STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii, Respondent.	CASE NO. CE-07-659 ORDER NO. 2528 ORDER GRANTING BOARD OF REGENTS' MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING BOARD OF
REGENTS' MOTION FOR SUMMARY JUDGMENT

On March 4, 2008, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint (Complaint) against Respondent BOARD OF REGENTS, University of Hawaii (BOR), alleging the BOR engaged in a prohibited practice when Chancellor Leon Richards (Richards) failed to act in good faith in response to a final report issued by a hearing officer regarding an employee's negative tenure application review hearing, and that Chancellor Richards failed to substantively comply with the hearing officer's directive that prejudicial and extra-dossier materials not be considered in the Chancellor's re-evaluation of the tenure application. The UHPA alleged violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), 89-13(a)(8), and 89-13(b)(5).

On June 16, 2008, the BOR filed its Motion for Summary Judgment, and on June 25, 2008, the UHPA filed its Memorandum in Opposition to [BOR's] Motion for Summary Judgment (Memorandum in Opposition). The Board held a hearing on the BOR's Motion for Summary Judgment on July 3, 2008, pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). After careful consideration of the record and arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting the BOR's Motion for Summary Judgment.

FINDINGS OF FACT

1. The UHPA was or is at all relevant times an employee organization within the meaning of HRS § 89-2[1] for employees belonging to bargaining Unit 07.[2]

2. The BOR was or is at all relevant times a public employer within the meaning of HRS § 89-2 for purposes of this Complaint.[3]

3. The UHPA and the BOR are parties to a collective bargaining agreement (Agreement) applicable to Unit 07 employees. The Agreement contains a tenure application review procedure that permits a faculty member to challenge a negative tenure decision by the employer. Article XII of the Agreement, governing tenure and service, provides in relevant part:

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[1]HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[2]HRS § 89-6 provides in relevant part:

Appropriate bargaining units.

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(7) Faculty of the University of Hawaii and the community college system[.]

[3]HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

G. NEGATIVE TENURE ACTIONS

* * *

8. The Faculty Member may within ten (10) calendar days after examining the dossier, or within twenty (20) calendar days of receipt of written notification if the Faculty Member does not examine the dossier, elect one (1) of two (2) alternative procedures by submitting a request in writing in accordance with the following:

   a. If the Faculty Member believes that this Agreement or the supplemental guidelines and procedures established or approved by the Employer have been violated or misapplied and that such violation or misapplication has adversely prejudiced the application, the Faculty Member may make a written statement to the Union, which specifies the nature of the violation or misapplication, and may request that an appeal of the negative tenure decision be initiated. The appeal shall be filed according to the following procedures:

      1) The Employer and the Union shall select an individual with significant academic background to serve as a Hearing Officer to review the appeal of the Faculty Member. The Union may present on behalf of the Faculty Member any evidence in support of the claim that this Agreement or the supplemental guidelines and procedures established or approved by the Employer have been violated or misapplied and that such violation or misapplication has prejudiced the application.

      2) If the Hearing Officer does not find a violation or misapplication of this Agreement or the supplemental guidelines and procedures established or approved by the Employer, or, having found a violation or misapplication, does not find that such violation or misapplication has adversely prejudiced

the tenure application and decision, the Hearing Officer shall so report.

3) If the Hearing Officer determines that the provisions of the Agreement or the supplemental guidelines and procedures which form the basis of the appeal were violated in a significant manner, and further finds that there was a reasonable probability that such violation of procedure in the evaluation process adversely prejudiced the decision complained of, the Hearing Officer shall:

   a) direct that the application dossier be reconsidered; may direct that the reconsideration process commence at any of the levels of review, or that any intervening level of review up to the Chancellor or appropriate Vice President be omitted; and may also direct that any improper material which has prejudiced the decision be expunged from the dossier; and/or

   b) direct that a new [Tenure and Promotion Review Committee] TPRC be appointed in accordance with the provisions of this Agreement; or

   c) direct that the probationary period be extended for an additional year, notwithstanding the limitations in this Article and the Faculty Member be permitted to submit a new application for tenure.

4) In extreme cases, where the Hearing Officer finds that the provision of the Agreement or the supplemental guidelines and procedures which form

the basis of the appeal were grossly violated, and such violation seriously prejudiced the decision, the Hearing Officer may submit findings in a report to the Employer and the Union. The report may include a recommendation that tenure be granted.

5) The Hearing Officer shall report findings of fact, conclusions, and recommendations to the Employer and Union within thirty (30) days of the close of hearing.

6) Upon receipt of the report of findings, the Employer shall, after a review of the report, make a decision within a reasonable time whether to award tenure or remand the matter for reconsideration as directed by the Hearing Officer. The Employer shall notify the Union of its decision, and if requested, a statement of reasons will be provided should the Employer not grant tenure pursuant to the recommendation of the Hearing Officer.

7) In the event that the President disagrees with the conclusions of the Hearing Officer, the President will complete a full review of the procedural and substantive issues involved at each stage of the process. The President will provide a full accounting of the basis for the decision rendered, prior to forwarding any recommendation to the Board of Regents. The rationale for the decision must be transmitted by the President to the applicant. Upon the completion of the reconsideration as directed by the Hearing Officer, the decision of the Employer shall be final and binding on all parties.

8) The fees of the Hearing Officer and other costs related to the hearing shall be shared equally by the Employer and the Union.

b. In the alternative, the Faculty Member may request a meeting with the Administrator who notified the faculty member of the negative decision. In such event, the Administrator shall meet with the Faculty Member.

* * *

c. Neither the procedures nor the decisions arising out of G.8.a. and b. of this Article shall be subject to further review under Article XXIV, Grievance Procedure.

5. In the present case, a tenure applicant who is a lecturer, instructor, and program coordinator of the New Media Arts program at Kapiolani Community College (KCC) submitted an application for tenure and promotion to KCC in the fall of 2006.

6. Pursuant to terms of the Agreement, the tenure application consisting of the applicant's dossier and materials introduced by Department/Division Chair (DC) Kauka DeSilva, faculty member David Behlke, and others were evaluated by, and at the levels of, the Department Personnel Committee (DPC), the DC, Vice Chancellor of Academic Affairs (VCAA) Louise Paggotto, and the Tenure and Promotion Review Committee (TPRC). No vote was taken at the DPC level of review; instead, various DPC members submitted statements. Subsequently, both the DC and VCAA recommended denial of the application. The TPRC then reviewed the application and voted in favor of the application. On March 16, 2007, Chancellor Richards denied the tenure application.

7. Pursuant to Article XII of the Agreement, the UHPA filed a timely appeal on behalf of the applicant based upon alleged procedural violations of the tenure process.

8. On September 21, 2007, the UHPA and employer held a negative tenure application review hearing before Hearing Officer David Panisnick, who was mutually selected by the parties.

9. By letter dated October 16, 2007, the Hearing Officer issued a Final Report regarding the UHPA's appeal. The report concluded that there were procedural violations regrading the DC and VCAA's negative recommendations. As a remedy, the Hearing Officer recommended that the letters of recommendation from the DC and the VCAA be expunged from the dossier, and that the dossier be reconsidered at the level of the Chancellor. Specifically, the Hearing Officer made the following Recommendation:

> Pursuant to the 2003-2009 Agreement between the University of Hawaii Professional Assembly and the Board of Regents of the University of Hawaii, (G. Negative Tenure Actions, 8, a, 3, a; the Hearing Officer directs:
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> 1. That the application dossier be reconsidered.
> 2. That the review commence at the level of the Office of the Chancellor.
> 3. That the letters of recommendation from the Department Chair and the Vice Chancellor of Academic Affairs be expunged from the dossier.

10. In accordance with the Hearing Officer's direction, Chancellor Richards reconsidered the application dossier minus the DC and VCAA's letters of recommendation. After reconsideration, Chancellor Richards denied the tenure application.

11. In reaching his decision, Chancellor Richards considered the contents of the application dossier, including but not limited to problems concerning the applicant's interaction with others indicated in the DPC's report (which was not directed to be expunged), the applicant's own application, and the Chancellor's own personal knowledge regarding the applicant's management, leadership, and professional interactions. Specifically, in addition to the personnel conflicts and issues noted in the DPC report and the applicant's application, the Chancellor personally received complaints and concerns from faculty, students, and staff regarding the applicant's style, leadership, lack of support and encouragement, failure to work cooperatively, in addition to the applicant's inability to effectively deal with New Media Arts programmatic issues. Without considering the expunged material, there was sufficient information to lead the Chancellor to conclude that the applicant should be denied tenure.

12. On or about January 11, 2008, the Hearing Officer sent a letter to the BOR, stating, inter alia, that Chancellor Richards' letter to the applicant following reconsideration "repeats the same false, irrelevant, pretextual and extra-

dossier rationale as supplied in his original decision. In my opinion, the content of the Chancellor's letter can only be justified with support from the material which I directed to be expurgated from the dossier." The UHPA attached to its Memorandum in Opposition, submitted to the Board on June 25, 2008, the Declaration of David Panisnick that contains similar statements about the Hearing Officer's opinion regarding the Chancellor's reconsideration.

13. In response to the Hearing Officer's January 11, 2008, letter, the BOR, by letter dated February 13, 2008, informed the Hearing Officer that the BOR would not over-rule Chancellor Richards' decision or conduct an investigation into the matter. The BOR stated that the employer's decision was final and binding, and that the Agreement did not allow the BOR to overturn the Chancellor's decision.

14. On March 4, 2008, the UHPA filed the present Complaint against the BOR, alleging the BOR engaged in a prohibited practice when Chancellor Richards failed to act in good faith in response to a final report issued by a hearing officer regarding an employee's negative tenure application review hearing, and that Chancellor Richards failed to substantively comply with the hearing officer's directive that prejudicial and extra-dossier materials not be considered in the chancellor's re-evaluation of the tenure application. The UHPA alleged violation of HRS §§ 89-13(a)(5), 89-13(a)(8), and 89-13(b)(5).[4]

15. On June 16, 2008, the BOR filed its Motion for Summary Judgment, and on June 25, 2008, the UHPA filed its Memorandum in Opposition. The Board

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[4]HRS § 89-13 provides in relevant part:

> Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
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> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9; [or]
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> * * *
>
> (8) Violate the terms of a collective bargaining agreement....
>
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
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> * * *
>
> (5) Violate the terms of a collective bargaining agreement.

held a hearing on the BOR's Motion for Summary Judgment on July 3, 2008, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).

16. At the Board's hearing on the BOR's Motion for Summary Judgment, the BOR made an oral motion to strike the UPHA's Memorandum in Opposition as untimely.[5] Pursuant to HAR §12-42-8(g)(3)(C)(iii), answering affidavits, if any, shall be served on all parties and shall be filed with the Board within five days after service of the motion papers, unless the Board directs otherwise. The UHPA's response to the Motion for Summary Judgment was thus due on June 23, 2008, but was not filed until June 25, 2008. The Board denies the motion to strike in this instance, but cautions the parties that the Board expects compliance with the Board's rules and may strike any pleading or filing that does not comport with the rules.

17. The Board finds that the reconsideration performed by Chancellor Richards did not violate the Agreement, and that the reconsideration substantively complied with the Hearing Officer's directive. There is no evidence that the materials that were required to be expunged were not expunged. Chancellor Richards, in his Declaration attached to the BOR's Motion for Summary Judgment and in his letter to the applicant following the reconsideration, articulated his reasons for his decision to deny tenure, and described how he came to his conclusions, based upon both the materials that were not expunged from the dossier and application, as well as his own experience with the applicant. While the Hearing Officer believes the Chancellor's letter to the applicant "can only be justified with support from the material which [the Hearing Officer] directed to be expurgated from the dossier[,]" such conclusion on the Hearing Officer's part does not create a genuine issue of material fact to defeat the BOR's Motion for Summary Judgment. The Board has reviewed all portions of the Agreement that were submitted by the parties, and finds that there was no violation of the agreement, and that the Chancellor's decision is binding.

18. With respect to the assertion that Chancellor Richards considered "extra-dossier" material during his reconsideration, the BOR has cited to cases in other jurisdictions that have held "collegiality" to be a valid consideration for tenure review even though it was not expressly listed among the university's tenure criteria. In the present case, the Board finds that the

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[5]Because the motion to strike was made orally at the hearing on the Motion for Summary Judgment, the UHPA was not able to submit a written response to the motion to strike at hearing, and the Board was not able to consider the motion to strike prior to, or in preparation for, the hearing. The Board took the oral motion to strike under consideration, and the parties proceeded to present their oral arguments on the Motion for Summary Judgment.

factors considered by Chancellor Richards during his reconsideration do not constitute a breach of the Agreement for purposes of this Prohibited Practice Complaint.

19. Based upon the Board's findings that Chancellor Richards did not violate the Agreement, the Board finds no prohibited practice pursuant to HRS §§ 89-13(a)(8) or 89-13(b)(5). Additionally, the Board finds that the BOR, the sole respondent in this Complaint, is not a "public employee" or "employee organization" for purposes of § 89-13(b)(5).

20. With respect to alleged violation of HRS § 89-13(a)(5), refusal to bargain collectively in good faith with the exclusive representative, the Board finds that the facts surrounding this Complaint do not support a claim of refusal to bargain or failure to negotiate a mandatory subject of bargaining. Although the UHPA asserts that the BOR has a duty to perform its contract negotiation and contract performance obligations in good faith, the facts present in this case indicate that the case involves contractual issues which are governed by HRS § 89-13(a)(8). There are no facts to implicate any issue involving contract negotiation; no request for bargaining was made or denied. Accordingly, the Board finds no violation of HRS § 89-13(a)(5).

DISCUSSION AND CONCLUSIONS OF LAW

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

2. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624.

3. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

4. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

5. "When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided [by Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Hawaii Rules of Civil Procedure (HRCP) Rule 56. Thus, "[a] party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, 'nor is [the party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time.'" Henderson v. Professional Coatings Corp., 72 Haw. 387, 501, 819 P.2d 84, 92 (1991).

6. With respect to the HRS § 89-13(b)(5) claim, the statute states that it is a prohibited practice for a "public employee" or "employee organization or its designated agent" wilfully to violate the terms of a collective bargaining agreement. Pursuant to HRS § 89-2, a "public employee" is defined as "any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g)." In turn, HRS § 89-6(g) excludes from coverage, among others, elected or appointed officials, members of boards, and top-level managerial and administrative personnel. An "employee organization" is defined in HRS § 89-2 as "any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees." Accordingly, the BOR, the sole respondent in this case, is neither a public employee nor employee organization, and the Board therefore dismisses UHPA's claim based upon an alleged violation of HRS § 89-13(b)(5).

8. With respect to the HRS § 89-13(a)(5) claim, the Board concludes that the UHPA has not alleged sufficient facts to support a claim of refusal to bargain. Although the UHPA asserts that the BOR has a duty to perform its contract negotiation and contract performance obligations in good faith, the facts present in this case indicate that the case involves contractual issues which are governed by HRS § 89-13(a)(8). There are no facts to implicate any issue involving contract negotiation; no request for bargaining was made or denied. Accordingly, the Board dismisses the claim based upon HRS § 89-13(a)(5).

9. With respect to the HRS § 89-13(a)(8) claim, Chancellor Richards considered the contents of the application dossier, including but not limited to problems concerning the applicant's interaction with others indicated in

the DPC's report (which was not directed to be expunged), the applicant's own application, and the Chancellor's own personal knowledge regarding the applicant's management, leadership qualities, and professional interactions; the Chancellor did not consider the materials that were directed to be expunged from the dossier. Specifically, in addition to the personnel conflicts and issues noted in the DPC report and the applicant's application, the Chancellor personally received complaints and concerns from faculty, students, and staff regarding the applicant's style, leadership, lack of support and encouragement, failure to work cooperatively, in addition to the applicant's inability to effectively deal with New Media Arts programmatic issues. Without considering the expunged material, there was sufficient information to lead the Chancellor to conclude that the applicant should be denied tenure. The Board finds that the Chancellor complied with the directive of the Hearing Officer and did not violate the Agreement. Pursuant to the Agreement, the employer's decision following reconsideration is final and binding.

10. While the Hearing Officer believes the Chancellor's letter to the applicant "can only be justified with support from the material which [the Hearing Officer] directed to be expurgated from the dossier[,]" such conclusion on the Hearing Officer's part does not create a genuine issue of material fact to defeat the BOR's Motion for Summary Judgment. The Board has reviewed all portions of the Agreement that were submitted by the parties, and finds that there was no violation of the agreement.

11. With respect to the assertion that Chancellor Richards considered "extra-dossier" material during his reconsideration, the BOR has cited to cases in other jurisdictions that have held "collegiality" to be a valid consideration for tenure review even though it was not expressly listed among the university's tenure criteria. In the present case, the Board finds that the factors considered by Chancellor Richards during his reconsideration do not constitute a breach of the Agreement for purposes of the Complaint.

12. Based upon the Board's findings that Chancellor Richards and the BOR did not violate the Agreement, the Board concludes there is no prohibited practice pursuant to HRS §§ 89-13(a)(8) or 89-13(b)(5), and dismisses those claims.

13. The Board denies the BOR's motion to strike the UHPA's Memorandum in Opposition to the BOR's Motion for Summary Judgment. Although the motion to strike is denied in this instance, the Board cautions the parties that the Board expects compliance with the Board's rules and may strike any pleading or filing that does not comport with the rules.

ORDER

For the reasons discussed above, the Board grants the BOR's Motion for Summary Judgment and dismisses the Complaint.

DATED: Honolulu, Hawaii, July 25, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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