



March 4, 2011

TO: Keith Y. Amemiya, Esq.  
Executive Administrator and  
Secretary of the Board of Regents

FROM: J. N. Musto, Ph.D.  
Executive Director

A handwritten signature in black ink, appearing to read 'J. N. Musto'.

SUBJECT: **UHPA Response to the Proposed Updates of the Board of Regents Policies (BORP)**

Pursuant to your memorandum of February 11<sup>th</sup>, the staff of UHPA has reviewed all of the provisions and chapters included in the transmittal. It appears that the principle being applied to these revisions is to eliminate the operational details from the BORP, delegate authority in such matters to the President, and then convert the substance contained in the BORP to Executive Policies, e.g., job descriptions for faculty. Obviously, this process can involve the intentional and unintentional result of impacting “wages, hours, and terms of employment.”

By way of example, the classification of faculty, which has been deleted from the BORP Chapter 9 and moved to the NEW Executive Policy, does not carry with it the designations of Specialists and Librarians at UH-Hilo that have long existed (see the OHR job codes.) It is unclear if this just reflects a deliberate change in policy or simply the failure of the NEW Executive Policy to pick up these classifications. These classifications were present under the BORP “...for all faculty at the University of Hawaii Manoa, University of Hawaii at Hilo...” etcetera.

The current collective bargaining agreement (CBA) between UHPA and the Board of Regents (BOR) contains many references to the existing BORP. The proposed amendments will eliminate many of these BORP references to existing rights that are tied to the CBA. However, the details contained in the BORP that pertain to wages, hours, and working conditions are maintained by Article III, Section A.1. Thus, all rights existing in the BORP at the execution of the

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CBA are preserved by agreement for the term expiring on June 30, 2015. The UHPA will continue to cite BORP rights that existed as of the execution of the CBA.

Any attempt to implement changes to the maintained wages, hours, and working conditions will be a breach of the CBA. Thus, the existing rights under the CBA will not be modified. It will be necessary for the parties to archive the entire BORP existing at the time the CBA was executed in order to preserve the rights. Shifting away from the BORP to Executive Policies changes the meaning of Article III, Section A., and the meaning of the maintenance of rights and benefits under the CBA. This is something that the parties did not contemplate at the time of the negotiations of the contract. At the option of the parties, transitional language may be negotiated to preserve the existing rights. The language in Article III, Section A.2 is an example of language to preserve the rights in an outdated document.

It is not known what action the President will take with respect to the delegated authority. The operational details may be eliminated in toto or the President may alter the details. It is clear that Article III preserves the existing rights. Further, Article XXVIII provides that the existing rights prevail over any conflicting rules, regulations, and policies established by the University, whether in the BORP or the NEW Executive Policies.

In future negotiations, the UHPA may elect to move existing rights into the CBA such as the selection of academic chairs in Article XXIII, to assure that the employment conditions existing at the time of the agreement do not have to be fought over as the result of future changes to the BORP or through the delegation of the subject matter to other policies or procedures.

The proposed amendments to the BORP eliminate many details and provide very few limits to what the President may establish. The amendments consistently establish that compensation must be in accord with existing CBA. However, any new policies established by the President that affect wages, hours, and working conditions under HRS Chapter 89 are negotiable. A refusal by the President to bargain negotiable rights is a prohibited practice and is enforceable by the HLRB.

HRS Chapter 89 not only establishes an obligation to negotiate, but also a right to consultation by the exclusive representative, i.e., UHPA in matters concerning Bargaining Unit 7. Therefore, we suggest that since the BOR is undergoing these major revisions of the BORP it would be useful to amend



Chapter 9-3 of the BORP to add a new subsection c. UHPA would propose the following, with proposed deletions struck out and the new material underlined.

*BORP Section 9-3 Collective Bargaining.*

*The University of Hawai'i shall negotiate and consult with the exclusive employee representative and administer the collective bargaining agreement in accordance with Chapter 89, Collective Bargaining in Public Employment, Hawai'i Revised Statutes, as amended.*

*a. Personnel in Bargaining Units. Wages, hours, and other terms and conditions of employment shall be subject to the provisions of negotiated agreements listed below between the Exclusive Representative and the Employer.*

*(1) Agreement between the University of Hawai'i and the exclusive representative for the faculty of the University of Hawai'i (Bargaining Unit 7).*

*(2) Agreement between the University of Hawai'i and the exclusive representative for the personnel of the University other than faculty (APT—Bargaining Unit 8).*

*(3) Agreements for the respective bargaining units for civil service personnel shall be as negotiated by the State of Hawai'i and the exclusive representative for each bargaining unit.*

*b. Personnel not in Bargaining Units. Wages, hours, and other terms and conditions of employment for all personnel excluded from a bargaining unit shall be provided by law or action of the Board whichever is applicable. (Oct. 20, 1978)*

*c. Consultation between the Employer and the Exclusive Representatives, pursuant to Section 89-9(c), Hawai'i Revised Statutes, as amended, shall be conducted by the President, or the President's designee, at the UH System level. Section 89-9(c) consultation will not be delegated to the Chancellors or the campuses, although the President or designee may include knowledgeable persons from affected campuses in the consultation. The President shall create policy requiring campuses to notify the President when consultable issues arise.*



In light of the new authority being transferred to the President with respect to provisions of Chapter 89, we would further suggest that a NEW Executive Policy be issued by the President covering employment relations in the UH System. UHPA proposes the following language.

*All Chancellors and Deans shall refer all matters potentially involving statutory consultation with one or more unions to the President. The President or the President's designee shall determine if the matter is consultable and, if so, manage the consultation. The matter or matters shall be referred to the President sufficiently in time that meaningful consultation between the University as Employer and the union as Exclusive Representative can take place before the University, the Chancellor, or the Dean, or anyone responsible to them, attempts implementation of the rule, policy, or change in question.*

*The University's duty to consult with Exclusive Representatives (unions) of UH employees is established by § 89-9 (c), H.R.S. The pertinent Hawai'i statutory language provides:*

*Except as otherwise provided in this chapter, **all matters affecting employee relations**, including those that are, or may be, the subject of a rule adopted by the employer or any director, **shall be subject to consultation with the exclusive representatives** of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and **consider their input**, along with the input of other affected parties, **prior to effecting changes** in any **major policy affecting employee relations**. (Emphasis added)*

*The University's duty to consult with its unions is important, mandatory, and enforceable before the Hawaii Labor Relations Board. Failure to properly consult may subject the University to a prohibited practice charge by the union, brought under § 89-9(c) and §89-13.*

*The duty to consult is not satisfied by the University's consultation with employees. For example, traditional academic consultation to develop collegial consensus with the faculty is laudable, but insufficient under the law. The statutory duty to consult requires the University, as a public employer, to consult with the unions of affected employees.*

*The duty to consult requires that the employer initiate consultation. It is not incumbent on the union to seek consultation.*





*The University must provide notice to the union of proposed personnel practices and policies of a substantial and critical nature, other than those requiring negotiations, in reasonable completeness and detail, requesting the opinion, advice or input of the union thereto. The University must listen to the views of the union and deliberate together thereon, without the requirement of either side to concede or agree on any differences.*

*The duty to consult and the duty to bargain are mutually exclusive. A topic that can or should be in a traditional collective bargaining agreement should be treated under the duty to bargain. The most obvious examples of the duty to bargain are matters of wages, hours, other terms and conditions of employment, and matters of grievances. Matters requiring consultation are all other matters affecting employee relations, even if they involve management rights and even if the University has the absolute right to ultimately impose its rule or policy preference on its employees.*

*As a rule of thumb, Chancellors, Deans, and their subordinates, should refer to the President for consultation any rule, policy, or action involving more than a few employees at a time. Classic examples clearly requiring consultation are the reorganization of academic departments or entities, the movement of work locations, the reassignment of work from one category of employee to another, the closure of buildings, or the issuance of general procedural rules applicable to more than a few employees.*

*Where the President or designee determines that the matter is not subject to the duty of consultation, the matter will be referred back to its source.*

*The processing of individual grievances or class grievances is subject to the collective bargaining agreement and is not subject to the duty to consult.*

### **General Comments on the Proposed Revisions**

*(Note: throughout the document there should be consistency in the use of Board of Regents, i.e., Board or Regents, and University of Hawai'i, i.e., University or UH.)*

### **BOR By-laws**

- Article I.—noted that General Counsel is not “university” counsel. Does that imply a substantive change in duties, reporting, and accountability, principal represented? (CBA Article III E, states that the University General Counsel provides representation to Bargaining Unit 7 members.)



- Article II, 1. b., not clear as to meaning; what does deletion of unilaterally mean?
- And/or is an improper usage, it should just be “or”.
- D.2. (3)—good addition to add termination of programs to the charge.
- Committee on Long-Range Planning—if you’re going to change language then attempt to define what “fiscal capabilities of the State” actually means.
- Article VII: Legal Counsel C.—how can there be a conflict? A conflict with whom? (p. 12) This raises a serious policy issue on the use of legal services from outside sources, competing attorneys representing various branches of the administration, etc. Who is given the responsibility of enforcing BORP when it comes to violations committed by the administration? Does the administration have the right to secure independent counsel at the institution’s expense in such cases?
- See p. 13 for continuing reference to “university counsel” under C. 3., and on p. 14 D., “University’s” remains. In some cases, the BOR may have retained outside counsel that is representing the BOR in matters of conflict of interest, i.e., where the General Counsel may be involved.

### **Chapter 1: General Provisions**

- Definition of Vice Presidents and Chancellors deleted but titles is used in the body of the Chapter, p. 1-2.(c)
- On p. 1-5, rather than “sunshine laws” there should be a specific reference to HRS
- Section 1-5 Non-Discrimination should include all other topics in Article II of the CBA, e.g., lawful political activity. We approve the additional of other protected classes that should also then be added to the CBA.
- Campus entities are not defined but referenced on p. 1-7; Maui is not listed separately, although it is listed in Chapter III as a community college with the name Maui College. What is in a name?



- On p.1-8 “applicable University and /or Board policies” what is a University policy and how is it different from a Board policies? Does his limit scope of the academic topics that can be reviewed by such bodies?

### **Chapter 2: Administration**

- See p. 2-1 Officers.
- Wasn't the VP for Administration eliminated?
- Who appoints the VP for Legal Affairs? Why is term “university general counsel” now used?
- What does the title “provost” imply in terms of line and staff authority?
- The other “chancellors” at the community colleges are not defined as officers; therefore, the term has a different meaning within the internal structure. The term Chancellor remains undefined. (The BOR should reconsider how the community college system was changed under the direction of former President Dobelle, and return to a unified system of campuses under the direction of one Chancellor.)
- Delegation of authority from the BOR to President to “others” unnamed. You can delegate authority but you cannot delegate responsibility. That should be clear in the amendment. ( p. 2-3)
- There is no need to continue in BORP policy any requirement for self-assessment.

### **Chapter 3: Organizational Units**

- Section 3-3: “The President shall promulgate policies and procedures regarding the maintenance and changes to the organization and functions of the University units.” Represents an unprecedented change in the authority of the BOR in relationship to the President; giving the President the unilateral right to change the basic nature of the institution. This was not even noted in the Power Point summary.



#### **Chapter 4: Mission and Planning**

- P. 4-2, why doesn't the description of missions include the same listing of degrees at UHH with those listed under UHM? It assumes that UHH will offer not just the Master's degree but also the Ph.D.
- 4-1 C. (1) (d) describing community college curriculum is duplicated in the section that follows under the CC system. There is no mention of baccalaureate degrees despite Maui College being listed as under the community colleges.
- Not consistent in the use of the term "University" and "University of Hawaii", or "University of Hawaii System" in some cases deleting the last phrase "of Hawaii" from existing text while keeping in other places.
- On p. 4-5, Section 4-3 does not acknowledge addition of baccalaureate degrees being offered through the community colleges in the academic plans.

#### **Chapter 5: Academic Affairs**

- Again, the style use of the "/" is often inappropriate.
- What does "credit-bearing" mean? This should refer to instructional programs granting Student Credit Hours upon successful completion of the course that may lead to a degree.
- Section 5-1 a. (1) (b) and/or should be simply "or" but the sentence doesn't make sense.
- On p. 5-3, e. (1) we find the first mention of "student learning outcomes" in the BORP. The term is not operationally defined and it has the potential of significantly changing the conditions of employment.
- Termination of Programs, p. 5-4, does not consider the Maui College 4-year degrees in reference to stopping out programs since it is listed as community college, not a four-year institution.
- Why limit the number of awards a person can receive for teaching excellence, see p. 5-5, Section 5-2 a. (1)?





- Since the “chancellors” control the campuses, the removal of the reference to “faculty” from the Selection process section, p. 5-5, could lead to a selection procedure that does not include peers.
- The administrative head of each community college campus is functionally a provost not a chancellor, despite the use of the term. See definition in Chapter 2. This continued mixed use creates problems in the organizational structure.
- In Section 5-5 Academic Calendar, p. 5-7, the semester should be defined in terms of the number of weeks it covers. The other language is subject to interpretation and possible misuse, which could have a substantial impact on the terms and conditions of employment.
- What is the difference between a center and an institute, see p. 5-9?
- On p. 5-10, UHH will be offering the Ph.D., not just graduate degrees.
- Section 5-10, p. 5-14, Distance Learning
  - Provisions are present in the CBA dealing with distributive education which includes distance learning.
  - Distance Learning is no longer in the domain of Outreach, but integrated into programs.
  - Why has such a large section in the BORP focused on one curricular delivery mechanism, when the point of the revisions was to move away from operational policies?
- In section 5-11, each campus admission ceiling is set by the BOR, but the Power Point refers to 35% ceiling for non-residents at baccalaureate granting institutions.
- On p. 5-25, the Classified Research policy language moved to Chapter 12 and substantially reduced in description and scope. What are the substantive implications?
- Patent and Copyright Policy is the basis for the CBA provisions; Article XI references this language. Deleting the language impacts the CBA.



- Section 5-10, RCUH, is moved to Chapter 12 with substantive changes that could impact bargaining unit work.
- Section 5-18, p. 5-32, Implementation of Policy; refer to statutory responsibility to formal consultation with the exclusive representatives of the faculty and staff as set forth in the beginning of this memorandum.

### **Chapter 6: Financial Assistance and Fees**

- On p. 6-2, c. (3), what does the qualifier, “regular” mean to credit courses? The BOR sets tuition for all courses that grant student credit hours.
- Exemption, p. 6-19, from tuition needs referral to CBA, Article III C. and D.
- P. 6-19, the qualification that the appointment must exceed 3 months for tuition exemption is not required in the CBA.

### **Chapter 7 : Student Affairs**

- No comment.

### **Chapter 8: Business and Finance**

- On p. 8-13, “either the” under (c) is unnecessary; perfectly good as written.
- On p. 8-30, Fund raising, transparency in reporting of donors should be included.

### **Chapter 9: Personnel**

- The proposed amendments will eliminate all amendment history. This elimination has a minor impact on Article III, Section A.1 of the CBA concerning which rights are in existence at the time the CBA was executed. The BORP existing at the execution of the CBA will need to be archived.
- 9-1 (3) (a), p. 9-3, is a “zipper clause” not present in the CBA since past practice would have determined any change in compensation for department chairs.



- All department chair job descriptions and duties are deleted, they now become subject to bargaining. The NEW Executive Policy incorporates some provisions, but changes others.
- Credit hours relative to lecturers, p. 9-6 threshold for half-time status was in the policy.
- BORP 9-2 details concerning the Classification Plans and Compensation Schedules are eliminated and delegated to the President. See changes beginning at p. 9-11.
- BORP 9-2 details concerning the high demand disciplines are eliminated and delegated to the President. See changes beginning at p. 9-49.
- On p. 9-73, deletion of "partisan" is a substantive change since county council and mayoral elections are non-partisan. This does impact the rights of faculty under the CBA.
- Section 9-7, Outside Employment, needs to be reviewed in the context of the language of the CBA.
- Section 9-16 (old) now 9-14, a. (4) should be amended to reflect the agreement reached between UHPA and the BOR that established the standard teaching load for the Community Colleges at 27 SCH rather than 30 SCH per academic year.
- p. 9-126, 1. c. delegates the deleted Incentive Early Retirement (IER). Does this policy continue or was the BORP repealed? Is this promulgated in the NEW Executive Policy?
- Under delegation of authority, on p. 126, the "2 in 7 rule delegation" referenced. There is no such restriction in the CBA as it applies to the evaluation of requests for either paid or unpaid leaves of absence, and this qualification remains in conflict with the CBA.

### **Chapter 10: Land and Physical facilities**

- No comment.



### **Chapter 11: Miscellaneous**

- Section 11-8, p. 11-3, Reports to Legislature, should fall under duties of the President, section 2-2.

### **Chapter 12 (new): Research**

- Through the deletion in Section 12-2 (c) there is a major change to the definition and restrictions on classified research.
- Security clearances imply that classified research is being conducted.
- Section 12-7, RCUH, (b) deleted second section substantially changes the limitation on service orders to RCUH, so that any work could be transferred which has an impact on all UH bargaining units.
- Who has the right to make the service order to RCUH?
- Why delete the reporting to the BOR in Section 12-7(e)?

### **Executive Policy**

- The copy we received was not complete, so it is unclear what the full language of the NEW Executive Policy will include.

Also included in the documents transmitted to UHPA was an Administrative Policy, A-3.101, noted as a draft—old language?

CC: Duane Stevens, UHPA President  
M.R.C. Greenwood, UH President  
Linda Johnsrud, UH Vice President for Academic Affairs