BEFORE ARBITRATOR MARIO R. RAMIL

STATE OF HAWAI'I

In the Matter of the Arbitration between UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Union, and BOARD OF REGENTS OF THE UNIVERSITY OF HAWAII Employer.	***Grievance re Article XXX - Duration*** **DECISION AND AWARD** Arbitration hearing date: July 14, 2009

DECISION AND AWARD

The parties presented this grievance to the Arbitrator for final and binding decision under the Collective Bargaining Agreement ("CBA" or "Agreement") between Board of Regents of the University of Hawaii ("Employer" or "BOR") and University of Hawaii Professional Assembly ("Union" or "UHPA"), effective on July 1, 2003 to June 30, 2009. Joint Exhibit 1 ("Ex. J-__"). The grievance was processed through the grievance procedure without resolution, and thereafter, the Union notified the Employer of its intent to arbitrate the dispute.

A hearing was held before the arbitrator on July 14, 2009, at the law offices of Torkildson Katz Moore Hetherington & Harris, 700 Bishop Street, 15th Floor, Honolulu, Hawaii. The Employer was represented by Robert S. Katz, Esq. and the Union was represented by T. Anthony Gill, Esq. The parties stipulated to the grievability and arbitrability of the grievance and no challenges were raised to the timely filing and processing of the grievance.

All parties were fully and fairly represented. The arbitrator made disclosure of all potential conflict and all parties waived any objections to having the arbitrator serve. Sworn

testimony was taken without a transcript from J.N. Musto, Ph.D., Executive Director of the UHPA and David McClain, Ph.D., President of the University of Hawaii ("UH"), exhibits were offered and made part of the record, and post-hearing briefs were submitted.

I. ISSUES PRESENTED

The question presented for determination by the Arbitrator is as follows:

Whether the Duration clause, Article XXX of the Agreement, operates so as to extend the Agreement from and after July 1, 2009?

II. RELEVANT CONTRACT PROVISIONS

A. Collective Bargaining Agreement

The following provisions of the parties' CBA (marked as Ex. J-1) are relevant to the Arbitrator's decision.

ARTICLE XXX, DURATION.

A. This Agreement shall be effective as of July 1, 2003 and shall remain in effect to and including June 30, 2009. During the term of this Agreement, the parties, each on the call of the other, shall meet to bargain in good faith on matters covered herein. In the event that agreement cannot be reached on these matters, the current language of the Agreement shall continue in force and effect and Article XXIX, No Strike or Lockout, shall control the actions of the parties.

B. Negotiations for renewal shall be as provided by law.

ARTICLE XXIV, GRIEVANCE PROCEDURE.

C.(2)(a) The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement. The Arbitrator's award must be consistent with the terms of this Agreement.

III. STATEMENT OF FACTS

In order to achieve agreement on the salary issue, the parties agreed to expand the 2003 Agreement into a six-year agreement in order to backload the salary increases in the last two (2)

years of the six (6)-year agreement. Following the ratification and execution of the 2003 - 2009 Agreement, UHPA and UH negotiated over those proposals that had not been completed prior to ratification and either reached an agreement which was reflected in a separate Memorandum of Agreement or did not reach agreement and withdrew the proposal as in the case of the Department Chairs' compensation. Employer Exhibit 4.

During the term of the 2003 - 2009 Agreement, i.e., in 2008, UHPA and UH commenced negotiations for a new Agreement to become effective as of July 1, 2009. However, the parties have not been able to reach an agreement on a new contract.

IV. STANDARDS OF REVIEW

In order to ascertain the meaning of contract language in a collective bargaining agreement, Labor Arbitrators generally employ the principles of statutory and contract interpretation developed by the courts. Elkouri and Elkouri, How Arbitration Works, (Fifth Edition) 470-515 ("Elkouri"). In this regard, in construing collective bargaining agreements, the primary objective is to ascertain and effectuate the intention of the parties as manifested by the agreement it its entirety. University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii, 66 Haw. 214, 219, 659 P.2d 146, 169 (1983).

Under Hawaii law a contract "should be construed as a whole and its meaning determined from the entire context not from any one part, word, phrase, or clause." Hillis Motors, Inc. v. Hawaii Auto Dearlers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993). Also, the Courts instruct that we are "bound to give effect to all parts of a [contract], and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the [contract]." See Keliipuleole v. Wilson, 85 Hawai'i 217, 941 P.2d 300 (1997).

In addition, the "plain meaning doctrine" dictates that "[i]f the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators." Elkouri at 470; In re Robert's Tours & Trans., Inc., 104 Hawai'i 98, 103 (2004)("Robert's") ("Where the language is plain and unambiguous, our duty is to give effect to its plain and obvious meaning"). This is because an arbitrator cannot "ignore clear-cut contractual language," and "may not legislate new language, since to do so would usurp the role of the labor organization and employer. Id. at 482-483.

V. ANALYSIS

A. Clear and Unambiguous Language

The issue here is whether Article XXX, Duration of 2003 - 2009 Agreement between UHPA and the BOR is "plain and clear, conveying a distinct idea" and thus, there is no need to resort to technical rules of interpretation. And of course, in construing Article XXX, our starting point is the language itself.

Because we start with the language of Article XXX, it should be noted that arbitrators give words their ordinary and popularly accepted meaning and in this regard apply a "reasonable man standard" in interpreting words or phrases in collective agreements. Elkouri at 488. Further, "arbitrators have often ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern." This is because "dictionary definitions provide a neutral interpretation of a word or phrase that carries the air of authority." Id at 490-491.

Article XXX is entitled "Duration" which means: "Extent, limit or time [, for example, t]he portion of time during which anything exist." Black's Law Dictionary, (Fifth Edition) 1979.

Clearly therefore, in construing Article XXX, we must solely focus on the "time" the Agreement is in force and effect.

With respect to the body of Article XXX, it simply provides four sentences that must be read "as a whole and its meaning determined from the entire context":

1. THIS AGREEMENT SHALL BE EFFECTIVE AS OF JULY 1, 2003 AND SHALL REMAIN **IN EFFECT TO AND INCLUDING JUNE 30, 2009.**

2. **DURING THE TERM OF THIS AGREEMENT**, THE PARTIES, EACH ON THE CALL OF THE OTHER, **SHALL MEET TO BARGAIN** IN GOOD FAITH ON MATTERS COVERED HEREIN.

3. IN THE EVENT THAT AGREEMENT CANNOT BE REACHED ON THESE MATTERS, THE **CURRENT LANGUAGE** OF THE AGREEMENT **SHALL CONTINUE** IN FORCE AND EFFECT AND ARTICLE XXIX, NO STRIKE OR LOCKOUT, SHALL CONTROL THE ACTIONS OF THE PARTIES.

4. **NEGOTIATION FOR RENEWAL** SHALL BE AS PROVIDED BY LAW.

Emphases (capitalization and bold) added.

The First sentence of Article XXX is clear. We need not turn to the dictionary to understand that the "duration" of the 2003 – 2009 Agreement will end on June 30, 2009.

The phrase "[d]uring the term of this Agreement" of the Second sentence is a reference to the duration of the Agreement expressed in the First sentence. Because the First sentence highlighted the fact that the Agreement (and all of the matters covered therein) will end June 30, 2009, the Second sentence focused on good faith bargaining that must occur over "matters covered" by the Agreement before the Agreement ends on June 30, 2009. The phrase "shall meet to bargain in good faith" mimics the mandatory language of Hawaii Revised Statutes (HRS) § 89-9(a) ("shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith") and thus, the Second sentence clearly suggest and reinforces the legal duty of the parties to bargain, during the course of the Agreement, toward a replacement contract. Clearly therefore, the nature of the language -

"bargain in good faith" - support the reading that the Second sentence refers to and includes negotiation for a renewal agreement.

The Third Sentence refers to the subject matter of the Second sentence, i.e. "meet to bargain in good faith on matters covered therein," and addresses the contingency of not reaching agreement on "these matters" during the term of the Agreement. The Third sentence therefore specifically addresses, in clear and plain language, the extended duration of the 2003 - 2009 Agreement in that it "shall **continue** in force and effect" "[i]n the event that agreement cannot be reached on these matters."

Because these four sentences must be read as a whole and in view of the "duration" focus of Article XXX, the subject matter of the Fourth sentence (negotiations for renewal) makes it clear that the First, Second, and Third sentences also deal with the renewal of the Agreement, i.e. negotiation and agreement on "matters covered herein."

"An Agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends." Elkouri at 470. Accordingly, Article XXX, Duration, of the 2003 - 2009 Agreement, in clear and unambiguous language, provides for the extension of said Agreement after June 30, 2009 in the event that a renewal contract cannot be reached during the term of the Agreement.

B. Did Employer Make a Plausible Conflicting Interpretation Thereby Rendering the Duration Provision, Article XXX, Ambiguous?

Because UH maintains that based on the "plain and ordinary meaning," the language of Article XXX **clearly evinces** the parties' intent to establish a six-year contract that would expire on June 30, 2009," we will approach this analysis from that perspective. In other words, the question here is whether the UH interpretation presents a "plausible" interpretation of Article

XXX because "an agreement is ambiguous if 'plausible contentions may be made for conflicting interpretations' thereof." Elkouri at 470.

UH's interpretation hinges on their reading of the words "during" and "matters" in sentences Two and Three. It appears that UH is interpreting the phrase "[d]uring the term of this Agreement" to exclude "matters" in negotiations over a renewal contract. UH Post-Hearing Brief at 6-7. In other words, it is UH's position that the Second and Third sentence expressly excluded the 2008 negotiations over matters to replace the 2003 - 2009 Agreement. Putting it another way, UH interprets the plain language of Article XXX by reading into the words "during" and "matters" a distinction between matters that amends the existing items in the 2003-2009 Agreement and matters that would replace said Agreement (Renewal negotiation). Because a contract's meaning should be "determined from the entire context and not from any one part, word, phrase, or clause," I disagree.

First, Article XXX is a "duration" provision that refers to the "time" or life of the Agreement and accordingly, it must be interpreted in that light. Thus, I reject the interpretation of the word "during" to limit the subject of good faith bargaining only to "matters" left unresolved when the parties bargained over the six-year term of the 2003 - 2009. UH Post-Hearing Brief at 6. Because the First sentence of Article XXX clearly state that the Agreement will end June 30, 2009, it follows that negotiation for a replacement contract must occur "during the term of the Agreement" (Second sentence) in order to address the "duration" or "time" issue presented by the Agreement ending June 30, 2009. Accordingly, the word "during" of the Second sentence cannot be interpreted to preclude the necessary bargaining over a renewal Agreement.

Secondly, there is nothing in the text of Article XXX or in the words "on matters covered herein," or "these matters" that would limit what is covered or not covered in negotiation "during the term of the Agreement." For example, the Second sentence did not use limiting words like "unresolved matters" from the 2003 - 2005 negotiation. It did expressly state that "bargain in good faith" language solely refers to or only allows midterm negotiations over "outstanding issues" from the last renewal negotiation. Rather, the Second sentence used "matters" in the broadest sense and accordingly, the intent of the parties is to cover "the four corners of the Agreement" (Musto's testimony) or "the table of contents of the Agreement" (McClain's testimony). In view of the broad words, there is nothing in the text of Article XXX that clearly created a distinction between amendments of matters existing in the 2003 - 2009 Agreement and renewal negotiation of matters to replace the 2003 - 2009 Agreement.

Thirdly, given the phrase "the agreement shall continue in force and effect" in the Third sentence, there is nothing in the text to clearly explain that Article XXX is not an "Evergreen Clause."

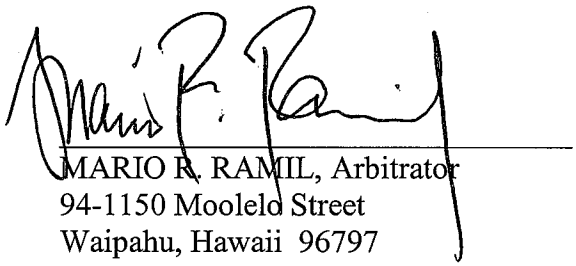
Given the above discussion, I find and conclude that UH failed to make a plausible conflicting interpretation that would render Article XXX ambiguous.

Accordingly and without more, because Article XXX is plain and clear, conveying a distinct idea, "there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators." Putting it another way, "where the language is plain and unambiguous, our duty is to give effect to its plain and obvious meaning." (Robert's). This is because an arbitrator cannot "ignore clear-cut contractual language," and "may not legislate new language, since to do so would usurp the role of the labor organization and Employer. Elkouri at 470, 482-483.

VI. CONCLUSION

For the foregoing reasons, the Arbitrator concludes, pursuant to the plain meaning doctrine, that the 2003 - 2009 Agreement (Joint Exhibit 1) did not expire on June 30, 2009. Because an agreement could not be reached regarding matters for a replacement Agreement, "the current language of the agreement (Joint Exhibit 1) shall continue in force and effect and Article XXIX, No Strike or Lockout, shall control the actions of the parties." In other words, Article XXX, Duration, operated to extend the duration of the Agreement from and after July 1, 2009.

DATED: Honolulu, Hawaii, July 20, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Award was duly served on the following by electronic mail and at the addresses listed below by hand-delivery:

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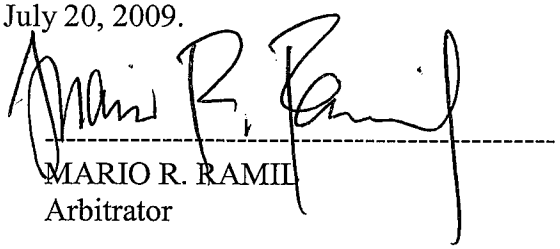

MARIO R. RAMIL
Arbitrator

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