

Dispute Prevention & Resolution, Inc.
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Judge Victoria S. Marks (ret.)
Arbitrator

THE ARBITRATION TRIBUNALS
DISPUTE PREVENTION & RESOLUTION, INC.

In the matter of the Arbitration Between

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

Union,

and

UNIVERSITY OF HAWAII,
BOARD OF REGENTS

Employer.

Grievance of Vickery K. Lebbin

DPR 10-0117-A

Hearing Dates:

August 23, 25, 27,
September 1, 15, 27, 29, and
October 4, 2010

**ARBITRATOR'S DECISION and
PARTIAL FINAL AWARD**

ARBITRATOR'S DECISION and PARTIAL FINAL AWARD

The Arbitration occurred on August 23, 25, 27, September 1, 15, 27, 29, and October 4, 2010. Present during the Arbitration were Vickery K. Lebbin (Lebbin), the grievant, Kristeen Hanselman, University of Hawaii Professional Assembly (UHPA) representative, represented by Linda M. Aragon, Esq. Also present were Dr. Beverly McCreary, University of Hawaii (UH) representative, represented by Christine F. Tamashiro, Esq. and Christine S. Y. Chun, Esq.

INTRODUCTION

Lebbin is a tenured faculty member at the UH Manoa Hamilton Library in the Business, Humanities and Social Sciences Department (BHSD). Lebbin was denied a promotion from Librarian Rank IV to Librarian Rank V by UH. Lebbin asserts that her promotion was denied based upon her union activity, in violation of Article II (B) of the Collective Bargaining Agreement (CBA) and HRS § 89-13(a), subsections (1) (3) (4) and (8).

ISSUE

Was UH's decision to deny Lebbin's promotion motivated by anti-union sentiment, and if so, has UH established that the decision regarding promotion would have been the same, regardless of Lebbin's union activity?

THE COLLECTIVE BARGAINING AGREEMENT (CBA)

ARTICLE II, NON-DISCRIMINATION

- B. 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.

* * *

ARTICLE XIV, PROMOTION

A. GENERAL

Any Faculty Member shall upon application be considered for promotion in any year in accordance with guidelines established by the Employer. 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.

B. PROCEDURES FOR RECOMMENDING PROMOTION

1. The application for promotion is prepared by the candidate in consultation with the Department/Division Chair, if so requested by the candidate, in accordance with the established guidelines. No anonymous material shall be made a part of any dossier.
2. Should there be a substantial change in the promotion criteria in the year of application, the candidate shall have the option of being considered under the criteria contained in the guidelines distributed in the preceding year.
3. Procedures and provisions described in Article XII, F.2., Paragraphs a through o, shall apply for promotion as well as tenure, except as otherwise provided in this Article.
4. The Employer will notify the Faculty Member of its decision in writing normally no later than June 30. The promotion, if granted, will be effective as of August 1, even if the decision and notification are made after June 30.

C. SALARY UPON PROMOTION

Faculty Members promoted in accordance with this Article shall have their salary increased by eight percent (8%).

D. NEGATIVE RECOMMENDATION

1. In the promotion evaluation process, the Chancellors will, after receipt of the Tenure and Promotion Review Committee (TPRC) report, notify each Faculty Member whose dossier contains a negative recommendation with respect to the promotion application.
2. When a Faculty Member receives such notice from the Office of the Chancellor, the Faculty Member may, within ten (10) calendar days after receiving such notice, inform the Office of the Chancellor in writing of a desire to examine the dossier.
3. Upon receiving the request, the Office of the Chancellor shall provide the Faculty Member an opportunity to examine the dossier within ten (10) calendar days.
4. The Faculty Member may, within ten (10) calendar days after examining

the dossier, submit written comments and additional material to the Office of the Chancellor for transmission to the TPRC. If the TPRC recommendation is positive, the Faculty Member may submit the additional material directly to the Chancellor. The Office of the Chancellor shall notify the TPRC that additional materials have been submitted.

5. The TPRC will consider the comments and additional material submitted by the Faculty Member and incorporate these together with its recommendation in the dossier. When the Chancellor disagrees with the recommendation of the TPRC, the Chancellor shall discuss the case with the TPRC before making a recommendation or decision. The Chancellor will, after reviewing the dossier and the recommendation of the TPRC, make a recommendation or decision.
6. When a Faculty Member receives written notification from the Employer in accordance with Section B, that the application for promotion has not been granted, the Faculty Member may, within ten (10) calendar days after receiving such notice, inform the Office of the Chancellor in writing of a desire to examine the dossier.
7. Upon receiving the request, the Office of the Chancellor shall provide the Faculty Member an opportunity to examine the dossier within ten (10) calendar days.
8. The Faculty Member may, within ten (10) calendar days after examining the dossier, or within twenty (20) calendar days of receipt of the written notification if the Faculty member does not examine the dossier, request a meeting with the Chancellor. In such event the Chancellor shall schedule a meeting with the Faculty member within ten (10) calendar days.

E. PROMOTION REVIEW PANEL (PRP)

1. For the purpose of providing assistance and advice on certain cases that come before the President in accordance with the provisions of this Article, Promotion Review Panels (PRP) to be made up of senior, experienced, and knowledgeable persons in the University shall be established.
2. Promotion Review Panels of three (3) to five (5) members shall be appointed by the President of the University or the President's designee, with the concurrence of the President of the Union or a senior Faculty member duly designated by the Union's President. In making their selections, they shall abide by exclusions of persons made by the Faculty member as set forth in Article XV, C., Exclusion Option.

* * *

3. A PRP may be convened in the following situations, upon compliance with the procedures set forth in this Article:
 - a. When the TPRC has recommended in favor of promotion and the Chancellor has decided against promotion;
 - b. When the Chancellor has recommended in favor of promotion (irrespective of the recommendation of the TPRC), and the president has reservations about acting favorably upon the recommendation to promote; or
 - c. When the TPRC has recommended against promotion and the Chancellor has decided against promotion, but the Referee, as provided in Section J below, has found that there was a significant procedural violation that probably contributed in a material way to the negative decision.

F. REVIEW BY PROMOTION REVIEW PANEL UPON REQUEST OF FACULTY MEMBER

The applicant may request a review of the case by a Promotion Review Panel in situations in which the TPRC had recommended in favor of promotion and the Chancellor had decided against promotion. Such request must be made in writing, within five (5) calendar days after the meeting with the Chancellor.

The Faculty Member may, in connection with the request, submit additional materials not duplicative of materials in the dossier or previously submitted. The Chancellor shall transmit the dossier and such additional materials to the PRP.

G. REVIEW BY PROMOTION REVIEW PANEL UPON REFERRAL BY THE PRESIDENT

In those situations in which the TPRC and the Chancellor have both recommended in favor of promotion, or in which the TPRC has recommended against promotion and the Chancellor has recommended in favor of promotion, and the President has reservations about acting favorably on the recommendation to promote, the President shall refer the application dossier to the PRP for its review and report before rendering a decision.

H. FUNCTION OF PROMOTION REVIEW PANEL

The PRP shall consider the application dossier and where applicable, the Referee's report, as well as such additional materials as may be submitted in accordance with the provisions of this Article. It will make a finding on the substantive aspects of the application in the context of the Collective Bargaining

Agreement and the Promotion Guidelines, and respond to the question: "Has the Applicant made a persuasive case for promotion?"

The PRP may request additional information from both the Faculty Member and from the Chancellor in those cases in which the Chancellor has rendered a negative decision, or from the President or the President's designee in those cases referred to it by the President. Such information may be requested in the form of written or oral statements, provided that both the Faculty Member and the Administrator are given equal opportunity to respond and that they use the same form of communication to present their cases. The PRP may also meet with the President or the President's designee before submitting its report. Other than for these meetings the PRP will review the case on the basis of the written record, in the context of the provisions of this article and the Promotion Guidelines. The PRP will consider each case according to its own merits, without comparison or contrast with any other case.

The PRP will submit its report within thirty (30) calendar days after meeting with the Chancellor or the President to the Office of the president for inclusion in the dossier. Any member of the PRP may submit an individual report that the PRP shall incorporate with its report.

The Employer will notify the Applicant of the report of the PRP, if negative, and of the decision of the President, if negative. Within ten (10) calendar days after receiving such notice, the Applicant may submit a request in writing to the Office of the President for an opportunity to examine the dossier, and arrangements will be made to provide such opportunity. Additionally, if the Applicant so requests, the Employer will provide the Applicant with a statement of reasons for the decision.

In the event that the President disagrees with the conclusions of the PRP, such a decision must include a full review of procedural and substantive issues at each stage of the process. The rationale for the decision will be transmitted to the applicant.

* * *

K. CONFIDENTIALITY OF PROCEEDINGS

The integrity and confidential nature of the promotion evaluation process shall be maintained. Other than for the personal examination of the dossier, meetings as provided for in this Article, and the submission of materials as provided for in this Article, the Applicant shall not otherwise attempt to influence or communicate with persons engaged in the evaluation and review process.

L. CONCLUSION OF PROCESS

A principal purpose of the promotion evaluation process set forth in this Article is

to provide the Applicant with a final decision reached in a careful yet expeditious manner. Such decisions and the provisions of this Article shall not be subject to the formal grievance procedure.

Jt. Exhibit (Jt. Ex.) 2 at 29-33.

* * *

ARTICLE XXIV, GRIEVANCE PROCEDURE

A. DEFINITION

A grievance is a complaint by a Faculty Member or the Union concerning the interpretation and application of the express terms of this Agreement. All matters under this Article, including investigations, shall be considered confidential. Information pertaining to the decision of an arbitrator may be subject to disclosure under the provisions of Section 92F, Hawaii Revised Statutes.

B. GENERAL

1. Faculty are encouraged to work out grievances with their immediate superiors on an informal basis, including voluntary mediation, without resort to the formal grievance procedure, whenever possible. If it is not possible to resolve the grievance informally, and the Faculty Member desires to pursue the matter, the procedures under Paragraph C. below, shall apply.

C. PROCEDURES

1. Requirements for Filing a Formal Grievance.

A grievance must be submitted in writing and shall contain (1) a statement of the facts concerning the grievance, (2) the specific provision of this Agreement alleged to have been violated, (3) the relief requested, and (4) whether the Faculty Member attempted an informal adjustment of the grievance and, if so, with whom.

The Faculty Member may request the assistance and representation of the Union in the grievance procedure. Alternatively, the Faculty Member may file a grievance and have the grievance heard without intervention of the Union provided the Union is afforded an opportunity to be present at the conference(s) with the grievant, in which case a copy of the grievance shall be furnished to the Union. Any adjustment made shall not be inconsistent with the terms of this Agreement.

A grievance must be filed within twenty (20) calendar days or within forty-

five (45) calendar days in the case of a class grievance, of the date following the alleged violation giving rise thereto, or the date on which the Faculty Member or the Union first knew or reasonably should have known of such alleged violation, or the date on which either party informs the other that informal attempts to resolve the grievance are concluded, whichever date is later.

There shall be no obligation by the Employer to consider any grievance not filed within the specified time limit and in accordance with the specific procedure stated in each step.

2. Formal Grievance Procedure

The Employer and the Union may, by mutual agreement, waive any or all of the steps and proceed directly to Step 3.

- a. **Step 1.** A grievance shall be filed with the Chancellor, or the respective designee (herein all referred to as Chancellor). The Chancellor shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the grievance and shall issue a decision in writing to the grievant within fifteen (15) calendar days after the close of the meeting.
- b. **Step 2.** If the response at Step 1 does not resolve grievance, the grievant may appeal the Step 1 response by filing an appeal with the President of the University or the President's designee within fifteen (15) calendar days after receipt of the Step 1 response. Such appeal shall be in writing and shall specify the reason why the Step 1 decision is unsatisfactory. The President need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. The President or the President's designee shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the appeal or grievance is filed and shall render a response in writing to the grievant within twenty (20) calendar days after the close of the meeting.
- c. **Step 3.** Arbitration. If the grievance has not been settled at Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union

may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the President's designee.

Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

If Agreement on an Arbitrator is not reached within fifteen (15) calendar days after the request for arbitration is submitted, either party may request the Hawaii Labor Relations Board to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator.

No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement. The Arbitrator shall not consider any new alleged violations or charges than those presented initially.

- 1) If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits. The Arbitrator shall render an award in writing, no later than thirty (30) calendar days after the conclusion of the hearing or, if oral hearings are waived, then thirty (30) calendar days from the date statements and proofs were submitted to the Arbitrator.
- 2) The decision of the Arbitrator shall be final and binding upon the Union, its members, the Faculty Member(s) involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below.
 - 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.

- b) When the Arbitrator finds that any disciplinary action under Article XVIII was improper, the Arbitrator may set aside, reduce, or otherwise modify the action, and may award back pay to compensate, wholly or partially, for any salary lost.

The fees of the Arbitrator, the cost of the transcription, and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of any transcript that it requests.

* * *

ARTICLE XXV, RIGHTS OF THE EMPLOYER

The Employer reserves and retains, solely and exclusively, all management rights, powers, and authority, including the right of management to manage, control, and direct its personnel and operations except those as may be modified under this Agreement.

Jt. Ex. 2 at 1, 44 - 47.

HAWAII REVISED STATUTES

§ 89-13. Prohibited practices; evidence of bad faith

(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;

* * *

(3) Discriminate 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;

**THE CONSTITUTION OF THE STATE OF HAWAII, ARTICLE XIII, ORGANIZATION,
COLLECTIVE BARGAINING.**

Section 2. Public Employees. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.

LEGAL STANDARD

To prevail on a claim of anti-union discrimination one must show that a) the employee was engaged in protected union activity; b) the employer was aware of the protected activity; and c) the employee's protected activity motivated or was a substantial reason for the adverse treatment. SCA Tissue North Amer. LLC v. N.L.R.B., 371 F.3d 983, 988 (7th Cir. 2004) and N.L.R.B. v. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612 (1982). Anti-Union motivation may be inferred from the following: "a company's expressed hostility toward unionization together with knowledge of the employee's union activities; proximity in time between the employee's union activities and the adverse action; the inconsistencies between the proffered reason and other actions of the employer; and disparate treatment of certain employees compared to other employees with similar work records..." Hyatt Corp. v. N.L.R.B., 939 F.2d 361, 375 n.7 (6th Cir. 1991); citing Turnbull Cone Baking Co. v. N.L.R.B., 778 F.2d 292, 297 (6th Cir. 1985), cert. denied, 476 U.S. 1159, 106 S. Ct. 2277, 90 L.Ed.2d 720 (1986). In addition, circumstantial evidence is sufficient to

establish anti-union motive. Healthcare Employees Union, Local 339, AFL-CIO v. N.L.R.B. and St. Vincent's Medical Center, 463 F.3d 909, 919, 180 LRRM 2533 (9th Cir. 2006).

The Employer has the burden of showing the inevitability of the termination or employment action. Healthcare Employees Union, Local 339, AFL-CIO v. N.L.R.B. and St. Vincent's Medical Center, 463 F.3d at 919; Kaiser Foundation Health Plan v. Int'l Union of Operating Engineers Local 501, 94 Lab. Arb. Rep. (BNA) 266 (1990) (Kaufman, Arb.) (2003). Stated another way, the employer must show that there were legitimate, nondiscriminatory reasons for the employment action. Hawaii Government Employees Ass'n v. Cayetano, 6 HLRB 336, 350 (2003).

The Union bears the ultimate burden of persuasion. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-507 (1993); and Furukawa v. Honolulu Zoological Soc., 85 Hawai'i 7, 12-13, 936 P.2d 642, 648-49 (1997). In other words, the Union must show that the nondiscriminatory reason was a pretext to mask unlawful discrimination. Hawaii Government Employees Ass'n v. Cayetano, 463 F.3d at 350 citing Susan Anderson, 6 HLRB 208 (2001).

GRIEVANCE PROCEDURAL BACKGROUND

Lebbin and UHPA pursued her denial of promotion on three fronts: 1) through the CBA promotion process; 2) through the grievance process; and 3) through the Hawaii Labor Relations Board (HLRB).

Lebbin followed the CBA promotion process, which resulted in her being denied a promotion from Librarian IV to Librarian V. The facts of that process are key in this grievance / Arbitration and will be discussed below.

Procedurally, the grievance process began on March 18, 2009 when Lebbin filed her Step 1 Formal Grievance, wherein she stated:

On 26 February 2009, I was notified of a negative recommendation in my promotion application. On 27 February 2009, I received a copy of my dossier including the *dean's/Director's Assessment and Recommendation*. While I received positive, unanimous votes from both the Library Personnel Committee (5 members) and the Tenure and Promotion Committee (8 members), the Dean (Paula Mochida) voted negatively. Mochida's assessment and recommendation letter included criticism of my activities on behalf of the Union (page 6.3, paragraph 4).

Lebbin also asserted that Articles II B and XIV of the CBA were violated and that "Mochida breached the criteria used for judgment by expanding into prohibited areas. Jt. Ex. 4.

On April 23, 2009, an amendment to the Step 1 Formal Grievance was made. Lebbin requested that UH: 1) "Invalidate the Dean/Director vote and remove the Assessment and Recommendation from the promotion document..."; 2) "Invalidate the Chancellors recommendation to deny promotion and grant the promotion immediately"; and 3) "Issue a notice to all faculty and administrators that reference to union protected activities . . . is illegal..." Jt. Ex. 5.

On May 13, 2009 Assistant Vice Chancellor for Academic Affairs Personnel, Peter Quigley, denied the Step I grievance, finding no violation of the CBA. He offered to redact paragraph 4 of page 6.3 of Mochida's Assessment and Recommendation from the promotion application (dossier). Jt. Ex. 6.

On May 26, 2009 a Step 2 grievance was filed. Jt. Ex. 7.

On May 29, 2009 UHPA filed with the Hawaii Labor Relations Board (HLRB) a prohibited practice complaint against UH alleging that Lebbin was denied promotion from Librarian IV to Librarian V because of her union activity. Jt. Ex. 22.

On July 21, 2009 Linda Johnsrud, Vice President for Academic Planning and Policy (Dr. Johnsrud), wrote UHPA indicating that she needed more time to investigate Lebbin's grievance. Jt. Ex. 9.

On August 13, 2010 Dr. Johnsrud also offered to redact paragraph 4 of page 6.3 of Mochida's Assessment and Recommendation from the promotion dossier before the dossier was forwarded to the Promotion Review Panel (PRP). Jt. Ex. 11.

On August 14, 2009 Lebbin and UHPA declined to have just one paragraph of Mochida's assessment redacted from Lebbin's dossier. Jt. Ex. 12.

On November 18, 2009 UHPA demanded that the grievance be moved to Step 3 Arbitration or that a Step 2 decision be issued on or before November 25, 2009. Jt. Ex. 19.

A further demand for Arbitration was made on November 30, 2009. Jt. Ex. 20.

On December 7, 2009 UHPA filed with HLRB a prohibited practice complaint against UH for failing to timely issue a Step 2 decision. Jt. Ex. 23.

On December 11, 2009 the Step 2 decision was rendered, denying the grievance and finding no violation of Articles II and XIV of the CBA. Jt. Ex. 21.

On May 6, 2010 the HLRB deferred its proceedings regarding the prohibited practice allegation involving denial of Lebbin's promotion to the Arbitration. Jt. Ex. 22.

On May 10, 2010 the HLRB determined that UH's failure to issue a timely Step 2 decision was moot. Jt. Ex. 23.

On June 24, 2010 the HLRB ordered the parties to meet with a fact-finder appointed by the HLRB to confirm or deny the statements made by Chancellor Hinshaw regarding the Tenure and Promotion Review Committee (TPRC). Jt. Ex. 24.

STATEMENT OF FACTS

UHPA's statement of the facts as set forth in its Post-Arbitration Brief is established by the record and adopted by the Arbitrator as follows:

Vickery K. Lebbin is a UH Manoa faculty librarian. Since 1998, Lebbin has been a reference and instructional librarian in the Business, Humanities and Social Services Department (BHSD) at the Hamilton Library. See, Joint Exhibit "Jt. Ex." 1 at 1.4a. Every two years a different BHSD faculty member serves as chair of the department. See, Lebbin's testimony Transcript Vol. 1 at 54. Lebbin was the department chair from 2007 through 2009. Jt. Ex. 1 at 1.4a. She was also the 2007-2009 Chair of the Library Faculty Senate. Id. at 4.4. In 2007, Lebbin also served as an UHPA representative, and in 2008, she was elected to the UHPA Board of Directors. Id. at 4.4 - 4.5.

In early October 2007, there was some disagreement between UH Vice President Linda Johnsrud ("Johnsrud") and UHPA regarding the authority of faculty members, primarily department chairs, to supervise support staff. See, librarian Paul Wermager's October 19, 2007 email, attached as Union Exhibit ("Un. Ex.") A.

At the November 2007 Library Departmental Council meeting, Mochida instructed the faculty to, "do whatever they feel comfortable with" in regards to signing as supervisors on employee leave forms and evaluations. See, meeting minutes written by Martha Chantiny, Un. Ex. C., and Tr. Vol. I at 116. Librarian department chairs varied in their handling of leave forms. Some librarians continued to sign forms, but crossed out the word "supervisor" on the forms; some librarians, like Wermager, Lebbin and Chantiny forwarded the forms to library administration for signature. See, (Employer 's Exhibit "Em. Ex.") 20 and Un. Ex. EE (leave forms signed by Division Head Wil Frost), and testimony of Mochida Tr. Vol. VI at 1508-1509.

The supervisory issues were resolved at the library in January 2008, after UHPA Executive Director J.N. Musto met with Mochida. See, Un.

Exs. J and K. Also during this time, Mochida notified the faculty of her plan to hire “non-faculty Librarians” who would be classified as Hawaii Government Employees Association (“HGEA”) bargaining unit 8, Administration, Professional and Technical (“APT”) positions to work as supervisors. See, Un. Exs. G, H, and I. This led to UHPA filing a Unit Clarification petition at the Hawaii Labor Relations Board, alleging UH had hired non-faculty members to perform the work of Unit 7 faculty, in violation of Hawaii Revised Statutes (“H.R.S.”) §89-6. See, Un. Ex. M. UHPA relied on librarian faculty to testify at the labor board hearing. See, Em. Ex. 21.

On or about October 10, 2008, Lebbin submitted her application for promotion from Librarian IV to Librarian V. See, Jt. Ex. 1 at 1.1. The five-member Library Department Personnel Committee (“LPC”) unanimously recommended promotion. Id. at 5.23. On December 15, 2008, Mochida recommended against the promotion. Mochida’s negative recommendation criticized Lebbin for following UHPA’s advice regarding the supervisory issue eleven months prior. Id. at 6.3. In February 2009, the eight-member TPRC reviewed Lebbin’s dossier and unanimously recommended promotion. Id. at 7.1.

On March 17, 2009, Lebbin testified at the Hawaii Labor Relations Board on behalf of UHPA in the Unit Clarification case. Lebbin was one of four librarians subpoenaed to testify on behalf of the Union. Un. Ex. N. and Em. Ex. 21. Interim University Librarian Paula Mochida and Program Officer to the Vice Chancellor Beverly McCreary testified on behalf of Respondent UH. Em. Ex. 21.

On February 27, 2009, Lebbin was notified of Mochida’s negative recommendation. On March 9, 2009, Lebbin submitted a rebuttal statement, as provided in Article XIV of the 2003 - 2009 Agreement between UHPA and UH (“collective bargaining agreement” or “contract”). Jt. Ex. 2. The rebuttal specifically addressed Mochida’s negative comments.

On March 18, 2009, UHPA filed a grievance on behalf of Lebbin alleging Mochida’s negative recommendation was a result of Lebbin’s union activity in violation of the contract’s non-discrimination clause, Article II (B). Id. at 1.

On April 13, 2009, Chancellor Hinshaw denied Lebbin’s promotion. This denial meant the promotion application would not be forwarded to the UH President or UH Board of Regents. This denial triggered a meeting between Hinshaw and the TPRC, which occurred the same day. See Jt. Ex. 2 at 29. This meeting was the subject of the Fact-finder’s report. See, Jt. Ex. 3. On April 16, 2009, Lebbin was notified of Hinshaw’s denial via a

letter. Jt. Ex.1 at External Reviews tab.

On April 23, 2009, Lebbin, along with UHPA Associate Executive Director Kristeen Hanselman ("Hanselman"), attended the Step 1 grievance hearing with the Chancellor's designee, Vice Chancellor Peter Quigley.

On May 7, 2009, Lebbin met with Hinshaw to discuss the Chancellor's reasons for denial of the promotion, as provided for in the contract. Jt. Ex. 2 at 29.¹

On May 12, 2009, Lebbin requested that her dossier be reviewed by a Promotion Review Panel. Jt. Ex 1 at PRP tab, first page.

On May 13, 2009, Quigley issued a decision on the Step 1 grievance, in which he denied the discrimination allegations, yet offered to remove from the dossier the offending statements made by Mochida. See, Jt. Ex. 6 at 3. Quigley's denial was based on statements made by Hinshaw in her May 7, 2010 meeting with Lebbin. Id. UHPA did not accept this offer since removal of Mochida's statement would not remedy the harm already committed by the Chancellor's denial of promotion. See, UHPA's May 26, 2009, Step 2 grievance, attached as Jt. Ex. 7.

On May 26, 2009, Chancellor Hinshaw wrote a memorandum stating the reasons she denied Lebbin's grievance. Jt. Ex. 8.

On May 29, 2009, UHPA filed a prohibited practice complaint with the HLRB based on anti-union animus violations of HRS§ 89-13 (a), subsections (1), (3), (4) and (8).

On July 7, 2009, UH Vice President Linda Johnsrud ("Johnsrud") held a Step 2 hearing with Lebbin and Hanselman. Jt. Ex. 21.

On July 14, 2009, UH filed a motion at the HLRB to defer the prohibited practice complaint to arbitration. Jt. Ex. 22. By letter dated July 21, 2009, Johnsrud requested an extension of time to investigate the grievance. See, Johnsrud's July 21, 2009, letter to Hanselman, attached as Jt. Ex. 9. Hanselman, via telephone with Jim Nishimoto, a member of Johnsrud's staff, denied the extension, and offered to skip the Step 2 decision and expedite the arbitration in response to UH's filing a motion to defer the prohibited practice to arbitration. See, Jt. Ex. 22. UH declined UHPA's expedited arbitration offer. Un. Ex. Y.

¹. A faculty member may request a meeting with the Chancellor within 20 days of receipt of written notification of the promotion denial. Jt. Ex. 2 at 29.

UH also refused all of UHPA's discovery requests related to the grievance, and refused all offers to discuss how to preserve [sic] the TPRC's confidentiality. See August 10, 2009, letter from UHPA to Johnsrud (containing a packet of confidential questionnaires to be distributed to the TPRC members), Jt. Ex. 10 and Un. Ex. O; Johnsrud's October 15, 2009 refusal, Jt. Ex. 17; UHPA's November 3, 2009 letter (request to bargain procedure and request for the delayed Step 2 decision), Jt. Ex. 18; UHPA's November 18, 2009 letter (second request to bargain and demand for arbitration due to the three-month overdue Step 2 decision).

In addition to deciding the grievance, Johnsrud also had oversight of Lebbin's Promotion Review Panel ("PRP"). Jt Ex. 11. In a letter dated, August 13, 2009, Johnsrud offered to remove Mochida's anti-union statements, contained on page 6.3 of the dossier, prior to submitting the dossier to the PRP. Id. In this letter, Johnsrud acknowledged that she had not provided the Step 2 decision. Id. UHPA, again, declined UH's offer and questioned Johnsrud's objectivity to assemble an impartial PRP while presumably conducting an investigation and making a final administrative decision on the grievance. The PRP returned their decision on August 24, 2009, denying Lebbin's promotion, citing issues that were taken from the two negative reviews in the dossier and Mochida's assessment. See, PRP decision, Jt. Ex. 1. The PRP's decision was followed by UH President M.R.C. Greenwood's denial of Lebbin's appeal for consideration by the Board of Regents. See, Greenwood September 4, 2009 letter, Jt. Ex. 1.

On August 20, 2009, instead of answering UHPA's discovery request, Johnsrud provided another memorandum from Chancellor Hinshaw detailing her conversation with the TPRC. See, Johnsrud's August 20, 2009 letter and Hinshaw's August 10, 2009, memorandum, attached, as Jt. Ex.14.

By November 30, 2009, UHPA had not received Johnsrud's Step 2 decision, which was four months past due. UHPA wrote to UH President Greenwood to demand arbitration. Jt. Ex. 20.

On December 7, 2009, UHPA filed a second prohibited practice at the HLRB. UHPA alleged prohibited practices under HRS § 89-13 due to UH's failure to issue a Step 2 hearing decision within 20 days of the Step 2 hearing; refusal to advance the grievance to arbitration; and failure to provide information requested by UHPA in order to investigate the grievance. Un. Exhibit W.

The Board found that UH committed prohibited practices by issuing a delayed Step 2 decision, and willfully refusing to bargain over the requested discovery. See, HLRB Order 2702, Jt. Ex. 23.

After UHPA filed the second prohibited practice complaint, Johnsrud issued a Step 2 decision on December 11, 2009. Johnsrud denied the grievance stating that: a) Mochida's allegedly anti-union statements were not a factor in Hinshaw's decision; b) Hinshaw had legitimate reasons for her denial; and c) Article II (B) allegations were not subject to the grievance process, notwithstanding the fact that UH took a contrary position before the HLRB when it petitioned for a deferral of the prohibited practice charge to arbitration. Jt. Ex. 21.

At the March 10, 2010 HLRB hearing, UHPA offered to split the cost of a Fact-finder with UH. UH refused UHPA's offer. The HLRB then appointed a Fact-finder, and ordered UH to provide the TPRC names to the Fact-finder and split the costs with UHPA. Jt. Ex. 24. The Fact-finder, Thomas Crowley, Esq., met with the TPRC members and on July 30, 2010, issued an Interim Report, and a final report on August 18, 2009. Jt. Exs. 3 and 3a.

THE PROMOTION PROCESS

PROMOTION CRITERIA

There are three levels of criteria² that apply to promotions. Tr. 1018. The most specific criteria are the departmental criteria – the Library Personnel Committee (LPC) Policies and Procedures. Jt. Ex 1 at 5.6 - 5.21; and Tr. 1028. A comparison of the LPC Librarian IV and Librarian V criteria may be helpful. Jt. Ex 1 at 5.14.

LPC POLICIES & PROCEDURES

LIBRARIAN IV	LIBRARIAN V
Perform functions & activities with outstanding competence	

² UH must follow the promotion criteria. As stated in UHPA v. UH, 66 Haw. 207, 211 n. 2, 659 P.2d 717 (1983): "Once criteria are established ... the procedure of review must fairly follow the criteria. Otherwise, the criteria are meaningless and may become a façade for unfair or discriminatory practice."

	May represent the Library in University or community affairs.
Demonstrate evidence of maturing professional growth & assumption of progressive and varied responsibilities	
Exhibit independence and creativity in provision of services and/or program development or evaluation	May be involved in organizing, implementing or evaluating programs and/or services in the Library or University
Participate in academic or professional activities within the University & beyond	Must demonstrate academic and professional <u>leadership</u>, functioning in responsible positions in academic and professional affairs. Leadership can be at the state or national level and demonstrated by contributions to the field through publications, committee work, presentation of papers, etc.
May be engaged in managerial or supervisory activity	May be engaged in managerial or supervisory activity

The UH Manoa criteria for promotion are mid-level criteria. Tr. 1022. A comparison of the Librarian IV and Librarian V criteria follows:

**CRITERIA AND GUIDELINES FOR FACULTY TENURE/PROMOTION FOR THE UH
AT MANOA
UH Ex. 1 at 11.**

LIBRARIAN IV	LIBRARIAN V
Evidence of increasing professional maturity in the professional specialization and in the performance of duties	Must provide evidence of increasing productivity and professional maturity in the performance of duties in the rank of Librarian IV
Ability to exercise independent professional judgment	Evidence of the competent exercise of independent professional judgment.
Ability to anticipate and recommend changes in accordance with the changing needs of the Library and University	

Exhibit independence and creativity in the provision of service and/or program development or evaluation	
Participation in academic or professional activities within the University and beyond.	Must demonstrate academic and professional <u>leadership</u>, functioning in responsible positions in academic and professional affairs. Leadership can be at the state or national level and demonstrated by contributions to the field through publications, committee work, presentation of papers, etc.
If managerial or supervisory responsibilities are an aspect of the Librarian's assigned position ... there should be demonstration of maturing competence.	If managerial or supervisory responsibilities are an aspect of the Librarian's assigned position ... there should be demonstration of mature competence and effectiveness.

The Board of Regents criteria are the most general criteria. Tr. at 1019.

**CRITERIA AND GUIDELINES FOR TENURE/PROMOTION APPLICATION
MINIMUM QUALIFICATIONS
BOARD OF REGENTS POLICIES
UH Ex. 1 Appendix A at 9.23 – 9.24**

LIBRARIAN IV	LIBRARIAN V
Perform functions and activities with outstanding competence.	
Evidence of maturing professional growth and assumption of progressive and varied responsibilities.	
Ability to anticipate and recommend changes in accordance with the changing needs of the Library and University	May represent the Library in University or community affairs.
Exhibit independence and creativity in the provision of service and/or program development or evaluation.	May be involved in organizing, implementing or evaluating major programs and/or services within the Library or University.

Participation in academic or professional activities within the University and beyond	Must demonstrate academic and professional <u>leadership</u>, functioning in responsible positions in academic and professional affairs. Leadership can be at the state or national level and demonstrated by contributions to the field through publications, committee work, presentation of papers, etc.
Managerial or supervisory activity when appropriate to their position.	Managerial or supervisory activity when appropriate to their position

The Library Personnel Committee

The LPC unanimously recommended Lebbin for promotion. Jt. Ex. 1 at 5.1 and 5.23 – 5.24. In particular, the LPC stated:

The Committee finds that Vickery Lebbin's dossier provides **ample evidence of achievements** indicating that she is prepared to advance to the highest rank of University librarians. She **meets the criteria and qualifications**. ... The most important criteria for ascension to Rank 5 is "an acknowledged reputation for excellence among professional colleagues outside the immediate University community" and a **demonstrated "academic and professional leadership functioning in responsible positions in academic and professional affairs."**

... Ms. Lebbin's [area of specialization] is instruction and research/publishing and **she is one of the most productive library faculty** in these areas. ... She also makes significant professional contributions at the national and local levels.

... she partnered with a colleague to create the Library Essentials Program, the only systematic instructional effort provided by the library for English 100 students, which is a foundational component of the university's general education requirement. The Library Essentials Program helps the English Department fulfill its informational literacy requirement. Ms. Lebbin was an early-adopter in the use of audience response and analysis technology to actively engage students.

Ms. Lebbin's publications are in reputable and scholarly journals. Her works are cited (4.65-4.67) in numerous publications. Her contribution is at the national level in two of the most important organizations of her specialty – Association of College and Research

Libraries and (ACRL) and LOEX-of-the West. Ms. Lebbin's contributions to the profession locally are especially notable in her work to **organize and manage the Hawaii Library Association (HLA) annual conferences. ... awarded the Distinguished Library Award in 2007.**

Ms. Lebbin's University and Library service have been at important levels of faculty relations and governance (**faculty senate, library senate, UHPA**) and in areas of her specialty (**Faculty Mentoring Program, Center for Teaching Excellence, information literacy committees**). She has served as Head of the Business, Humanities, and Social Sciences Department of the library – a position that rotates every two years. This department manages the largest reference operation in the library.

A note regarding the two negative wide-ranging evaluations (WRE): It is the Committee's position that **such criticism is not well-aligned with the criteria, not well-supported and not widely held throughout the library.** The Committee feels that Ms. Lebbin has clearly addressed these criticisms in her response and the negative evaluations should not detract from her case.

A minor criticism is that the dossier could have benefited from a clearer delineation and explanation for the inclusion of accomplishments prior to 2003. Nevertheless, **the Committee thinks that Ms. Lebbin's post 2003 accomplishments more than meet the qualifications for Rank 5.** (Emphasis added).

Jt. Ex. 1 at 5.23 – 5.24.

The Interim University Librarian

After the LPC, Lebbin's dossier was forwarded to the Interim University Librarian, Paula Mochida (Mochida). Mochida did not recommend Lebbin for promotion.

Lebbin asserted that Mochida misapplied the criteria in evaluating Lebbin's dossier. Initially, Mochida paraphrased the criteria. Jt. Ex. 1 at 6.2. n. 1; and Tr. 1257. Mochida also focused on increasing productivity and professional maturity rather than assessing academic and professional leadership. This is particularly revealing because

Mochida testified that Lebbin met leadership activities in the areas of research and publishing, but that she, Mochida, failed to state that in her assessment. Tr. 1330.

Ross Christensen, a member of Lebbin's LPC, noted that Mochida failed to adhere to the criteria. He stated:

[Mochida] substituted a may or a must with a should and then she's combined the notion of leadership with organizational responsibility, which happens nowhere else in the criteria.

* * *

... I really would be very uncomfortable if an administrator evaluating me could invent criteria or introduce new criteria or change the criteria. I would feel that this was very unfair.

Tr. 296.

Ross Christensen went on to conclude that Lebbin met the criteria and demonstrated academic leadership by her involvement in the: Library Essentials Program, Hawaii Library Association, LOEX conference, committee work, presentations at conferences and her very strong publishing record. Tr. 274 – 286. Paul Wermager, another Hamilton Library Department Head, felt that Lebbin met the criteria, as did Pat Polansky, the Chair of Lebbin's LPC. Tr. 458 and 596.

It is evident that the key distinction between a Librarian IV and a Librarian V is that of **academic and professional leadership**. This leadership is shown in two main ways: 1) holding positions in academic and professional affairs; and 2) by publications, committee work and presentation of papers, etc.

LEBBIN'S QUALIFICATIONS

The following are highlights of Lebbin's dossier since her last promotion in 2003. Jt. Ex 1 at 4.3 - 4.32 and 8.2 - 8.5:

Positions in Academic and Professional Affairs

- Served as external reviewer on promotion, tenure and comprehensive review cases for librarian faculty members at UNLV and Univ. of Colorado Denver. Tr. 43.
- 2006 co-prepared winning proposal to host Library Orientation Exchange Conference (LOEX) of the West and then co-chaired the conference. Tr. 45-52.
- 2007 – 2009 Lebbin was BHSD Department Chair. Tr. 54; and Jt. Ex. 1 at 1.4a
- 2007 Hawaii Library Association Distinguished Librarian Award (bestowed only 12 times since its inception in 1972). Tr. 20 and 45.
- Last 10 years – significant role in managing 2 day Annual Conference for Hawaii Library Association.
- 2007 Co-proposed, designed & implemented the Library Essentials program, which continues to the present and instructs 1,000 students per semester. 73 Library Essential workshops have been presented to date. Tr. 63 - 73; 312 – 313 and 379.
- Chair, Library Faculty Senate: 2002 & 2007 - 2009 – elected by librarian faculty. Tr. 21 and 26; and Jt. Ex. 1 at 4.4.
- UH All Campus Council of Faculty Senate Chairs – member. Tr. 26.
- UH Council of Chairs – member as Department Head for BHSD. Tr. 26.
- UHPA Board of Directors – 2008 elected by UH Manoa faculty. Tr. 22; and Jt. Ex. 1 at 4.4 and 4.5.

- UHPA Faculty Representative – 2007 elected by librarian faculty. Tr. 22; and Jt. Ex. 1 at 4.4 and 4.5.

Publications, Committee Work and Presentation of Papers, etc.

- Faculty Mentoring Program – 5 panel discussions in 2007 & 2008.
- UH Libraries Information Literacy Committee – 2005 & 2006.
- Library as Place Team – appointed 2008.
- Library Departmental Council – member.
- Public Services Heads Committee – member.
- Library Personnel Committee (LPC) – 2007; 2006 – alternate.
- Travel Task Force – 2006.
- Published six (6) papers. “Academic librarian who publishes three (3) referenced articles in a five-year period is among top 10% in productivity.” Wiberley Jr., Hurd & Weller.
- 15 presentations for University, State, National and International conferences and meetings.
- Association of College and Research Libraries (ACRL): E-Resources in Communication Studies Committee (2006-2008); Communication Studies Committee (2002 – 2006); 2005 Program Planning Committee.

UNION ACTIVITY

Lebbin was a UHPA faculty representative and then a member of the Board of Directors of UHPA, both elected positions.

In October 2007 an issue arose regarding whether faculty should be supervising other faculty or support staff. Department heads were informed that they should not be signing leave forms or evaluating other bargaining unit members. UHPA Ex. A & B; and Jt. Ex. 1 at 5.31. Lebbin was a Department Chair at that time and communicated the above concerns to Mochida. Jt. Ex. 1 at 5.31. Mochida instructed department heads to “do whatever they felt comfortable with” regarding signing leave forms. UHPA Ex. C; and Tr. 1270, 1273 and 1508 - 1509. Lebbin and some other department heads then forwarded the forms to their Division head or to Mochida for signature. Tr. 464; UH Ex. 20; and UHPA Ex. EE. This issue was resolved by January 2008. UHPA Ex. J and K.

In the late Fall 2007 Mochida decided to hire non-faculty APT’s (Administrative, Professional & Technical) to fill positions. UHPA Ex. D, G and H. The UHPA filed a Unit Clarification Petition with the HLRB regarding this proposed action in October 2008. On October 21, 2008 Kristen Anderson, a member of Mochida’s Library Executive Team, placed a negative letter in Lebbin’s dossier. Jt. Ex. 1 at 5.29. On October 22, 2008 Martha Chantiny, then a member of Mochida’s Library Executive Team, placed a negative letter in Lebbin’s dossier. Jt. Ex 1 at 5.36; and Tr. 1288. On October 30, 2008 Lebbin, as chair of the Library Senate, sent a letter to Mochida about the APT issue. Tr. 855 – 857 and 860. On December 15, 2008 Mochida signed her negative assessment of Lebbin recommending that promotion be denied. Jt. Ex. 1 at 6.1 - 6.4. All three of these negative documents discussed Lebbin’s Union activities.

In addition, the library administration views the unions as thorns in their side and as meddling in library affairs. Tr. 645, 647 and 687 - 688.

**LEBBIN'S UNION ACTIVITY MOTIVATED OR WAS A SUBSTANTIAL
REASON FOR EMPLOYER TO DENY PROMOTION.**

The union was blamed for “meddling” when Mochida decided to convert faculty librarian positions to APT non-faculty librarian positions, which led to the negative comments by Anderson, Chantiny and Mochida. Tr. 687 – 688. In addition, Mochida and others in administration viewed the union as a problem. Tr. 594, 645 – 647 and 687 - 688.

Mochida decided to deny Lebbin's promotion before she even reviewed Lebbin's dossier. Tr. 592. Patricia Polanksy, the head of the LPC, warned Mochida that she had no legitimate basis to deny Lebbin's promotion. Tr. 604.

Mochida's Assessment and Recommendation minimized many of Lebbin's accomplishments and mischaracterized a number of Lebbin's activities. Jt. Ex 1 at 6.2 – 6.4; and Tr. 393. The following are some of Mochida's key comments, together with a summary indicating Mochida's erroneous statements.

1. Mochida stated that Lebbin had minimal activity between 2003 – 2006 and then a slight increase in 2007. She also stated that Lebbin's accomplishments were not that significant.

2008 Lebbin's activity

- Authored a book chapter
- LOEX Conference presentation
- Canadian Library Association Conference presentation
- Utah Library Association Conference presentation
- College of Education Faculty & Staff presentation

- Manoa Faculty Mentoring Program presentation
- UH New Graduate Student Orientation presentation
- Elected Chair, Library Faculty Senate
- Elected, UHPA Board of Directors
- External reviewer for University of Colorado Denver
- ACRL E-Resources in Communication Studies Committee

2007 Lebbin's activity

- LOEX Conference presentation
- Hawaii Library Association presentation
- Hawaii Association of School Librarians presentation
- UH Library Instruction Conferences presentation
- UH New Graduate Student Orientation presentation
- Received Hawaii Library Association Distinguished Librarian Award
- Co-Proposed & implemented Library Essential Program – which has continued to the present
- External reviewer for UNLV
- Library Personnel Committee (LPC)
- ACRL E-Resources in Communication Studies Committee

2006 Lebbin's activity

- 2 Peer reviewed articles
- UH New Graduate Student Orientation presentation
- UH Pacific Library Training Institute presentation
- Co-chaired LOEX Conference of the West

- Elected, UHPA Faculty Senate Representative
- Alternate to the LPC
- Travel Task Force
- Hawaii Library Association Conference Committee
- ACRL EBSS Communication Studies Committee
- ACRL E-Resources in Communication Studies Committee

2005 Lebbin's activity

- Brigham Young University presentation
- Hawaii Library Association presentation
- Hawaii Association of School Librarians presentation
- Sacred Hearts Academy Faculty presentation
- Manoa Faculty Mentoring Program presentation
- Hawaii Library Association Conference Committee
- External reviewer for UNLV
- ACRL EBSS Communication Studies Committee
- ACRL Instruction Section 2005 Program Planning Committee
- ACRL Instruction Section Management of Instruction Services Committee
- Lebbin was on sabbatical from Feb. 04 – Feb. 05. Tr. 85; and Jt. Ex. 1 at 1.4a.

2004 Lebbin's activity

- LOEX Conference presentation
- Peer reviewed article

- Hawaii Association of School Librarians presentation
- UH Teaching Assistant Training presentation
- Hawaii Library Association Conference Committee
- ACRL EBSS Communication Studies Committee
- ACRL Instruction Section 2005 Program Planning Committee
- ACRL Instruction Section Management of Instruction Services Committee

2003 Lebbin's activity

- Hawaii Library Association Conference Committee
- ACRL EBSS Communication Studies Committee
- ACRL Instruction Section 2005 Program Planning Committee
- ACRL Instruction Section Management of Instruction Services Committee

Jt. Ex. 1 at 4.3 – 4.32 and 8.2 – 8.5.

2. Mochida stated that Department liaison is considered an important way to keep abreast of curriculum; that active librarians have active teaching programs; and that there was an absence of support for her promotion from the academic departments assigned to Lebbin.

- It is noteworthy that Mochida told BHSD that liaison work is not that important. Tr. 92.
- Lebbin co-sponsored, designed and implemented the Library Essentials Program in 2007, which addresses the English 100 information literacy

requirement and instructs about 1,000 students per semester. Tr. 66 -74; 301 – 304, 312 – 313, 317 and 379.

- The LPC, in the past, solicited Wide Ranging Evaluations from only librarian faculty. Others within the UH are not notified of who is going up for promotion. Jt. Ex. 1 at 8.4; and Tr. 87 – 89.
 - Nonetheless, two (2) faculty members from the English Department wrote letters of recommendation for Lebbin. Jt. Ex. 1 at 5.26 and 5.28.
3. Mochida also stated that the Library Essentials Program came about a year or more after she had meetings with the department about the need to develop a program for information literacy. She went on to say that she expected this to be a program initiated without prompting.
- Both Lebbin and Ross Christensen, the co-developers of this program, are emphatic that they initiated the Library Essentials Program without any prompting from anyone. Tr. 280 and 300 – 304.
4. Regarding clicker technology, Mochida stated that Lebbin has not shared this technology beyond her library department (BHSD).
- Ross Christensen stated that Lebbin has shared this technology with faculty, both within and outside of the library. Tr. 304 – 305.
 - Paul Wermager, who is in another department within the library, attended a workshop that Lebbin gave on the clicker technology. Tr. 420 – 422 and 477.
 - In fact, Mochida authorized the purchase of additional clickers for the library. Tr. 478.

- Furthermore, Mochida wrote Lebbin a letter congratulating her on a presentation about clicker technology. Jt. Ex. 1 at 4.50.
5. Mochida stated that Lebbin led a campaign to prohibit faculty from any kind of supervisory or management responsibilities of staff represented by labor unions.
- Paul Wermager brought this issue to the attention of the Library when he wrote all library department heads on October 19, 2007 stating: “ Faculty dept heads cannot supervise/manage other faculty...dept heads should NOT sign faculty leave forms or do evaluations of civil service staff.” UHPA Ex. A; and Tr. 402 – 405. Lebbin merely informed Mochida about this. Jt. Ex. 1 at 5.31.
6. Mochida also stated that Lebbin was the **only** department head that refused to sign leave forms.
- Other department heads did not sign leave forms, including Paul Wermager, Martha Chantiny, Pat Polanksy and James Adamson. Tr. 464, 600, 676 and 1508 – 1509.
 - Mochida was aware that other department heads were not signing leave forms because she signed leave forms herself and because she knew that some Division heads were signing leave forms. Tr. 1445 - 1446 and 1508 – 1509.
7. Mochida said that the issue regarding leave forms created undue anxiety and confusion for the organization.

- Ross Christensen, Paul Wermager and Patricia Polansky all said that this issue did not create any type of disturbance in the library. Tr. 289, 427, 464, 600 and 676 – 679.
 - In fact, Mochida testified that two employees, including Debbie Okuno, voiced concerns about the leave forms. Tr. 1403 – 1405. However, Ms. Okuno testified that this issue did not affect her in any way. She also testified that she was never anxious about this issue and that this issue did not cause her any concern. She also said that she did not talk with any administrator about this matter. Tr. 1845 – 1852.
8. Finally, Mochida stated that Lebbin has published relevant research, but has not incorporated her good ideas into library programs.
- The prior discussion about the Library Essentials Program, the clicker technology and the many presentations Lebbin has given refute this assertion. Jt. Ex 1 at 4.3 - 4.32 and 8.2 - 8.5

Mochida concluded her negative recommendation by saying that “leadership requires finding solutions to problems, not just pointing them out.”

The Tenure and Promotion Review Committee (TPRC)

After Mochida’s negative recommendation, Lebbin’s dossier was forwarded to the Tenure and Promotion Review Committee (TPRC). The TPRC unanimously recommended promotion. Jt. Ex. 1 at 7.1 and 7.3.

TPRC’s vote: 8 in favor, 0 against. The LPC and external reviewers all state that the applicant meets the minimum qualifications for promotion to the rank of B5. The Interim University Librarian states that the applicant fails to meet the minimum qualifications. Additionally, two *Wide Ranging Evaluations* opposed promotion.

The committee concurred with the LPC's view that the *Wide Range Evaluations* were not well supported. Regarding the negative evaluation of the Interim University Librarian, the committee recognizes that professionals acting in good faith can disagree and such a disagreement may indicate that the case is a close decision. In forming its decision, the TPRC felt that the LPC and the external reviewers provided sufficient evidence that the applicant meets the minimum qualifications for promotion.

Chancellor Virginia S. Hinshaw (Hinshaw)

From the TPRC, Lebbin's dossier went to Chancellor Virginia S. Hinshaw (Chancellor Hinshaw). On April 13, 2009 Chancellor Hinshaw denied Lebbin's promotion. This meant that the promotion application would not be forwarded to the UH President or the UH Board of Regents. This denial resulted in a meeting with the TPRC, which also occurred on April 13, 2009. Jt. Ex. 2 at 29 – 30; Jt. Ex. 1 at 9.1 and External Review Tab; and Jt. Ex. 14. Lebbin then met with Chancellor Hinshaw on May 7, 2009 to discuss the Chancellor's reasons for denying promotion. The Chancellor wrote Lebbin on May 26, 2009 explaining why she denied Lebbin's promotion. Jt. Ex. 8. Key points raised by Chancellor Hinshaw in this letter include the following:

- The Chancellor read Mochida's review and it was not a factor in her decision;
- The Wide Ranging Evaluations – by Anderson & Chantiny (both mentioned Lebbin's Union activity);
- "As a Librarian V, it is imperative that you see beyond the problems that exist and focus on establishing solutions";
- There are stressful relationships within the Library that may impede productivity.

The TPRC noted this as a concern in my discussion with them and confirmed my review of your dossier.

Chancellor Henshaw's indication that the TPRC agreed with her assessment of the dossier caused considerable alarm, in light of the fact that the TPRC had unanimously recommended promotion. Consequently, there was an effort to confirm this conclusion with TPRC members. Typically, an applicant is not to communicate with persons engaged in the evaluation and review process. Jt. Ex. 2 at 33, ¶¶ K. In an effort to further clarify matters, Chancellor Hinshaw wrote another letter, dated August 10, 2009, regarding her meeting with the TPRC. Jt. Ex. 14. In this letter she stated, in relevant part, that:

- She told the TPRC that Co-chairing the LOEX of the West conference was not primarily academic;
- Lebbin was not adequately involved in leadership within the Library;
- Faculty leadership "requires that you determine what not to do anymore, how to do it more efficiently, or how to delegate it to other staff";
- Lebbin had not been productive at the level expected for Librarian V;
- TPRC felt that it was a "close call" whether Lebbin met the criteria for Librarian V;
- TPRC struggled to see the level of productivity expected at Rank V;
- TPRC members agreed that if Lebbin's dossier was looked at from a leadership lens, there was perhaps more evidence that it did not meet the criteria for Librarian V; and
- TPRC felt that Lebbin's dossier only provided "sufficient evidence."

The Union filed a prohibited practice complaint with the HLRB regarding, *inter alia*, the inability to investigate Lebbin's grievance and the need to obtain information from TPRC members. Jt. Ex. 23 and 24. The HLRB ordered a Fact-Finder to confirm or

deny statements attributed to the TPRC by Chancellor Hinshaw. Jt. Ex 3 and 3A. The Fact-Finder learned that the TPRC processed 8 dossiers: 4 of them were librarians, 2 of which were for promotion to Rank V. The TPRC consisted of 8 members and 5 of them probably attended the meeting with Chancellor Hinshaw. Key findings of the Fact-Finder include the following:

CHANCELLOR HINSHAW	FACT-FINDER
There are stressful relationships within the Library.	TPRC members found interdepartmental personality conflicts, but no conclusion that Lebbin was the cause. ³ Jt. Ex. 3 at 20.
She told the TPRC that co-chairing the LOEX of the West conference was not primarily academic.	TPRC members did not agree with the Chancellor's conclusion. The TPRC felt that chairing the LOEX is viewed as prestigious, indicating that one is prominent enough to get important presenters on current topics, and choreographing the entire event. The conference demonstrates leadership and external recognition. Jt. Ex. 3 at 11.
Lebbin was not adequately involved in leadership within the Library. Faculty leadership "requires that you determine what not to do anymore, how to do it more efficiently, or how to delegate it to other staff".	TPRC generally disagreed. TPRC said Chancellor seemed to be applying her own subjective definition of leadership. Jt. Ex. 3 at 12 and 18.
Lebbin had not been productive at the level expected for Librarian V.	TPRC said there was a pattern of personality conflicts within the Library – this influenced Interim Librarian's remarks and the negative letters. Jt. Ex. 3 at 14 and 19.

³ Lebbin doesn't have stressful relationships in her department. Stressful relationships harkens back to Mochida's, Chantiny's and Anderson's comments. Tr. 445. Chantiny is a contentious person and she intimidates people. Tr. 410. She has a strong personality, can be very off-putting and has a history of work place violence. Tr. 866 – 869, 1289 and 1294.

TPRC felt that it was a “close call” whether Lebbin met the criteria for Librarian V.	The TPRC recommendation meant yes without qualification. Lebbin clearly met the criteria for promotion. “Close call” was taken out of context. It meant that there wasn’t unanimous approval for promotion (the Interim Librarian had made a negative recommendation and there were 2 negative wide-ranging letters – one from another applicant for promotion). Jt. Ex. 3 at 12 – 13; Jt. Ex. 3A at 9.
TPRC struggled to see the level of productivity expected at Rank V.	TPRC did not say this. TPRC did not struggle to see level of productivity. TPRC unanimously agreed that productivity was demonstrated. Jt. Ex. 3 at 15; Jt. Ex. 3A at 11 and 16.
	TPRC member said Chancellor commented on Lebbin’s rebuttal to Interim Librarian. Jt. Ex. 3 at 17.
TPRC members agreed that if Lebbin’s dossier was looked at from a leadership lens, there was perhaps more evidence that it did not meet the criteria for Librarian V.	Some TPRC members did not recall this discussion. Two TPRC members said “No” and “definitely not” – dossier demonstrated sufficient leadership. Jt. Ex. 3 at 17.
TPRC felt that Lebbin’s dossier only provided “sufficient evidence.”	TPRC members stated: Phrases “sufficient evidence” and “minimum qualifications” are standard and don’t connote low threshold. Instead it means “yes,” and yes means yes. The TPRC never said “only.” Jt. Ex. 3 at 21 – 22.
	TPRC says support for the Chancellor’s position is questionable. Jt. Ex. 3 at 24.
	TPRC says Chancellor incorrectly extrapolated the TPRC’s statement. Jt. Ex. 3 at 24.
	TPRC member surprised and disappointed that Chancellor overrode TPRC recommendation. Jt. Ex. 3 at 24.

There is no question that Lebbin was involved in union activity and that the employer knew about Lebbin's union activity. The real issue is whether Lebbin's union activity motivated or was a substantial reason for the refusal to recommend promotion. The clear answer is yes. Two negative letters from Anderson and Chantiny were written regarding Lebbin's application for promotion. Both of those letters criticized Lebbin's union activity. Mochida also criticized Lebbin's union activity. Chancellor Hinshaw read Mochida's recommendation, but said it was not a factor in her decision to deny promotion. Initially, it should be noted that it is difficult to "unring a bell." Tr. 1087 - 1088. As an example, Chancellor Hinshaw's words about leadership are similar to what Mochida stated: Hinshaw: A leader needs to "see beyond the problems that exist and focus on **establishing solutions**." Mochida: "leadership requires **finding solutions** to problems, not just pointing them out." Second, Chancellor Hinshaw mentions the negative letters of Anderson and Chantiny and Lebbin's rebuttal to these letters. Finally, Chancellor Hinshaw misinterpreted the TPRC. This could be because she is a powerful and respected figure on campus and TPRC members chose not to directly or forcefully disagree with her during their meeting. Alternatively, she heard what she wanted to hear during her meeting with TPRC members. It should be noted that the Arbitrator does not doubt that the Chancellor reported what she believed the TPRC indicated. Tr. 1083-1084. It appears that the Chancellor and the TPRC simply failed to accurately communicate with one another. In any event, it is clear that the TPRC unanimously recommended Lebbin for promotion, and they never changed that recommendation.⁴

⁴ The instant case is very different from Qamhiyah v. Iowa State Univ. of Science and

There is an additional concern about the Chancellor and the TPRC. Two members of Lebbin's TPRC contacted the Union, but only one of them was present at the meeting with Chancellor Hinshaw. The one TPRC member who was present during the meeting with the Chancellor informed the Union that 1) the Chancellor did not reflect what the TPRC said regarding Lebbin; and 2) the Chancellor pressured them to change their vote on a different dossier – a faculty member from the College of Business. Tr. 554 - 557. Regarding the faculty member from the College of Business, the TPRC member asserted that the Chancellor wanted the TPRC to change its vote because the Chancellor was recommending the person for promotion.⁵ Tr. 554 – 555. The TPRC members also discussed this matter with the Fact-Finder, who declined to report on it since it was not part of his charge from the HLRB. Jt. Ex. 3 at 24 – 25. Apparently, the TPRC reconsidered their vote regarding the faculty member from the College of Business. The TPRC had a number of members abstain from the re-vote on this applicant. The result was a vote of 2 in favor, 1 against and 5 abstentions. Tr. 1573 – 1575. The result was that the TPRC voted 2 to 1 in favor of promotion for this applicant (the abstentions do not count as a vote either way). The Chancellor went on to approve this applicant for promotion. The Chancellor stated that the TPRC reconsidered their vote after the applicant made a rebuttal, not at her urging. The Chancellor also asserted that she did not meet with the TPRC before they reconsidered their vote. Tr. 1150 – 1154. Dr. McCreary asserted that the Chancellor only meets with the TPRC

Tech., 566 F.3d 733, 745 - 746 (8th Cir. 2009). In Qamhiyah evaluators at nearly every level criticized the applicants "scholarship, fundraising and publishing records" and agreed that the applicant did not satisfy ISU's standards for tenure and there was no evidence indicating that bias affected the decision.

⁵ Jt. Ex. 2 at 30, ¶ D5: The Chancellor meets with the TPRC when the Chancellor disagrees with its recommendation.

after the TPRC has voted. Tr. 1573 and 1756 - 1757. Dr. McCreary also said that this was the first time she had seen 5 TPRC members abstain from a vote. Tr. 1756. On this record, which contains a fair amount of hearsay, the Arbitrator is unable to determine what transpired.

UH Arguments Regarding Motivation or Substantial Reason

UH argued that it was acceptable to mention Lebbin's union activity because Mochida was merely giving context for expressing disappointment in Lebbin's professional judgment. Jt. Ex. 1 at 6.3. Similarly, Dr. Johnsrud testified:

Vicky was holding a Department chair position...So when she chose not to fulfill those responsibilities, from my perspective she crossed the line that may well have been union activity, but it's not protected when it infringes on Employer's rights.

Tr. 1616.

The leave form issue is the focal point of the above comments. It is noteworthy that Lebbin was not the only department chair that refused to sign leave forms. Tr. 114 – 116, 464 and 1508 – 1509. In particular, Chantiny, another Department chair, also refused to sign leave forms. Tr. 464; and 1508 – 1509. However, Chantiny was on Mochida's Library Executive Committee, and Chantiny and Mochida were friendly with one another. Tr. 640. Furthermore, Chantiny was promoted to Librarian Rank V at the same time Lebbin was denied promotion to Librarian Rank V. Tr. 416 – 422 and 596. More importantly, the leave form issue did not affect library operations. Tr. 289, 427, 464, 600 and 676 – 679.

UH also argued that the mention of union activity did not taint the entire process. At the Step 1 grievance Dr. Quigley offered to remove the "offending" paragraph from Mochida's assessment and at the Step 2 grievance, Dr. Johnsrud offered to remove the

“offending” paragraph. Jt. Ex. 6 and 11; and Tr. 1624 and 1809 – 1810. Such a suggestion, made with the best of intentions, reminds one of the adage: If you have a plate of stew and you discover a piece of rancid meat in it, you don’t just throw out that one piece of meat – you throw out the whole plate of stew.

The same principal applies here. Mochida’s assessment criticized Lebbin, in part, because of her union activities. In fact, it appears that Lebbin was singled out because of her union activities. For example, Martha Chantiny was not criticized for refusing to sign leave forms, but Lebbin was. The criticism of Lebbin permeated Mochida’s entire assessment. As has been demonstrated above, the criticism was not well founded. This leads one to conclude that Lebbin’s union activity was the reason Mochida was so critical of Lebbin.

INEVITABILITY OF PROMOTION DENIAL

Lebbin was able to review dossiers of Librarians who had applied for promotion to Librarian Rank V, due to the Faculty Mentoring Program. Lebbin reviewed two other dossiers – Greg Geary and Ruth Marie Quirk. Tr. 949 – 950. Geary and Quirk both went up for promotion in 2006, Mochida assessed both of them and both were granted promotions to Rank V. A comparison of Lebbin, Geary and Quirk was made:

NAME	LETTERS	MOCHIDA’S SUPPORT	LPC VOTE	TPRC VOTE
Lebbin	5	Against	5 for; 0 against	All in favor (8)
Geary	1	For	4 for; 1 against	5 for; 1 against
Quirk	4	For	0 for; 5 against	All in favor

NAME	CONFERENCES	PUBLICATIONS	COMMITTEE WORK
Lebbin	19 in 5 years	13 Book reviews -1 after last promotion. 1 Book Chapter 4 Peer reviewed articles 0 Other articles 1 Conference proceeding 1 International presentation 3 National presentations 7 State presentations	4 National Committees 1 State Committee
Geary	15 in 9 years	15 book reviews - 1 after last promotion. 1 Book Chapter 0 Peer reviewed articles 0 Other articles 0 Conference proceeding 0 International presentation 3 National presentations 2 State presentations	2 National Committees 0 State Committees
Quirk	50 in 16 years	0 Book chapters 0 Peer reviewed articles 1 Other article 0 Conference proceedings 1 International presentation 4 National presentations	1 National Committee 0 State Committees

		10 State presentations	
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Tr. 955 – 959.

Furthermore, Martha Chantiny was promoted to Librarian Rank V. Chantiny was known to intimidate others and had a history of workplace violence. She had never been elected to the Faculty Senate or to the LPC. Tr. 186 – 187, 410, 1289 and 1294.

Additionally, Mochida has supported all 20 Librarians who have applied for promotion while she was the Interim University Librarian, except for Lebbin and one other who withdrew his application before it went to the TPRC. Tr. 924 – 925; and 976 – 977.

In 2008 approximately 114 people applied for promotion on the UH Manoa campus. Lebbin was the only one who did not get promoted. Tr. 980 – 981; and 1066. In 2010 approximately 120 people applied for promotion on the UH Manoa campus. Only four (4) were not promoted. Tr. 981, 1006 and 1066. Thus, it is clear that the overwhelming majority of applicants are granted promotion.

Many of Lebbin's colleagues were surprised and disappointed that Lebbin was not granted promotion. They stated that Lebbin is a leader in the library, had a good publishing record and more than warranted promotion. Tr. 392, 393, 396, 397, 417, 432, 596, 643 – 644, 648, 653 and 675. Significantly, it was stated that if anyone should have been promoted it was Lebbin and if anyone should not have been promoted it was Chantiny. Tr. 417.

Most disconcerting is the fact that Lebbin's promotion denial has had a chilling effect upon other faculty. Two other library faculty members expressed concern about

their chance for tenure/promotion in light of what occurred to Lebbin. Tr. 672 – 673. After not being promoted, Lebbin resigned from the Union. Tr. 921.

UH argues that it is improper to compare one applicant for promotion with another applicant for promotion. Tr. 1033 – 1037. This may be true in the context of the promotion process itself. However, a comparison is relevant in the context of determining whether there was disparate treatment among employees and whether the employment action was inevitable. See, Hyatt Corp. v. NLRB, at 375 n. 7.

The Promotion Review Panel (PRP)

After the Chancellor's denial of Lebbin's promotion, Lebbin's dossier went to the PRP. The PRP's sole determination is whether the applicant made a persuasive case for promotion. Jt. Ex. 2 at 30 – 31 ¶ H; and Tr. 1014 and 1750. The PRP only reviewed the dossier. It did not receive any information about Lebbin's grievance. Tr. 917 – 918, 1655 – 1666 and 1658 - 1659. Similarly, the PRP was never advised that there was an issue about whether potential union discrimination had tainted the process. In addition, the PRP was not given a copy of Article II B of the CBA. Tr. 1749 – 1750. Hence, the PRP was not clued in to the potential problem that could explain the negative recommendations of Mochida and the Chancellor.

The PRP concluded that Lebbin did not make a persuasive case for Promotion to Librarian V. Jt. Ex. 1 at PRP tab. There are a number of concerns regarding the PRP. First, it relied, in part, on the Wide-Ranging letters of Chantiny and Anderson, which contained discriminatory comments. Next, it relied upon the negative recommendation of Mochida, which also contained discriminatory comments. It also relied upon the comments of the Chancellor. However, the Fact-Finder had not yet been appointed, so

there was no objective challenge to some of the Chancellor's statements. Tr. 899 – 900.

The PRP did note that Lebbin "is to be commended for her academic and professional leadership, locally and nationally." It then went on to state that "there is insufficient evidence of "professional maturity"... " and that there was "insufficient evidence of "mature competence and effectiveness... ." These statements are similar to Mochida's statements in her negative recommendation.

Thereafter, UH President Greenwood denied Lebbin's request to have the Board of Regents consider her for promotion. Jt. Ex. 15. The Board of Regents has retained the authority to grant promotions to Rank IV and Rank V. Tr. 1013.

UH Arguments Regarding Inevitability of Promotion Denial

UH argued that each level of review was independent and properly applied the criteria. Each successive level of review builds upon what previously occurred. Each level reviews the same dossier and considers the recommendations of the prior reviewers. Thus, a subsequent reviewer, like the Chancellor or the PRP, can be influenced by the recommendations of earlier reviewers, such as the Interim University Librarian. In that sense, then, each level of review is not completely independent, although each review may be exercising its own judgment.

UH also argued that the Union, being unhappy with the result of the promotion process, is simply seeking another bite at the apple. However, as was previously discussed, the promotion process did not address the allegations of discrimination. Thus, this forum may address those allegations as they constitute, potentially, a violation of Article II B of the CBA.

In addition, UH asserts that the Union is asking the Arbitrator to step into the place of the decision makers. It is agreed that the Arbitrator is not deciding whether a promotion is warranted. At the same time, one must review the criteria and the facts to determine what role, if any, union activity played in the assessments that were made during the promotion process.

CONCLUSION

The Union has clearly established that Mochida's recommendation that Lebbin be denied promotion to Librarian Rank V was motivated by Lebbin's union activity. Mochida also failed to carefully follow the criteria set forth for Librarian V. Thus, Mochida's improper motivation tainted her entire negative recommendation. It is also clear that the Wide Ranging Evaluations of Anderson and Chantiny were motivated by Lebbin's union activity.

The Chancellor obviously relied on the improper letters of Anderson and Chantiny, as well as Mochida, in denying Lebbin's promotion. As a result, the negative comments about Lebbin are grounded in anti-union sentiment. Thus, union activity was a motivating factor in denying Lebbin's promotion.

The UH has failed to establish that the same negative promotion decision would have occurred regardless of Lebbin's union activities. The promotion process and the dossier build upon itself. Each level of review can look back and reflect upon what has occurred before its review. Moreover, it is remarkable that Lebbin was the only applicant out of 114 who did not receive promotion in 2008. This is even harder to understand when Lebbin's TPRC voted 8 to 0 in favor of promotion, but the Chancellor

denied Lebbin's promotion. At the same time, in another case, the same TPRC voted 2 for; 1 against with 5 abstaining, but the Chancellor approved promotion for that applicant.

The Union has clearly carried its burden of proving that the various reasons articulated by UH for denying Lebbin's promotion are a pretext for the real reason – her union activity which displeased Mochida, Anderson and Chantiny.

PARTIAL AWARD

The Arbitrator hereby enters the following partial award:

1. Mochida's Assessment and Recommendation shall be removed from Lebbin's dossier. Jt. Ex. 1 at 6.1 – 6.4;
2. Chancellor Hinshaw's Recommendation, together with her memoranda of May 26, 2009 and August 10, 2009, shall all be removed from Lebbin's dossier. Jt. Ex. 1 at 9.1;
3. The PRP Recommendation shall be removed from Lebbin's dossier. Jt. 1 at PRP tab;
4. Lebbin's dossier shall be forwarded to the UH Board of Regents;
5. The Arbitrator lacks the authority to issue a cease and desist order or an order requiring a posting;
6. The parties shall return to the Arbitrator to discuss what additional remedies, if any, might be appropriate after the UH Board of Regents has addressed the issue of Lebbin's promotion

7. The Arbitrator retains jurisdiction to address any and all issues regarding additional remedies and to address any issues that might arise regarding the Board of Regents.

DATED: Honolulu, Hawaii 1-12-11

A handwritten signature in cursive script, reading "Victoria S. Marks".

Judge Victoria S. Marks (ret.)
Arbitrator

University of Hawaii Professional Assembly v. University of Hawaii Board of Regents,
DPR No. 10-0117-A, Arbitrator's Decision and Partial Final Award.