policy merely states that the sanctions shall be in accordance with the contract. Thus, the BOR contends that the instant Policy is not subject to negotiation because it was promulgated to comply with federal law. In addition, where discretion is afforded the Employer as to implementation of the

federal law, the Policy makes clear that the already negotiated contract provisions are to be followed.

The UPW agrees with the BOR that the Hawaii Supreme Court's holding in University of Hawaii Professional Assembly v. Tomasu, supra, is dispositive in determining the bargaining obligations of the public employers regarding policies and programs mandated by federal statutes. The UPW contends that the HEA gives the University considerable latitude in defining sexual offenses and specifying penalties and sanctions. The UPW argues that since the law allows discretion, the Employer must negotiate with the UPW.

The UPW further contends that the sexual assault policies are like other workplace violence policies which are considered negotiable because of the impact on terms and conditions of employment. The UPW argues that the subject is similar to workplace safety issues which were found to be mandatory subjects of bargaining in HGEA v. Frank Fasi, 1 HPERB 641, 648 (1977). The Union contends that the subject impacts on job security. Specifically, the UPW contends that the definition of "sex offenses" is beyond the scope of the Higher Education Reauthorization Act of 1992; the policies and procedures change the confidentiality provisions of Section 17 of the Units 01 and 10 agreements; and the policy fails to identify specific sanctions resulting from the offenses.

In their Memorandum in Opposition to Complainant UPW's Cross-Motion for Summary Judgment filed with the Board on October 2, 1997, the Respondents contend that the Union argues that

the Higher Education Amendments of 1992 afford the University only three areas where the University has discretion and which is subject to bargaining. With respect to the definition of offenses, Respondents contend that applicable federal regulations list and define the offenses which must be included in the Policy. Accordingly, the definitions in the Policy are not subject to bargaining as contended by the Union.

Respondents also contend that the UPW argues that the federal statute affords the University the discretion to choose how to impose sanctions similar to the DFWA. Respondents contend that the DFWA gave the employer a choice to impose progressive discipline or require the employee to participate in a drug assistance or rehabilitation program. By contrast, the Higher Education Amendments do not contain the kind of discretionary language regarding discipline that the DFWA has. The HEA requires that the policy address possible sanctions to be imposed following an on-campus disciplinary procedure. Respondents contend that the Policy references the various collective bargaining agreements and therefore does not inject any additional term or conditions not contemplated by the contracts. With regard to sanctions, the UPW contends that it prefers to negotiate specific penalties for sexual assaults which Respondents contend would modify existing contractual provisions. Likewise, with respect to confidentiality, the Respondents contend that the Policy does not inject any term not previously contemplated by the contract and thus, there are no terms or conditions of employment which are affected by its implementation.

In UHPA v. Tomasu, supra, the Supreme Court considered whether the BOR's promulgation of a policy statement in accordance with the Drug-Free Workplace Act (DFWA) was subject to negotiation. The Court, citing Dec. No. 242, Hawaii Fire Fighters Association, Local 1463, 4 HLRB 164 (1987), noted that the Board previously found that bargaining was mandated on the implementation of the wage statutes of the Fair Labor Standards Act because the implementation of the federal statute went beyond mere compliance and permitted the employer discretion in its implementation. The Board held in the Fire Fighters case that where the employer has discretion under federal law, regulation, or administrative opinions in implementing federal law, the duty to bargain applies. The language of the DFWA[1] was found to give the employer the

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[1]Section 702(a)(1) of the DFWA provides in part:

> (a) Drug-free workplace requirement
> (1) Persons other than individuals
> No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by -
> . . .
>
> (F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so [convicted of any criminal drug statute violation], as required by section 703 of this title.

Section 703 provides in part:

> Employee sanctions and remedies
>
> A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1(D)(ii) or 702(a)(1)(D)(ii) of this title -

discretion to impose progressive discipline or participation in a rehabilitation program. Thus, in UHPA v. Tomasu, the Court found that the BOR had discretion to choose alternative means of compliance with the employee sanction requirements of the Act and therefore the duty to bargain applied to the BOR's implementation of the DFWA's sanction provisions. In considering the language of the DFWA, the Court found that the DFWA did not only mandate promulgation of a policy statement setting forth goals but also required implementation. The Court noted that the DFWA contained mandatory language predicating continued federal funding upon the state agencies' compliance with the terms of the Act and required not only promulgation of the policy but also active implementation which necessarily had some effect on wages, hours or terms and conditions of employment. Thus, the Court held that to the extent that the policy statement constitutes compliance with the DFWA, it is not bargainable. However, because the DFWA inherently mandates implementation which will affect bargainable topics, the Court found that UHPA could initiate bargaining at any time upon such topics.

> (1) take appropriate personnel action against such employee up to and including termination; or
>
> (2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

The Court also stated:

Whether the UHPA is entitled to demand bargaining over the implementation of the policy statement, however, also depends on when the duty to bargain arises. The duty to bargain arises in two circumstances potentially applicable to this decision: First, the obligation to bargain collectively with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. *See, e.g. NLRB v. Katz*, 369 U.S. 736, 737, 82 S.Ct. 1107, 1108, 8 L.Ed.2d 230 (1962) (unilateral implementation of automatic wage increases, changes in sick-leave benefits and numerous merit increases violated the statutorily imposed duty to bargain collectively); *Burlington Fire Fighters Ass'n v. City of Burlington*, 142 Vt. 434, 457 A.2d 642 (1983) (principle that unilateral imposition of terms of employment is a violation of duty to bargain is equally applicable to public sector bargaining); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). Therefore, when the employer attempts to promulgate a policy that will affect bargainable topics, the employer cannot do so without first initiating bargaining on such topics.

Second, the duty to bargain also arises if a union unilaterally demands "mid-term" bargaining, that is, bargaining midway through an active applicable collective bargaining agreement on bargainable subjects such as wages, hours, or terms of employment.

* * *

Consistent with the above theories, the BOR cannot unilaterally implement policies that affect bargainable topics (such as wages, hours, or terms of employment), and the UHPA should be able to demand bargaining midterm on topics subject to mandatory bargaining. Thus, in combination with the principles discussed

> by the HLRB in *Hawaii Fire Fighters*, the duty to bargain applies upon issuance of the policy statement if the topics covered in the statement over which the BOR is afforded discretion by the DFWA are subject to mandatory bargaining.

Id., at pp. 159-60.

In reviewing the UPW's contentions, the Board agrees with the BOR that the definitions of the sexual offenses are set forth in the applicable federal regulations and are therefore not subject to negotiation. 34 C.F.R. § 668.47. With respect to discipline and confidentiality, in reviewing the language of the federal statute, the statute provides that each institution shall develop a policy statement regarding its sexual assault program and procedures for on-campus disciplinary action, i.e., the policy should address:

> (ii) Possible sanctions to be imposed following the final determination of an on-campus disciplinary procedure regarding rape, acquaintance rape, or other sex offenses, forcible or nonforcible.
>
> * * *
>
> (iv) Procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that -
> (I) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceedings; and
> (II) both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceedings brought alleging sexual assault.

The issue is whether the federal law gives the Employer discretion in promulgating and implementing discipline procedures. While the BOR argues that the federal law at issue here does not give the Employer the same type of discretion as the DFWA,

specifically a choice between discipline and rehabilitation which triggered the duty to bargain in UHPA v. Tomasu, a closer reading of that case indicates that the Court recognized that the Board had found that the DFWA affords the employer a range of implementation in effectuating the provisions of the DFWA. Similarly, the Board finds in this case that the HEA envisions that implementation of the Policy requires the establishment of the apparatus to make the Policy functional, i.e., the on-campus disciplinary procedures. Thus, the Board agrees with the Union that the statute provides the same type of discretionary language with regard to possible sanctions to be imposed following an on-campus disciplinary procedure and to develop procedures for disciplinary action, including confidentiality concerns. While the final Policy promulgated by the BOR provides that disciplinary action will be taken in accordance with the applicable collective bargaining agreement and does not specifically set forth any sanctions, the original draft which prompted Rodrigues' request to negotiate specifically set forth a range of sanctions. It is clear that the statute gives the Employer a range of implementation and therefore discretionary authority to develop procedures for on-campus disciplinary action similar to that discussed by the Court in UHPA v. Tomasu. In this case, the BOR unilaterally deferred to the collective bargaining agreement after receiving comments from the other unions and contends that the Union has no authority to negotiate specific penalties for sexual assaults that would depart from the applicable contract standard of discipline for just and proper cause. Under the authorities cited by the Union, so long as

the UPW does not seek to negotiate a provision which conflicts with the existing agreements, the UPW should have the opportunity to negotiate provisions in the Policy with respect to discipline.

Based upon the record before the Board, the Board finds that the Respondents wilfully refused to negotiate over the Policy with regard to discipline. EASTMAN acknowledged Rodrigues' request to negotiate and promised him that they would meet before the Policy was implemented. Thereafter, the University redrafted the Policy[2] without any input from the UPW and without complying with the UPW's information request, promulgated the Policy. The Employer in this case, while attempting to comply with the federal mandates in adopting a Sexual Assault Policy effectively foreclosed the Union from participating in the process and wilfully refused to bargain over the subjects which are mandatory subjects of bargaining. Although the BOR in the exercise of its discretion chose to refer to the applicable contractual procedures, the BOR foreclosed the UPW's participation by refusing to negotiate with the Union. The Board therefore concludes that the Respondents wilfully violated § 89-13(a)(5), HRS. As the duty to negotiate in good faith is encompassed in § 89-9(a), HRS, the Board also finds

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[2]The BOR contends that it made no changes to the existing conditions of employment because it deferred to the existing contract rights. However, in UHPA v. Tomasu, the Court cited National Treasury Employees Union v. Federal Labor Relations Autority, 810 F.2d 295 (D.C.Cir. 1987), which recognized the union's right to request bargaining with respect to certain conditions of employment mid-term. The employer there contended that it had no duty to bargain because the agency had not made any changes in the areas covered by the proposals. The court in National Treasury recognized the long-established precedent that the duty to bargain extended to mid-term proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement.

that Respondents violated § 89-9 thereby committing a prohibited practice in violation of § 89-13(a)(7), HRS.

Given the Board's finding that the Respondents committed a prohibited practice in violation of §§ 89-13(a)(5) and (7), HRS, the Board refrains from considering the alleged violations of §§ 89-13(a)(1) and (8), HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant complaint pursuant to §§ 89-5 and 89-14, HRS.

The Employer violates § 89-13(a)(5), HRS, by refusing to bargain in good faith.

The Employer violates § 89-13(a)(7), HRS, by violating a provision of the chapter.

The BOR unilaterally promulgated a Sexual Abuse Policy and Procedure pursuant to a federal statute which gives the Employer discretionary authority to develop a procedure for on-campus disciplinary action. The BOR refused to negotiate with the UPW over the Policy as it pertains to discipline. The BOR therefore violated §§ 89-13(a)(5), and (7), HRS.

ORDER

The Board hereby grants Complainant's cross-motion for summary judgment, in part, and denies Respondents' motion for summary judgment.

The Board hereby orders the Respondents to cease and desist from refusing to negotiate with the UPW over the disciplinary procedures of the Policy. Further, Respondents shall

immediately post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit assemble, and leave such copies posted for a period of 60 consecutive days from the initial date of posting. Respondents shall notify the Board of the steps taken by the Employer to comply herewith within 30 days of the receipt of this order.

DATED: Honolulu, Hawaii, June 26, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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