

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-07-708

ORDER NO. 2711

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
BOR'S MOTION TO DEFER
PROHIBITED PRACTICE
PROCEEDINGS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING BOR'S MOTION TO DEFER PROHIBITED PRACTICE PROCEEDINGS

On May 29, 2009, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) filed a prohibited practice complaint (Complaint) against Respondent BOARD OF REGENTS, University of Hawaii (BOR or Employer), alleging the BOR committed a prohibited practice by denying a tenured faculty member (Faculty Member) a promotion from Librarian IV to Librarian V in retaliation for Faculty Member's protected union activity. The Complaint alleges prohibited practices under Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (3), (4), and (8).

On July 14, 2009, the BOR filed its Motion to Defer Prohibited Practice Proceedings, asserting that a grievance was filed on Faculty Member's behalf pursuant to the Unit 07 collective bargaining agreement (Agreement) as well as a request for review by the Promotion Review Panel (PRP), and requesting that proceedings on the Complaint be deferred until the contractual process invoked by the UHPA has been exhausted.

On July 21, 2009, the UHPA filed its Memorandum in Opposition to Motion to Defer Prohibited Practice Proceedings, asserting that the PRP does not decide statutory violations, and that the Board is the proper authority to review statutory violations.

On July 22, 2009, the Board hearing oral argument on the motion to defer proceedings 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 to Defer Prohibited Practice Proceedings.¹ The Board holds, in summary, that the grievance involves the similar factual allegations as the present Complaint, including the heart of the Complaint that Faculty Member was denied promotion to Librarian V because of retaliation for protected union activity. The Board concludes that judicial efficiency is not served by having the parties proceed in both forums, and accordingly defers proceedings on the Complaint to the contractual proceedings. The Board will entertain a motion to reopen proceedings in this prohibited practice action after the contractual proceedings are concluded to address issues that were not addressed or remedied by the contractual proceedings.

FINDINGS OF FACT

1. Complainant UHPA is an employee organization and the exclusive representative as defined in HRS § 89-2², of employees included in Unit 07³.
2. Respondent BOR is the public employer, as defined in HRS § 89-2⁴, of employees included in Unit 07.

¹In Order No. 2701, Order Granting BOR's Motion to Defer Prohibited Practice Proceedings, dated May 6, 2010, the Board ordered BOR's counsel to prepare findings of fact, conclusions of law, and order for the Board's review within 10 days, unless extended, and permitted UHPA's counsel to file objections within ten days. The BOR requested an extension and filed its proposed order, [Proposed] Findings of Fact, Conclusions of Law, and Order Deferring Prohibited Practice Proceedings, with the Board on May 20, 2010. UHPA did not file objections to the proposed order.

²"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 Hawai'i employee-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

³Pursuant to HRS § 89-6, Unit 07 is comprised of faculty of the University of Hawai'i and the community college system.

⁴"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.

3. The UHPA and BOR are parties to the Unit 07 Agreement.
4. On or about October 10, 2008, tenured Faculty Member at the University of Hawaii, Manoa campus, submitted her application for promotion from Librarian IV to Librarian V. The Library Department Personnel Committee (DPC or LPC) recommended promotion. On December 15, 2008, Interim University Librarian Paula Mochida (Mochida) recommended that promotion not be granted. In February of 2009, the TPRC recommended promotion. On May 26, 2009, Faculty Member was notified of a negative recommendation in the promotion application by Chancellor Virginia Hinshaw (Hinshaw or Chancellor).
5. On or about March 18, 2009, a grievance was filed by UHPA on behalf of Faculty Member pursuant to the Agreement's grievance procedure. The grievance alleges violations of Article II, B and Article XIV of the Agreement. The grievance alleges, *inter alia*, that the following provisions of the collective bargaining agreement were violated:

Article II, B of the Agreement between the University of Hawai'i Professional Assembly and the Board of Regents of the University of Hawai'i states, "Neither the Employer nor the Union shall discriminate against any Faculty Member on the basis of activity or lack of activity on behalf of the Union." My participation and support of the Union is being used as a factor of consideration for whether or not I receive promotion. Mochida, as a representative for the Employer, is discriminating (retaliating) against me for my union activity in this promotion process.

Article XIV of the Agreement between the University of Hawai'i Professional Assembly and the Board of Regents of the University of Hawai'i states, ". . . Criteria shall be in writing and shall be distributed in the guidelines and procedures provided to the applicant along with the promotion application forms and shall be the basis on which judgment for consideration of promotion shall be made." Mochida breached the criteria used for judgment by expanding into prohibited areas.

6. Article II.B of the Agreement provides:

Neither the Employer nor the Union shall discriminate against any Faculty Member on the basis of activity or lack of activity on behalf of the Union.

7. Article XIV.A of the Agreement provides:

. . . Criteria shall be in writing and shall be distributed in the guidelines and procedures provided to the applicant along with the promotion application forms and shall be the basis on which judgment for consideration of promotion shall be made.

8. On May 7, 2009, Faculty Member met with Hinshaw as provided by the Agreement when the Chancellor's recommendation differs from the TPRC.
9. On May 12, 2009, Faculty Member requested a review of her promotion case by the Promotion Review Panel pursuant to the Agreement.
10. On May 29, 2009, the UHPA filed the instant Complaint against the BOR, alleging that the BOR committed a prohibited practice by denying a tenured faculty member (Faculty Member) a promotion from Librarian IV to Librarian V in retaliation for Faculty Member's protected union activity. The Complaint alleges prohibited practices under HRS §§ 89-13(a)((1), (3), (4) and (8).
11. On July 14, 2009, the BOR filed its Motion to Defer Prohibited Practice Proceedings, asserting that a grievance was filed on Faculty Member's behalf pursuant to the Unit 07 Agreement as well as a request for review by the PRP, and requesting that proceedings on the Complaint be deferred until the contractual process invoked by the UHPA have been exhausted.
12. On July 21, 2009, the UHPA filed its Memorandum in Opposition to Motion to Defer Prohibited Practice Proceedings, asserting that the PRP does not decide statutory violations, and that the Board is the proper authority to review statutory violations.
13. On July 22, 2009, the Board heard oral arguments on the motion to defer proceedings.
14. The Board finds that because the factual issues and the discrimination claim in the grievance are so related to those in the Complaint, the testimony of key witnesses will likely be identical, as will the exhibits and legal arguments, in both the prohibited practice and grievance forums.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. The Complaint alleges prohibited practices pursuant to HRS §§ 89-13(a)(1), (3), (4), and (8), which provide:

It shall be a prohibited practice for a public employer or its designated representative willfully to:

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

* * *

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

- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

* * *

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

3. In Board Decision No. 22, Hawaii State Teachers Ass'n v. Dep't of Educ., 1 HPERB 251, 252 and 261 (1972), the Board stated:

It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, by deferral of matters concerning contractual interpretation and application to the arbitration process agreed to by the parties.

4. In Board Decision No. 396, State of Hawai'i Organization of Police Officers v. Kusaka, 6 HLRB 25, 27 (1998) the union challenged a Special Order ("S.O.") implemented by the Employer both through the grievance procedure set forth in the collective bargaining agreement between the

parties, and before the Board through a prohibited practice complaint. The Board stated:

In the instant case, both SHOPO and the Employer are parties to a collective bargaining agreement which provides for a grievance procedure, culminating in arbitration, to resolve disputes involving alleged contractual violations. Further, the evidence in the record indicates that SHOPO filed a second grievance challenging the S.O. and the grievance is presently pending. Thus, in keeping with the foregoing policy, the Board defers those claims alleging contractual violations to the grievance arbitration process and accordingly, dismisses those claims alleging contractual violations under Section 89-13(a)(8), HRS.

5. Accordingly, pursuant to the principles articulated in Hawaii State Teachers Ass'n v. Dep't of Educ. and, State of Hawai'i Organization of Police Officers v. Kusaka, *supra*, the Board concludes that judicial efficiency is promoted by encouraging the settlement of disputes through alternative means, and accordingly defers proceedings on the Complaint to the contractual proceedings.
6. The Board finds that judicial efficiency is not served by having the parties proceed in both forums.

ORDER

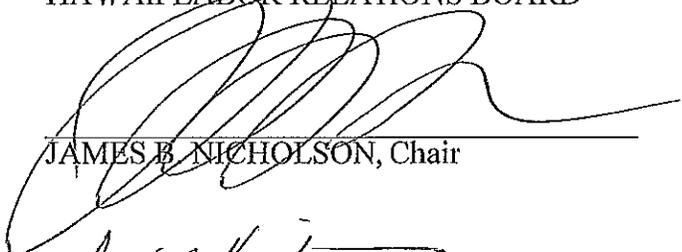
The Board grants the BOR's Motion to Defer Prohibited Practice Proceedings.

In summary, the Board finds that the grievance involves similar factual allegations as the present Complaint, including the heart of the Complaint that faculty member was denied promotion to Librarian VI because of retaliation for protected union activity. Because the factual issues and the discrimination claim in the grievance are so related to those in the Complaint, the testimony of key witnesses will likely be identical, as will exhibits and legal arguments, in both the prohibited practice and grievance forums. Judicial efficiency is not served by having the parties proceed in both forums. The Board concludes that judicial efficiency is promoted by encouraging the settlement of disputes through alternative means, and accordingly defers proceedings on the Complaint to the contractual proceedings.

The Board will entertain a motion to reopen this prohibited practice action after the contractual proceedings are concluded to address issues that were not addressed or remedied by the contractual proceedings.

DATED: Honolulu, Hawaii, June 17, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

Linda M. Aragon, Esq.
Christine Tamashiro, Esq.

