

BEFORE ARBITRATOR FRANK YAP, JR.

STATE OF HAWAII

In the Matter of the Arbitration Between)
) Grievance of Monique Mironesco, Ph.D.
UNIVERSITY OF HAWAII)
PROFESSIONAL ASSEMBLY)
)
Union) ARBITRATOR’S DECISION AND
) AWARD
)
and) Appendix A, B
)
BOARD OF REGENTS OF THE)
UNIVERSITY OF HAWAII, State of Hawaii)
)
)
Employer)
)
)
_____)

ARBITRATOR’S DECISION AND AWARD

I. INTRODUCTION

This matter is before the Arbitrator on a grievance filed by the University of Hawaii Professional Assembly (hereinafter “Union” or “UHPA”), on behalf of its member, Monique Mironesco Ph.D. (hereinafter “Grievant”) against the Board of Regents, University of Hawaii, State of Hawaii (hereinafter “Employer”).

This grievance involves Grievant’s employment contract termination as an associate professor from the temporary position to which she was appointed at the University of Hawaii’s West Oahu campus (hereinafter “UHWO”).

A four day arbitration hearing was conducted – on August 21 through August 23, and on October 22, 2014 in Honolulu. Wade C. Zukeran, Esq. represented the Union and Grievant; Robert S. Katz, Esq. and Kristi K. O’Heron, Esq. represented Employer. Also present during each day of the hearing were Eun S. Ahn, the Employer’s Representative, Misty Carmichael, the Union’s representative and Grievant.

The record of proceedings was preserved by stenographic transcript. The parties were afforded a full opportunity to submit evidence, to present opening statements, to examine and

cross-examine the witnesses, to present rebuttal evidence, and by written post-hearing memoranda, to present argument on the issues. Counsel fully and fairly represented their respective clients, and their respective positions were appropriately presented at the arbitration hearing and in their simultaneous Post Hearing memoranda submitted on December 12, 2014.

The Union's witnesses were Joseph Mobley, Ph.D., Gene Awakuni, Ph.D., Louis Herman, Ph.D., Linda Johnsrud, Ph.D., J.N. Musto, Ph.D., Neva Jacquelyn Kilpatrick, Ph.D., and Grievant. Dr. Mobley is a former Vice-Chancellor for Academic Affairs at UHWO; Dr. Awakuni is the former Chancellor at UHWO; Dr. Herman is Grievant's colleague in the Political Science concentration at UHWO; Dr. Johnsrud served as Vice-Chancellor for Academic Affairs at UHWO and as Executive Vice-President for Academic Affairs and Provost at the University of Hawaii-Manoa; Dr. Musto is the Union's Executive Director and chief Contract negotiator, and Dr. Kilpatrick is a former Vice-Chancellor for Academic Affairs at the UHWO. Grievant also testified as a rebuttal witness.

The Employer identified Drs. Mobley, Awakuni, Johnsrud, Musto, and Grievant as witnesses testifying on its behalf, as well as Edward Yuen, Joyce Chinen, Ph.D., Linda Randall, Ph.D. and Eun Ahn, Ph.D. Mr. Yuen was formerly Director of Human Relations at the UH-Manoa and was the University's Contract negotiations chief spokesman for the 2003-2005 Collective Bargaining Agreement, as well as for prior Agreements; Dr. Chinen served as chairperson of the UHWO's Division of Social Sciences in 2013; Dr. Randall is the Vice-Chancellor for Academic Affairs at UHWO, and Dr. Ahn is the interim Associate Vice-Chancellor for Academic Affairs at UHWO. Dr. Ahn also testified as a rebuttal witness.

Prior to Day 1 of the hearing, Employer challenged the arbitrability of two Union issues – contending 1) that Grievant's employment termination effective July 31, 2014 is not arbitrable because there was no allegation contained in the Step 1 grievance document specifying that Grievant's termination violated Article XIII Section C. of the Collective Bargaining Agreement ("CBA"); and 2) that Grievant's claim that Employer is obligated to appoint her to the newly created tenure-track permanent position based upon alleged oral promises made to her by former UHWO officials is not arbitrable because such alleged oral promises do not involve the violation of any provision of the CBA. On July 30, 2014 the parties presented oral argument. Dr. Musto was present to answer questions about the grievance. Employer's arbitrability challenge was

DENIED based upon the Step 1 and Step 2 grievance documents the Union provided the Arbitrator and Employer's counsel in attachments to an email it sent on July 11, 2014. A reading of the Step 1 and Step 2 decisions makes it clear that the decision-makers at each level were not misled by what Grievant alleged as a violation of the CBA, even though Article XIII C was not specifically identified in the Step 1 grievance document.

In her Step 2 decision, the UH-Manoa interim Vice President for Academic Affairs stated the following, in that part of her decision labelled "Grievance Background":

" 1. Step 1 Grievance.

The Grievant initially filed a Step 1 grievance, dated November 12, 2013, with Chancellor Rockne Frietas challenging the [UHWO's] decision to terminate her temporary appointment . . . and to engage in a national search for a tenured track position in Political Science, rather than converting her temporary appointment to probationary status, without recruitment, to a tenure track position."

That grievance background summary is consistent with the requested remedy articulated in the two page Grievance document drafted by the UHPA's Executive Director on Grievant's behalf:

"Requested Remedy:

1. That the UHWO administration reconsiders its prior decision and convert [Grievant's] position in political science to tenure track.
2. That the letter sent to [Grievant], dated September 26, 2013, terminating her Limited Term Contract be rescinded pending her appointment to a tenure track position."

Grievant's allegation that Employer is obligated to appoint her to a tenure-track permanent position premised upon alleged oral promises was considered arbitrable at this early juncture because the Arbitrator was unclear whether the Union is contending the alleged promises are contrary to a particular provision of the CBA, or whether the alleged promises are being raised to support a yet-to-be-articulated argument that the CBA was breached.

Prior to the hearing, Employer submitted Exhibits A through DD. The Union submitted Exhibits 1 through 15. The Parties also submitted Joint Exhibits 1 through 11, consisting *inter alia*, of the Step 1 and Step 2 grievance documents and their attachments, the negotiation proposals, counter-proposals and approved proposal pertaining to Article XIII of the 2003-2005 Collective Bargaining Agreement, and the UHWO Academic Plan for academic years 2012-2016. During the course of the hearing the Union submitted exhibits 16 through 25. The Union objected to Employer's exhibit DD on the basis it was not the search committee's final report. Mr. Zukeran represented that Union exhibit 15 was the search committee's final report.

Employer had no objections to Union's exhibits 1 through 18 and 22 through 25, but objected exhibits 19 through 21 essentially on grounds of relevance. Over Employer's objections, Union's exhibits 19 through 21 were admitted into the Record, as were Union's Exhibits 1 through 18 and 22 through 25, Employer's Exhibits A through CC, and all Joint Exhibits.

II. ISSUES

In their Post Hearing memoranda, the parties identified the grievance issues. The Union framed the issues as:

1. Did the Employer breach Article II of the Agreement by discriminating against the Grievant for the exercise of her contractual rights? If so, what should be the remedy?
2. Did the Employer breach Article XIII, Section B of the Agreement by failing to convert Grievant to a tenure track position? If so, what should be the remedy?
3. Did the Employer breach Article XIII, Section B of the Agreement for failure to act in good faith and/or the "Rule of Reasonableness", by failing to convert Grievant to a tenure track position based on assurances made by the UHWO administration? If so, what should be the remedy?
4. Did the Employer breach Article XIII, Section C of the Agreement by improperly terminating Grievant's limited term contract? If so, what should be the remedy?

Employer framed the issues as:

1. Did UHWO violate Articles II and XIII B of the 2009-2015 Collective Bargaining Agreement ("CBA") when it converted the Grievant's temporary political science position to a tenure-track political science position. elected to conduct a national search to fill the new position instead of appointing the Grievant to it, and by ultimately selecting the candidate ranked highest by the neutral faculty search committee for the tenure-track position?
2. Did the Employer violate Article XIII C when it terminated the Grievant's employment because her temporary position and its funding would cease to exist upon conversion of the Grievant's temporary political science position to a tenure-track political science position?

The remedies articulated by Union, makes clear what it seeks: (1) Order the Board of Regents to place Grievant in a tenure-track position; (2) If Remedy #1 is not granted, then to order the Board of Regents to rescind the UHWO's administration's letter dated September 26, 2013 letter informing Grievant that her limited term contract would be terminated on July 31, 2014; and (3) Order the Board of Regents to refrain from retaliating against Grievant in any future personnel actions for her filing of this grievance.

Essentially, the Union is contending that when the criteria for conversion specified in Article XIII Section B. is met and the temporary position is to be converted, Article XIII requires the conversion of both the position and the person – the position from temporary (non-tenure

track) to permanent (tenure-track), and the faculty member who was in the temporary position, by placement (i.e. “appointment”) into the permanent position with the ability to earn tenure.

III. APPLICABLE COLLECTIVE BARGAINING AGREEMENT PROVISIONS

The provisions of the 2009-2015 Collective Bargaining Agreement relevant to this proceeding are identified in the attached Appendix A.

IV. BACKGROUND

The University of Hawaii-West Oahu officially opened in January 1976 as the West Oahu College. Its campus was located adjacent to the Leeward Community College in Pearl City, Oahu. The school originally offered upper division courses, until the Fall of 2007, when it began offering courses across all four years of studies. In August 2012, UHWO moved to its new campus in Kapolei, Oahu. In May 2013, Rockne Freitas, Ph.D. became its Chancellor.

At the time of her employment termination, Grievant was classified as an associate professor, employed under a three-year contract as a full-time faculty member in a temporary instructional position at the UHWO.

Grievant was first employed at the West Oahu campus in academic year 2002 in the Division of Social Sciences (“Division”), as a lecturer, then appointed to the position of Instructor, teaching courses in political science. Beginning academic year 2007, she was promoted to Assistant Professor, and beginning academic year 2012, she was promoted to Associate Professor. Since the inception of her employment, Grievant was in “temporary appointment”^{1/} status, and the political science teaching position she held was considered a “non-tenured track” position. As a professor, Grievant’s employment was pursuant to a 3-year “limited term contract”, a term defined by Article XIII Section C. of the Agreement.

On July 1, 2013, Grievant was informed by the Dr. Chinen, the Division’s chairperson, that the Division was allocated two (2) State General Funded permanent (tenure-track) positions for the academic year 2014-2015, and that Dr. Chinen had recommended to the UHWO’s Vice-Chancellor for Academic Affairs, that one position be designated to the Anthropology discipline and the other position be designated to the Economics discipline. Grievant did not agree with such designations because she believed it was contrary to Article XIII B. Grievant chose to seek

^{1/} Article XII A.3. defines the term “temporary appointments” to mean “Faculty Members on Limited Term Contracts, Visiting Faculty, and lecturers who are not eligible for tenure”.

a resolution outside of the formal grievance process, communicating her disagreement in a written memorandum dated July 13, addressed to the Vice-Chancellor for Academic Affairs. On August 8, Grievant and UHPA's Executive Director met informally with the Vice-Chancellor and Interim Associate Vice-Chancellor for Academic Affairs to address Grievant's concerns. The outcome of the meeting was that the matter would first be addressed by the Division. On September 6, a Division meeting was held to discuss a number of matters, including the allocation of the two permanent positions to the Division, and Grievant's contention that one permanent position be used to convert the temporary Political Science position to which she appointed, to a permanent position. The Union's Executive Director attended that meeting and presented reasons why Grievant's temporary position should be converted and why Grievant should be appointed to that permanent position^{2/}.

In an email dated September 12, the Division's chairperson reported to the Division's faculty, that she was just contacted by the Interim Associate Vice-Chancellor who informed her that the Anthropology discipline would be allocated a permanent position, and that the Political Science discipline would be allocated the other permanent position. She further reported that allocating a permanent position to the Political Science discipline, however, did not mean Grievant, as the incumbent, would be directly converted to that permanent position. Rather, a national search to fill that permanent position would be undertaken, and Grievant would need to apply for the position. In an email dated September 12, the Interim Associate Vice-Chancellor informed Grievant that conversion of the political science position from a temporary position to a permanent position, meant that Grievant's employment would be terminated effective July 31, 2014.

Thus began a series of e-mail correspondence from September 12 through 16 between Grievant, her Union representative, and UHWO administration regarding the conversion of the temporary political science position to a permanent position. By email dated September 17 sent to both Grievant and the professor who was appointed to a temporary anthropology position, the Interim Associate Vice-Chancellor explained that changing the status of both positions from temporary to permanent, would have the effect of terminating their Limited Term Contracts and their employment with UHWO effective July 31, 2014 (the last day of the 2013 academic year),

^{2/} Appointing Grievant to the permanent position (*i.e.* converting her to probationary status) would place her in a tenure-track status, allowing her to acquire academic tenure should she successfully complete the requirements for tenure.

but that both of them could apply for the permanent Political Science and Anthropology positions and be included as a candidate when a national search to fill the position is conducted.

Grievant and the Union disagreed with the UHWO administration's decision that Grievant needed to apply for the to-be-converted position, contending that Article XIII mandated her appointment to the permanent position, once the position is converted. Further informal attempts to resolve the matter were unsuccessful. By letter dated September 26, 2013, Grievant was officially notified her employment under her temporary appointment limited term contract is being terminated effective July 31, 2014. Additional attempts made to informally resolve Grievant's employment termination and to continue her UHWO employment were unsuccessful. On November 5, 2013, the Notice of a permanent political science position (Position # 0076275) was posted. (Joint Exhibit 5 at p. 42)

On November 12, 2013, the Union filed a Step 1 grievance, together with supporting documentation. The remedies sought were (1) to convert Grievant's political science position to a tenure-track, (2) to rescind the September 26 letter terminating her employment pending her appointment to a tenure-track position, and (3) to refrain from retaliating against Grievant for her having filed the grievance.

On December 6, 2013, a Step 1 meeting was held involving Grievant, her union representative and two representatives of the UHWO Chancellor. By letter dated December 19, 2013, the Chancellor denied the grievance.

On December 20, 2013, the Union filed a Step 2 grievance to the Interim President of the University of Hawaii at Manoa, together with supporting documentation. The remedies requested were identical to those requested in the Step 1 grievance.

By letter dated January 6, 2014, Interim Vice-President for Academic Affairs, Joanne Itano, Ph.D. notified the Union's Executive Director that she had been appointed as the interim President's designee, and identified alternative dates for a Step 2 meeting. On January 28, a Step 2 meeting was held, but was continued to a later date in order to discuss possible resolution. On February 21, the parties mutually agreed to close the Step 2 meeting since a mutually agreeable resolution could not be reached.

By letter dated March 13, 2014, Dr. Itano denied the grievance in a 7 page letter, articulating the reasons for her decision.

By letter dated April 10, 2014, the Union demanded arbitration.

By letter dated May 30, 2014, the undersigned Arbitrator was notified he was mutually selected by the parties to arbitrate this matter. The Arbitrator agreed to serve.

V. CONTENTIONS OF THE PARTIES

A. The Union's Contentions

The Union contends that Article XIII addresses both the faculty member and the position, that Employer terminated Grievant for exercising her contractual rights, that equity requires converting Grievant to a tenure eligible position, and that Employer wrongfully terminated Grievant's three year 'rolling contract'. The Union further contends that all four of the substantive issues it has raised are arbitrable.

In opposing Employer's contention the Arbitrator lacks jurisdiction to decide whether Article XIII Section C was violated because the Step 1 grievance did not specifically identify a violation of Section C in the grievance documents, the Union argues since the entire subject of Section C pertains to limited term contracts, the claim that Grievant's employment contract was wrongfully terminated is not separate from the Agreement, and further Employer presented no evidence that either the Step 1 or Step 2 decision makers were misled by this lack of specific identification. In opposing Employer's contention the Arbitrator lacks jurisdiction to decide whether Section B was violated based upon alleged assurances or promises of conversion to a tenure eligible position, the Union contends the duty to act in good faith underscores all collective bargaining contracts, and is the basis of its claim that the UHWO did not consider whether those promises were breached, or that Grievant was qualified for the position, before conducting a national search.

In support of its contention that Article XIII addresses both faculty members and their positions, the Union identified the history which led to the creation of the Article, and argued how Article XIII is of benefit to both Employer and faculty members, why Yuen's July 29, 2003 Memorandum should be given no weight, why individual qualities of the not-tenure-eligible faculty member are key to determining whether that faculty member should become tenure-eligible, and that Grievant is a high performing and well-qualified for a tenure-track position but Employer provided no rationale why Grievant was not converted.

In support of its contention that equity requires converting Grievant, and by no doing so, Employer did not act in good faith (Appendix B) – the Union argues that various administrators at the UHWO and UH-Manoa assured Grievant she would be converted to a tenure eligible

position once one became available, that Grievant relied upon those repeated assurances, that it is fundamentally unfair not to convert Grievant's status, and that Employer had been made aware of the UHWO assurances but ignored that information.

In support of its contention that Employer violated Article II for Grievant's assertion of her contract right to have her temporary position converted and to be converted to tenure eligible, the Union argues that the UHWO initially did not want to convert the political science position, that when the administration was made aware of Grievant's desire, it attempted to coerce Grievant to change her stance, and when it realized that it could not "target" Grievant for termination without affecting other existing Division temporary positions, it decided to convert Dr. Turner's cultural anthropology temporary position, sacrifice the forensic anthropology program, and terminate Turner's employment – "to get to the Grievant". The Union asserts this retaliation against Grievant for raising a legitimate contract matter, is the breach of Article II.

In support of its contention that Employer violated Section C by wrongfully terminating Grievant's three year "rolling contract", the Union argues use of the four-month contract termination notice provision is improper because the basis for using that provision is the loss of external funding, and there is no loss of such funding since Grievant's position is a State general funded position. The Union further argues that UHWO did not terminate any of the other employment contracts of faculty members employed as lecturers in temporary positions, and rehired the same faculty members into the same positions after their limited term contracts expired. In sum, the Union asserts these are "proof of a targeted termination of the Grievant under the guise of the 'four-month' cancellation notice and a demonstration of a lack of good faith". And retaliation.

B. The Employer's Contentions

Employer contends that Article XIII Section B of the CBA applies to the conversion of temporary instructional positions, and not to the faculty member occupying that position, that Article XIII Section B does not limit any campus within the University of Hawaii System from conducting a national search to recruit for the converted position, that the UHWO's decision to conduct a national search to fill the converted position was neither performed in bad faith nor in violation of any established past practice, that Grievant's Limited Term Contract was properly terminated pursuant to Article XIII Section C of the CBA, that there is no violation of Article II of the CBA, and that there was no binding promise that UHWO breached.

In support its contention that Article XIII Section B applies to position conversions, Employer argues (a) the text of Article XIII Section B is plain and unambiguous in requiring Employer to make every effort to convert temporary positions to tenure track status, and that the title of Section B does not create an ambiguity in the otherwise unambiguous text of that section, (b) that should the Arbitrator consider Article XIII Section B to be ambiguous, extrinsic evidence confirms that Section B relates solely to the conversion of positions, and (c) construing Section B to pertain to persons in addition to positions, could produce undesired consequences.

In support of its contention that UHWO had the ability to conduct a national search for the converted political science position, Employer argues (a) the Arbitrator lacks jurisdiction to decide whether the UHWO acted in bad faith, (b) there is no evidence that UHWO acted in bad faith, (c) the Arbitrator may not read into Article XIII Section B, a requirement that Employer must forego a national search in favor of appointing the incumbent, and (d) Grievant failed to establish UHWO violated any clear, established past practice.

In support of its contention there was no violation of Article XIII Section B because of alleged assurances or promises Grievant would be granted probationary status when her position was converted, Employer argues (a) the Arbitrator lacks jurisdiction to consider that this claim, (b) because the Collective Bargaining Agreement is an express contract, Grievant cannot prevail under the theory of implied contract, where the notions of promissory estoppel and detrimental reliance apply, or in the alternative (c) Grievant has not proved the basic elements of a promissory estoppel or detrimental reliance claim exist under the facts of her case.

In support of its contention that Grievant's Limited Term Contract was properly terminated, Employer argues (a) it provided Grievant notice of termination within the CBA's mandated period, (b) there is no evidence Grievant's termination was retaliatory, and (c) termination was proper because the temporary position to which Grievant was appointed lost fiscal support and ceased to exist at the end of the academic year.

In support of its contention that UHWO did not violate Article II, Employer argues (a) Grievant did not engage in activity on behalf of the Union, rather she was asserting her rights under the CBA, and (b) Grievant did not sustain her burden to provide evidence of retaliation.

The Union and the Employer contend the burden of proof is upon the other. Employer contends the Union bears the burden of proof because it is contending that Employer violated a

specific provision of the Collective Bargaining Agreement. (ER Br. at 14) The Union contends “this is a termination case made under the guise of Article XIII for the Grievant’s assertion of her collective bargaining rights”, and thus Employer bears the burden of proof. The Union equates this grievance as akin to a ‘relative ability’ case, where Employer must first show that Grievant was not qualified for the permanent position, and then must show an absence of discrimination and arbitrary conduct, and the presence of good faith. (Union Br. at 1, 14)

VI. PRELIMINARY OBSERVATIONS

Because interpretation of Article XIII of the Agreement is central to the resolution of this grievance, and before the summary of testimony is presented, at this juncture the Arbitrator believes it is prudent to identify the terminology he will be using. The terms that follow may already be defined by Employer within its published Administrative Policy or Administrative Procedure documents, or within the 2009-2015 CBA – however unless otherwise noted, the Arbitrator has not been able to locate the definition or has not been shown the definition.

The terms “appointment”, “temporary position”, “permanent position”, “non-tenure-track”, “tenure-track” or a combination of those terms (e.g. ‘temporary non-tenure-track position, permanent-tenure-track position’) have been used in the testimony and in the exhibits. Such terms have been used for descriptive purposes. However, the terms have not been used in a consistent manner, and had caused the Arbitrator initial confusion.

An “appointment” occurs when a person is newly employed in an academic position within the University.

The term “temporary appointments” is defined in Article XII A.3. to mean “Faculty Members on Limited Term Contracts, Visiting Faculty and lecturers who are not eligible for tenure”.

The term “academic tenure” is defined in Article XII A.1. to mean “the right of Faculty Members to permanent or continuous service in the University”. Academic tenure (“tenure”) may be granted by the University President upon Initial Appointment if the faculty member had “previously held tenure at a comparable institution, pursuant to BOR Policy and Executive Policy” (Article XII B), or if the faculty member “holds a tenure track appointment” (Article XII C.1.a.) A tenure-track appointment leads to, but does not ensure the appointed faculty member will obtain tenure. Article XII C.1. provides:

- a. The probationary period begins when the Faculty Member first holds a tenure-track appointment
- b. The probationary period ends by the granting of tenure, the refusal of tenure by the Employer, or the non-renewal of appointment. During this period, probationers do not have a claim to their position and the Employer, through its officers, may exercise its prerogative of non-appointment without a statement of reasons.

The term “probationary period” is defined to mean “the period of assessment of eligible Faculty Members prior to the awarding of tenure”. (Article XII A.2.) The duration of the probationary period is dependent upon the salary classification of the faculty member (Article XII C.2.a.) but in no instance will the probationary period exceed seven (7) years of full-time probationary service. (Article XII C.2.b) The faculty member serving a probationary period in a tenure-track position is entitled to an employment contract. Article XII C.3. states that upon initial appointment, the employment contract shall be for two (2) years. If the faculty member is reappointed, and if the faculty member is at Rank 2 or 3, the contract will be for two years; if Ranked otherwise, the employment contract will be for one (1) year. Thereafter, renewals of the employment contracts are for periods of 12 months.

The phrase “direct conversion of the incumbent” is used in an April 30, 2004 Memorandum issued by the University of Hawaii Vice-President for Academic Affairs. That phrase is in reference to the individual who occupied a temporary position that has been converted to a permanent position and who then occupies the permanent position. Use of the term “direct conversion” or “directly converted” in this Decision will be synonymous with this phrase.

A tenure-track position, for purposes of this Decision, is synonymous with a permanent instructional position. Likewise, the terms “tenure-track” or “tenure” and “permanent position” are synonymous.

A non-tenure-track position, for purposes of this Decision, is synonymous with a temporary instructional position. Likewise, the terms “non-tenure track” or “non-tenure” and “temporary position” are synonymous.

VII. RELEVANT TESTIMONY

A. Joseph Mobley

Dr. Mobley was questioned about his awareness and understanding regarding the conversion of temporary positions to permanent positions, about conversations he had with

Grievant and Dr. Johnsrud about the conversion of the temporary political science position and of the faculty member appointed to that temporary position, about the faculty members who served on the search committee for the political science position, and about the UHWO's 2012-2016 Academic Plan that was being developed in anticipation of the UHWO's relocation to its Kapolei campus.

Dr. Mobley is currently a full professor in the School of Nursing and Dental Hygiene, at the UH-Manoa. (Transcript at page 11) In 1989, he began his association with UHWO as an assistant professor, earning successive promotions ultimately to full professor. In 2005, he was asked to serve as interim Vice-Chancellor for Academic Affairs (VCAA) and continued to served in that capacity for about 18 months, before transferring to the UH-Manoa. In January 2011, he returned to UHWO as interim VCAA for another 18 months until July 2012. During his second tour at UHWO, Dr. Gene Awakuni was the UHWO's Chancellor. (Tr. 12)

Dr. Mobley testified the Academic Plan is a projection of academic programs based upon anticipated student population growth, student needs, desired academic direction, considerations of accreditation, and existing and projected faculty growth. (Tr. 14-17) He testified that during both the Fall and Spring semesters in Academic Year 2011-2012, UHWO requested additional faculty positions but no additional positions were allocated to UHWO either from the University system or directly from the Legislature. (Tr. 19) He testified the Social Science Division is comprised of different specialty concentrations, such as Political Science, Economics, Business, Anthropology, among others. (Tr. 22)

Dr. Mobley testified he had no previous experience with the conversion of a temporary position to a permanent position, was not aware there was even a process, and "I really had no experience with converting an existing faculty member to a tenure-track position. This was the first time." (Tr. 26, 25) He testified he first became aware of the position conversion provision in the Collective Bargaining Agreement when he spoke with Dr. Johnsrud at the May 2011 graduation commencement exercise.^{3/} (Tr. 37, 48) To obtain more information he then spoke with Union associate director James Kardash, stating:

^{3/} Questioned whether Dr. Johnsrud informed him during the conversation that the temporary position Grievant occupied had to be converted, or that if the position was converted, then he was to appoint Grievant to the converted position, Dr. Mobley testified their conversation was "nothing that specific (Tr. 59) however, from their conversation he understood there was an obligation to appoint Grievant to the tenure-track position, when the position was made permanent. (Tr. 62)

“. . . and I think the main focus of that discussion was how binding or how forceful is this language . . . In other words, what would happen if we didn't [comply], for example. I just wanted to know what the parameters were. And he just indicated . . . that management has to make a good faith effort . . . to seek out, to basically create positions that are tenurable, that these could then be converted from non-tenure to tenure track. They're converted – exactly as is stated here, conversion of a temporary appointment to a permanent appointment, but tenurable, which would mean probationary status.” (Tr. 49-50)

Asked whether he understood Mr. Kardash meant the conversion of the temporary position or conversion of the person in the position, Dr. Mobley stated:

“At that time, I was not aware of the dichotomy, so in my mind it was a conversion of a person, but now I'm aware of the dichotomy and I wished I had asked, but I didn't.

Q [by Mr. Katz]: So Mr. Kardash did not specifically tell you whether or not that language referred to the conversion of the position or the conversion of the person?

A: He did not.

Q: And since you never had an occasion to actually do a conversion, you've never actually found out what it specifically refers to, is that correct?

A: True.” [Tr. 50-51]

Dr. Mobley was questioned about any “promise” he may have made to Grievant that if the temporary position she occupied was converted to a permanent position, that she would be directly converted to tenure-track.

“Q [by Mr. Zukeran]: Now did you have any conversation directly with Monique about the intention that West Oahu would convert her from non-tenure track to tenure track?

Mr. KATZ: Wait. Objection. Are we talking about converting her or converting the position she held?

MR. ZUKERAN: I'm talking about converting her.

A: My interpretation what Linda had told me was that it would be converting her and Jim Turner. And, yes, I do recall talking to Monique about it and indicating to her that I would be having conversations with Chancellor Awakuni with that intent in mind.

Q: Did you have any conversation with Chancellor Awakuni on that topic of converting Monique from a non-tenure track position to a tenure-track position?

A: Yes. I believe the next meeting I had with him, we brought up that subject.

Q: And do you remember what was said in that conversation?

A: Well, I remember the gist of it was that he agreed that we should apply, request two position counts in a suite of requests that would be earmarked for that conversion.

Q: And after that conversation with Dr. Awakuni, did you have any communications with Monique about your conversation with the Chancellor?

A: I don't recall specifics, but I'm sure that was a very likely follow-up to that meeting when I would communicate both to Dr. Falgout and Dr. Mironesco and Dr. Turner, that those requests would be made.

Q: As a vice chancellor of academic affairs, was it within your authority to communicate to Monique that her non-tenure track position would be converted to a tenure-track position when the Legislature granted a position?

A: It was certainly my authority to transmit the conversation with the Chancellor. The decisions ultimately were subject to – any decision had to come from him vis-à-vis things of that nature.” [Tr. 39-40]

But on cross-examination he testified:

“Q [by Mr. Katz]: Did you ever tell Dr. Mironesco that you were guaranteeing her that if the position she occupied was converted under the Collective Bargaining Agreement to a permanent position, that she would be guaranteed to be appointed to that position?

A: I don’t think I would ever use the term ‘guarantee’.

Q: In your own mind, was it your understanding that that’s an issue that would have to be addressed if and when a permanent position was authorized by the Legislature?

A: Yeah. In my own mind that if we obtained a position, of the two that we had earmarked for her and Dr. Turner, that basically we would take it from there, and I couldn’t guarantee . . . what would happen next. It was certainly my intent to shepherd it in that direction. . . . If I had anything to say about it.

Q: Sort of like the academic plan, I mean, you may wish this to happen, but there’s no way to guarantee it because you don’t even know whether you were going to be vice chancellor then.

A: That’s true. I could not guarantee beyond my own tenure there.” [Tr. 52-53]

B. Gene Awakuni

Dr. Awakuni testified about the scope of his authority as Chancellor as it pertained to faculty appointments, his understanding of position conversions and of faculty conversions when a temporary position is converted to a permanent position, and his understanding of Grievant’s eligibility for appointment to a tenure-track position.

Dr. Awakuni actively served as UHWO Chancellor from March 1, 2005 until May 2013, retiring from the University system in September 2013. (Tr. 65)

Dr. Awakuni identified the basis of his understanding how a faculty member in a non-tenure-track position could become a tenured-track faculty member.

“Q [by Mr. Zukeran]: . . . while you were chancellor at West Oahu, were you aware that a non-tenure-track faculty could become a tenure-track faculty member?

A: Well, I’ll say it like this. I became aware that that was the case and I don’t . . . recall all of the specifics, but I do recall that President McClain issued a memo to the campus indicating that if there was merit for such a conversion of a position, and if there was a position available, that it could occur.” [Tr. 67]

He testified that if a permanent position became available, any non-tenure-track faculty member could apply for the position and as the Chancellor, he had the authority to decide whether he would appoint that faculty member to that position, or whether a national search would be conducted to select someone for the position. (Tr. 72-73)

Questioned whether Grievant could or should be converted from the non-tenure-track position she occupied to a tenure-track position, he responded in the following fashion:

“Well, I saw no reason that she wouldn’t qualify. She was a faculty member in good standing, she was a contributor to the campus community in her committee work and has done a good job. So I didn’t see any reason why it couldn’t occur.” [Tr. 67]

Questioned about his awareness that Dr. Mobley had conversations with Grievant about converting her to a permanent position once the position became available, Dr. Awakuni responded as follows:

“Well, yes, I know they had conversations because Joe and I . . . we have conversations about how we should proceed with a particular faculty member or a position and how we should go forward with that.” [Tr. 67-68]

Elaborating, he stated:

“. . . we were talking . . . to her about the possibility of a conversion. We had no position, no permanent position count, so it would have been kind of a hypothetical situation to discuss actual movement from a non-tenure to tenure position,” [Tr. 68]

Asked specifically whether he believed Grievant should be directly converted to a tenure-track permanent position when such a position became available, he stated:

“Well . . .there’s a process for determining that, and it wouldn’t be just me – it would be reviewed by several other people – but as I mentioned earlier, I didn’t believe that there was anything in Monique’s record that would indicate that she wouldn’t be qualified to be considered.

So in that regard, there are no guarantees, but as I said, at the time we didn’t have any permanent positions and the permanent positions were hard to come by. As they arose, they would be assigned to the high demand areas – so Political Science was clearly not where most of the majors were ending up, so it would have been difficult for me to predict when a position would be available as assigned by the Legislature, and then when it might go to Political Science.” [Tr. 71-72]

C. Linda Johnsrud

Dr. Johnsrud testified about her conversation with Grievant during the May 2011 graduation exercise and her later communications with Grievant after Grievant was informed she would not be appointed to the converted position, her communications with Chancellor Freitas about appointing Grievant to the converted position, her understanding of Article XIII Section B and the prior instances of conversions of temporary positions to permanent positions, and her awareness of certain University policies concerning how faculty are selected for permanent positions, among other matters.

Dr. Johnsrud currently is employed by the University of Texas System. Her last position in the University of Hawaii System was as Executive Vice-President for Academic Affairs and as Provost at UH-Manoa for academic year 2013-2014. She also served as interim Chancellor at UHWO for an 18 month period beginning in the Spring Semester of one academic year and continuing through the next academic year. Her successor was Dr. Awakuni. (Tr. 75, 79, 80)

Dr. Johnsrud testified she had hired Grievant and at the time of hire, Grievant occupied a non-tenured track position. (Tr. 81). Asked about the conversation she had with Grievant during the May 2011 graduation ceremony, she stated:

“ . . . because the conversation I had with her was that she had been in her position for seven years, and according to the contract, if an individual has occupied a position, a temporary faculty position for ten [sic] years funded by G funds over the time period, the position is supposed to be converted to a tenure-track position. And so she told me at the time that she'd been in the position for that long, but she had talked to Chancellor Awakuni . . . I think Joe Mobley was in this conversation, too. . . .

Anyway, she had been told that West Oahu didn't have a position to convert to a permanent position, and there were actually two people, one was an anthropologist who had been hired at the same time [as she], and so they really needed two positions to convert these two temporaries. And I told Monique at the time, that it wasn't an obligation of West Oahu to provide the position, it was an obligation of Employer, so that we really needed to provide positions or find the positions for West Oahu for them to be able to meet the expectation in the contract that there would be a conversion to tenure track of these two positions.

* * * * *

. . . . It was my perception that that obligation, that it wouldn't be appropriate for a campus to deny that conversion because they didn't have positions. I thought, I believed that we as the System needed to look around and see if we could find a couple of positions as the Employer.”

[Tr. 82, 83]

Dr. Johnsrud was questioned about her second conversation with Grievant in October 2013 and the series of e-mail correspondence that followed. She testified that in the telephone call she had with Grievant, Grievant informed her that Grievant's employment contract was being terminated, and described the events leading to the notice of termination. [Tr. 87] She stated:

“ Monique had to raise the issue because the two positions had gone to . . . the Social Sciences unit, and that they were being . . . put to other uses. . . . and Monique felt that by virtue of the fact that she had to raise the issue, it put her at odds with the faculty who – in those units that thought they were going to get the positions.

And so then the issue apparently arose, and as Monique described it to me, the – I don't know if the faculty were asked to vote as to whether or not there should be a search. . . . Somehow that vote didn't get taken in a group meeting, and at that time Eun Ahn . . . decided to poll the faculty as to whether or not they wanted to do a national search or appoint Monique to the position. And the way Monique described the way he worded it, it suggested she would be tenured in this position, and she felt that the faculty were [sic] given a misrepresentation of what was to happen.

She was not supposed to receive tenure, she was supposed to be appointed to a tenure-track position and allowed to apply then for tenure. And . . . so she felt that . . . the whole thing had gotten garbled and that the faculty had responded in this poll that they

thought there should be a search, and she felt that they said that . . . the choices they were given – tenuring her or a national search – was not accurate, and they apparently voted for the search rather than giving somebody . . . automatic tenure. That should never have been made an option.

Which is . . . if that is what happened, and it certainly was Monique’s understanding of what happened, and I told her at that time that I thought that that process was not appropriate, not fair to her, and that she probably did have a grievance or a reason for a grievance. [Tr. 88-90]

In following up this telephone conversation with Grievant, Dr. Johnsrud described the conversation she had with Chancellor Freitas in her office. (Tr. 94) She stated:

“ . . . I told Dr. Freitas that I had had a conversation with Monique, and that the way she described how [Dr. Ahn] had polled the faculty, I thought that she may have grounds for a grievance. I told him that I had always made it clear that converting the position . . . did not guarantee that the person occupying the position would get it, that a search could always be had, but a search was optional. And I told Rockne that I had told Monique that, and my own recommendation to him was – to give her the opportunity to go up for tenure because . . . I felt at this point that she’d earned the right to go up for tenure.

West Oahu, I also said I knew how many failed searches they’ve had, it’s not always easy to get faculty members to come to West Oahu given the location and the salaries and that sort of thing, and I thought rather than doing a search, you could save the expense and have someone who’s had a strong record at West Oahu, have them go up for tenure.

So that’s the most of what I can remember about the conversation. I remember – Rockne doesn’t say a lot, but I remember him saying that he would go back to campus and see where they stood, and if they needed my help he would let me know.” [Tr. 94-95]

As a follow-up to that meeting with Chancellor Freitas, Dr. Johnsrud sent an email message to Grievant on the same day (Tr. 95) and answered the following questions upon cross-examination:

“Q [By Mr. Katz]: - - I believe you told us that you told Dr. Freitas that it was his decision whether or not to do a search or to appoint Dr. Mironesco to the new position; is that correct?

A: Yes, that’s correct.

Q: And I believe you told him that you had also said the same thing to Dr. Mironesco?

A: Yes. In all my conversations with Monique, I always made it clear that a search was always a possibility, that there was no guarantee.” [Tr. 102-103]

Also on cross-examination, Dr. Johnsrud was asked the following series of questions to which she answered in the affirmative:

- 1) That Article XIII Section B makes it an obligation that the Employer make every effort to convert temporary positions to permanent positions, and that the requirement is one of converting positions, as opposed to persons; (Tr. 98)
- 2) That conversion of a temporary position requires the existence of a permanent position and the money to fund the permanent position; (Tr. 99)
- 3) That the Contract does not state how a converted position is to be filled; (Tr. 101), and

4) That how a converted position is filled – whether by a search process or by direct appointment – is the prerogative of the chancellor at the particular campus where the converted position is located. (Tr. 101)

Dr. Johnsrud was twice questioned about the extent of her knowledge or experience in converting a temporary position to a permanent position.

“Q [By Mr. Katz]: . . . I'm trying to find out if you're aware of any past practice on the part of the University System, whether there were other instances in which temporary, non-tenure-track positions have been converted to permanent positions under Article XIII where the new position was filled either by a search or by appointment.

A. I have knowledge only of some at Manoa and for which a search was conducted. I don't believe I know of any where there was an appointment. [Tr. 101-102]

Q [By Mr. Katz]: . . . Are you aware of any positions that have been converted under Article XIII B?

A: Not specifically. . . . I'm fairly certain there were some at Manoa. . . . I remember hearing about them.” [Tr. 109]

D. Louis Herman

Dr. Herman testified about the scope of the political science program at UHWO since 2004, about seeking conversion of the temporary political science position to a permanent position, about what transpired during the September 6, 2013 Division meeting, about his conversation with Dr. Ahn concerning filling the converted position, about his participation as a member of the search committee, and his recommendation that Grievant teach a political science course during Academic Year 2014-2015, among other matters.

Dr. Herman is a professor of political science and has been employed at UHWO since 1990, making him the senior faculty member in that concentration. (Tr. 116) He testified being the “de facto chair” of that concentration, “making decisions that have to be made about [the] direction of the specialization, concentration, curriculum, planning, assessment – all the administrative duties associated with the concentration”, including the hiring of lecturers and membership on search committees. (Tr. 116-117) He summarized the scope of political science taught at UHWO since 2004, stating:

“We cover the whole discipline of Political Science, which is a very broad discipline and deals essentially with how the various dimensions of [how] . . . social, governmental and economic life fit together, and in a way that allows citizens, individuals, institutions, and leaders to evaluate them. So it's normative, it's big picture, it includes all Social Sciences and the Humanities in sort of providing a big picture understanding of the human foundation, specifically with relation to governance . . . [It includes] American Government's basic. Basic Hawaii course, Hawaii Politics, Political Philosophy, [Women's Studies, Agroecology]. . . . Gender, race, power are crucial categories of analysis in politics.” [Tr. 120-121]

He testified that he was the sole full-time faculty member in that concentration prior to Grievant's employment as a full-time instructor in 2004. (Tr. 121) He worked with Grievant during the period 2004 through July 2014, and considered her performance "exemplary, even outstanding". (Tr. 122)

Questioned about whether there had been discussions about converting the non-tenure track position Grievant occupied to a tenure track position, Dr. Herman testified "it was part of the Division's culture" even before 2013 to convert temporary positions that qualified to permanent positions, and that at various times in the past, requests had been made for G-funded positions. (Tr. 123) Asked about the two G-Funded positions that precipitated the grievance, he stated:

"The issue came up when G-funded positions were given to the Division, offered to the Division for Anthropology and Economics. And there was a general discussion about our understanding that before new positions would be created, the existing temporary positions would be converted to tenure track, and so that was the gist of the discussion.

Q [by Mr. Zukeran]: Did you form an idea of what should be done with these permanent positions?

A: Well, we felt that the priority would be to convert the temporary positions to tenure-track positions, full time tenure-track positions with the individuals in the positions. That was the tacit understanding. It was my tacit understanding.

Q: Okay. And was one of those positions . . . Monique's position in the Political Science?

A: Right, right. Yeah. [Tr. 123-124]

Dr. Herman was asked to provide more detail about the September 6 Division meeting. He first testified the meeting was well-attended, the room was full, although he could not state if all Division faculty members were present at this first Division meeting of the semester. He was questioned what he remembered about the meeting, and stated:

"Well, the crucial issue was point 6.c, in the agenda . . .the G-funded positions. That's mainly what sticks in my mind, and the debate that we had about the two options presented to us, which were confusing . . .

. . . the choice didn't seem . . . to cover all the options, and my understanding of the consensus was that we didn't want to have to make a decision . . . whether to convert the two positions instead of the new positions that are being created, because there was a need for the two new positions as well – Economics and Anthropology – but our understanding was that before new positions would be created, the existing temporary positions would be converted to tenure track with the incumbent. . . .

Q [by Mr. Zukeran]: And the incumbents in those temporary positions were Monique and Jim Turner?

A: And Jim, yeah. That was my sense of the consensus. I mean it was my prior understanding, and there was consensus in the meeting.

Q: And how did you reach your understanding, of the consensus?

A: Well, as I said, it had always been assumed in our previous meetings going back through the years, that any new positions given to the discipline would be used to convert

these two positions because these people, Monique and Jim had been hired and doing a good job, and we obviously wanted them as part of the division.” [Tr. 130-132]

Dr. Herman elaborated on the “debate”:

“Well, this was what the discussion was about . . . these two options. But we didn’t understand why, if we agreed to one, we would automatically have to give tenure to Monique and Jim to avoid a national search. That . . . didn’t seem to be a logical consequence. And that’s why I think we kicked it back, although this was not clearly formulated in the discussion. The discussion was quite passionate and went back and forth, and the conclusion was we don’t like these two choices, basically.

Q [by Mr. Zukeran]: Was there any discussion on what the choice might be or the choice might involve? Was there more than two choices, in other words?

A: It wasn’t really clarified. I think the decision was to kick it back to the administration, ask for better choices, basically. That’s my understanding of it. It wasn’t a very clear discussion. There was no voting [sic] taken or anything like that. But I understood the consensus as being supportive of conversion.” [Tr. 133]

In follow-up to the Division meeting and well as in response to an e-mail Dr. Ahn sent to all Division faculty announcing the results of a poll he took, Dr. Herman testified he sent a September 16, 2013 email (JT Ex. 5 at 32) to Drs. Ahn and Randall – which was his attempt to persuade them that both G-Funded allocated positions be used to convert the two non-tenure track positions rather than used to create a forensic anthropology and a economics position, since conversion had been a long discussed and an anticipated matter. (Tr. 137, 153-154) In his view, as Dr. Herman reiterated, a conversion of the temporary positions included direct conversion of the incumbents to the converted positions.

“Q [by Mr. Katz]: . . . So you were simply asking Dr. Ahn and Dr. Randall to use . . . the new permanent positions for the positions that Dr. Turner and Dr. Mironesco were filling?

A: Or to convert those positions first, and hopefully in addition, get two additional positions if they were. We didn’t want to have to choose.

Q: Were you also asking Dr. Ahn and Dr. Randall to not only convert the positions, but then to appoint Dr. Mironesco to one of those positions?

A: No. The assumption was the position that Dr. Mironesco and Dr. Turner occupied would be converted with them in it, that was my assumption.

Q: So you were asking Dr. Ahn and Dr. Randall not to do a national search?

A: Right, right.” [Tr. 156]

Dr. Herman testified he submitted Grievant’s name to teach a Fall 2014 political science course, Politics 384 concerning Women and Politics, to the current Division chair Mark Hanson, as well as to Dr. Randall. He testified Dr. Hansen supported his submission and forwarded it to the administration, but learned that Dr. Randall rejected the submission. He does not know the reason for rejection. (Tr. 146-148, 165)

E. J.N.Musto

Dr. Musto testified about Sections B and C of Article XIII – when and why it was proposed and its purpose, about the letter written by Employer’s spokesman Edward Yuen after the 2003 Collective Bargaining Agreement had been signed by the parties, about his involvement in Grievant’s case before the grievance was filed and his role in helping to prepare the grievance document, among others matters.

Dr. Musto has been the Union’s Executive Director and its Chief Negotiator for 35 years, and negotiated every one of its collectively bargained agreements since the 1982 Agreement and is also involved in contract enforcement. (Tr. 167-168) He testified that current contract negotiations are “tripartite” – consisting of representatives of the University of Hawaii, representatives of the Governor’s office, and the Union’s bargaining team consisting of faculty representatives and himself. (Tr. 169) He described the typical course of negotiations – the submission and exchange of proposals, discussions on each proposal and counter-proposal, the reaching of tentative agreements, then ratification of the tentative agreement by the various constituent bodies. (Tr. 169)

Dr. Musto was questioned about Article XIII, and testified it was first negotiated and became a part of the 2003 Agreement, and that the Article XIII language was carried over into the current 2009-2015 Agreement. (Tr. 170) He identified the purpose of Article XIII, stating:

“ . . . The language was proposed by UHPA initially. The purpose was to provide a level of job security to persons who were not eligible for tenure. That was stated when the proposals were given, and it was discussed between the Employer and the Union throughout the negotiations over the language until such time as an agreement was reached. The agreement was reached after a series of proposals and counterproposals. The last counterproposal was made by the Employer and agreed to by the Union.”

[Tr. 170-171]

He elaborated on the background and what the language intended to cover, and how Contract provision was applied.

“The paragraph B was language to incorporate actually a series of actions which the Union and the Employer had engaged in over the prior 15 years before this language was ever proposed – which was to take temporary positions and give them job security by creating a situation where they qualified for probationary status under the terms of our contract.

That aspect, there are some specific statutory requirements that are necessary for such a conversion from a temporary status to be made, and it encompassed what was necessary for that to be achieved and the conditions under which those conversions would be entered into.

Q [by Mr. Zukeran]: When we’re looking at this section of Article XIII, you mentioned job security. Are we talking about a person or the security of a position?

A: We were talking about individuals who held temporary positions which we were converting to provide them with job security.

Q: And in your experience in implementation of this particular clause, can you tell us whether faculty members were actually converted from temporary positions to permanent positions?

A: Yes. Under both the predecessor contract and the successor agreement, faculty [who] were holding positions, were converted to probationary status based on the criteria listed in the contract language in both situations.” [Tr. 171-172]

Questioned about discussions between the Employer and Union concerning the language of Article XIII Section B, Dr. Musto stated:

“Q: And were there any discussions between the Employer and the Union in terms of implementing Section B?

A: There were, again, in the negotiations of the language, what had been proposed and then agreed to, were the necessary components in which conversion could take place which a position could be made eligible for probationary status. Under that, there were other conversations about whether or not if a conversion did take place, did the incumbent – was the incumbent also to be converted. Part of the consideration of that was whether or not they qualified to be in the converted position, did they meet the qualifications.

The Employer expressed, first of all, their general interest in converting as many positions as they could if they received General Fund support for those positions. One of the things that changed in this contract language, if you’ll notice under B.2, - it says that the condition shall be seven consecutive years that includes an average of at least 75 percent State general funding.

Prior to this contract, the University only converted positions when there was 100 percent general funding behind the position, so one of the concessions that we won through this language was to reduce that to 75 percent. That came from a series of experiences, where positions were deliberately held at 98 percent general fund and 2 percent special funding in order just simply to not convert the individual in position to probationary status.

In our conversations in the bargaining, the Employer expressed their desire not to try to play games with the funding issue, and that’s part of the reason that they said that they would agree to this change.” [Tr. 172-173]

Dr. Musto further elaborated upon the prior history that lead to the formulation of the 2003 Agreement language and the faculty conversions under that Agreement, stating:

“ . . . we had a history with the Employer prior to this contract language, of making individual conversions where the Union, the Employer got together and wrote what would be basically supplemental language that applied only to the individuals on those conversions.

One of those cases was in Honolulu Community College where we converted an entire program, that had been temporary, and faculty in that program – some of them had been at the University for 20 years. We went through a very systematic program of looking at every individual, every position, whether or not the individual would be immediately converted, whether a portion of their time prior served would count toward a probationary period, whether their position would not be converted at all and remain temporary under that condition, or whether or not they would try and open it for hiring from the outside, either because the individual wasn’t interested in continuing or they . . . did not have the qualifications that they were looking for once it was converted.

So we had that history going in to the contract negotiations. Now we took that practice, we formalized it, we expanded it by the nature of the language that we agreed to, we wrote it into two contracts. We proceeded in those contracts with the same vein that we had been working on it, and I can only describe that as good faith. This is words that I used

during the bargaining. I said to the Employer I was worried and concerned about the good faith and the application of every paragraph, every word, and every piece of language in Article XIII, that the Employer would not attempt to act arbitrarily or capriciously in the implementation of any of it. And I was given assurances that that was not their intent, that if that had been their intent, they wouldn't have agreed to the language to begin with. And our experience, certainly in the first six year contract, was superlative. That's exactly how the Employer engaged in it, in good faith. Conversations were made of individuals directly into probationary settings. . . .” [Tr. 174-175]

Dr. Musto was questioned about the June 16, 2003 letter from Edward Yuen, written after the 2003 Agreement was signed. (ER Ex. B).

“The administration on its own articulated a set of conditions that they were going to use for their purposes to determine the approach that they were going to take. That was communicated to me by Mr. Ed. Yuen who had been the spokesperson for the University during the bargaining of the prior six-year contract. . . .” [Tr. 175]

* * * * *

“Q: And can you tell me what you remember of the circumstances, if any, leading up to the production of this letter?

A: Ed Yuen gave me a phone call and said I'm going to send you a letter because I am having difficulty with some of my administrators upon how we are going to interpret the language – again, this is of the prior six-year contract that we reached – and I want to make some clarifications of what we meant. And I said okay.

And after that conversation, I waited to receive the letter. The letter came and I read the letter, and I phoned Ed back and I said to Ed, I'm not going to respond to your letter, all right. The contract speaks for itself. I understand that as far as you're concerned, this is [what] you believe and [how] you intend, perhaps, to implement it, but I am not going to give my agreement or that of the Union to your interpretation. We will look at these, the various topics that you've covered in there, on an individual basis, you know should a grievance or a problem or disagreement over the implementation in the contract occur.

And that's very specific – the phone call before, the letter received, my phone call back to him, my explicit statement I would not provide him with a written response.”

[Tr. 179-180]

Questioned about that portion of the letter which reads, “In our preparations to implement the 2003 to 2005 collective bargaining agreement, it came to our attention that certain concepts which were discussed and agreed to in negotiations, were not clearly stated in the language of the agreement”, Dr. Musto stated:

“I responded to Ed in that sentence and said that is your problem, not mine. If the contract does not clearly state, then the ambiguity will be addressed in an arbitration, if we have a problem about it.” [Tr. 180]

Dr. Musto addressed the purpose of the limited term contract under paragraph C, Article XIII.

“Limited term contracts . . . were for those persons who did not qualify for probationary status because those positions did not meet the criteria in paragraph B, and it was our way, again, of extending a level of job security to those individuals – some of whom, again, [had] 20 years of experience in the institution, and in some cases knowing that . . . the positions

that they held might not ever likely . . . find a General Fund support necessary to qualify for part B.

So the institution of the rolling limited term contracts actually was a takeoff from a practice of the University for their athletic staff in which they used these rolling contracts for members of the athletic department. And I proposed that language, . . . or that the thought initiated with me was from the practice that I knew took place in the athletic department.

Q [by Mr. Zukeran]: Was the concept of job security part of the limited term contract purpose?

A: Yes. This is a form of limited job security. Not equivalent to tenure.” [Tr. 176-177]

He explained the reason for the 4 month termination feature in the third paragraph of Article XIII Section C, stating:

“ This particular section was something that the Employer felt was very necessary to have, and the reason for that is that they were worried that there was not a parallel to the retrenchment article in our contract, or that this would, in fact, parallel our retrenchment article, particularly if they were in a position where these temporary positions no longer had fiscal support.

A number of the limited term contracts are going to people who might be on long-term external contracts, so the question then came, so if the money for those contracts expires, we want to have a way in which we can give notice to cease the contract. As opposed to limited term contracts which came from General Funds of the State of Hawaii . . .

Q: During the course of the negotiations, do you recall any discussions about this clause that you read that a limited term contract may be terminated prior to its expiration provided that the faculty member is given at least four months notice?

A: Yes. I specifically recall Mr. Yuen giving the example of what happens if the external contract funding ends and we’re in the midst of a limited term contract with that individual, what can we do. And that gave rise to the giving at least four months notice.”

[Tr. 177-178]

Dr. Musto was questioned on what happens to the remaining period, when a 4 month notice of termination is given in the first year of a three year “rolling limited term contract”. He responded that if the 4 month notice is considered “proper”, then are no remaining years, because the contract has ended. However, if the notice is “not proper”, the contract remains in effect for its duration. (Tr. 183, 242-243)

Dr. Musto testified once he learned that two G-funded positions had been allocated to the Division, and would not be used to convert the temporary positions to permanent positions, he had a conversation with Dr. Randall about the Article XIII Section B conversion provision. He testified “her conversation was all around giving the Division the freedom to do what they wanted [to do with the two positions].” (Tr. 184) He testified a second meeting was held, this time with both Drs. Randall and Ahn and Grievant present, and he was informed during the meeting that Dr. Ahn now would be handling the matter. (Tr. 185) He testified this led to the Division meeting, when he attended. He described that meeting:

“ . . . All of which then led to a division meeting, which I was in attendance at. And at the meeting, this subject was brought up by the division chair . . . the division chair is saying, now the administration is saying to us, division, we can't use those positions for the other two disciplines we wanted to, we have to use them for the Political Science position and then the specific Anthropology position that was held by . . . Dr. Turner. And the chair said to the division, the assistant vice chancellor has asked us to be polled. And the division, as I sat there and listened to them, said we aren't going to be polled. What do you mean 'polled'.

They asked me to speak to the division. I spoke to the division. I spoke again about Article XIII, I spoke about the injustice I thought that was being perpetrated on Dr. Mironesco. They resumed their conversation. They polled themselves and said we are just going to tell the administration to . . . give Monique the position. They did some sort of a hand – actually there was a show of hands around the table, although I don't know that the chair ever took a count. And they all left saying we aren't going to respond to this inquiry, this anonymous person-by-person polling . . . by the assistant vice chancellor for academic affairs. The meeting was over.” [Tr. 188-189]

In testifying that he assisted Grievant in drafting the grievance document (Tr. 186) Dr. Musto identified the factual basis for the allegation of an Article II discrimination (Tr. 187-188, 225-230, 235-236). He identified that Article XIII Section C was violated because proper notice was not provided, stating:

“I don't believe that the notice was proper in the context it was given, which was again, the decision to eliminate any transfer into a permanent position and proceed with a national search, even though in an effort to try to comply with Employer's decisions, she applied for that position.

Q [by Mr. Katz]: Mr. Arbitrator, may I ask a question I think might answer your question? Dr. Musto, are you saying because you felt that the termination notice in this case was given in retaliation for her conduct, that that made the notice not proper under the provision?

A: Yes.” [Tr. 243-244]

Upon cross-examination, Dr. Musto agreed that Article XIII Section B does not mandate any particular method to staff a newly converted position. (Tr. 195) He agreed that decision is for Employer to make. (Tr. 196) He testified he would not be aware of a particular temporary-to-permanent position conversion, unless he is informed of it, and is not aware of any position conversion before 2003 in which a conversion had been made and a national search was conducted to fill the position. (Tr. 198).

F. Neva Jacquelyn Kilpatrick

Dr. Kilpatrick testified about her conversation during a ride to Ma'o Farms with Dr. Mobley, Dr. Randall and Grievant, her conversation with Dr. Johnsrud, and her familiarity with Grievant's work performance, among other matters.

Dr. Kilpatrick is currently employed by the California State University System, as Director of the System's San Marcos School of Arts. She began that employment in July 2014.

She was the UHWO's Associate VCAA from March 1, 2012 before becoming its interim VCAA when UHWO moved to its Kapolei campus. In June 2013, at her request, she returned to the UHWO faculty as an English professor. (Tr. 451-452)

Dr. Kilpatrick testified she first met Grievant on her first day of work at UHWO, while traveling by automobile to Ma'o Farms. She identified other riders in the vehicle as Dr. Mobley, who was the vehicle's driver, and Dr. Randall. (Tr. 452) She identified Grievant's status in a temporary position as one of the topics in what she characterized as a "casual" conversation, and remembers that conversation because the concept of occupying a temporary position after being promoted "didn't make sense to me because it was totally out of my experience". She remembered Dr. Mobley saying that Grievant had been in her position a long time, that she had been twice promoted while in the position and that it was "pretty much the same as tenure". Dr. Kilpatrick testified she disagreed and voiced her reason. (Tr. 453) Questioned whether she later had a conversation with Dr. Johnsrud about having long-term faculty members in a temporary position, she stated:

"Yes. I had at that point already – I had gone back and read the contract very carefully, and I was still somewhat perplexed by this idea. And so I asked Linda . . . if she would please just explain this stuff to me, because I knew we had three people in . . . that position. And so, . . . she told me that . . . basically anybody who did a good job for seven years in a temporary position, and that it was understood that they would then be . . . moved to a tenure-track position whenever a faculty line came up.

And so I mentioned that one of them was Monique, and she was really surprised that Monique had not been moved over already, and in that conversation she said that she had given a leadership workshop or series of workshops . . . and that Monique had been one of the people who took that workshop, and that she was really impressed with Monique. So that was my first conversation with Linda Johnsrud about Monique." [Tr.454]

Questioned whether she knew what was Chancellor Awakuni's view of Grievant's situation as a non-tenure track faculty member, she stated:

". . . I certainly wouldn't want to talk for Gene, but he seemed to be of the same general opinion that Joe had expressed earlier, that Monique was really a valuable employee and faculty member, and . . . he didn't seem like he was worried about her continuing employment. And he did say a couple of times that the University was not obligated, but had to make a good faith evidence [sic] to move the temporary people into a tenure-track line." [Tr. 456]

Dr. Kilpatrick acknowledged that she and Grievant discussed the matter of Grievant being directly converted into a permanent position, stating:

"Yes. But I'm afraid I wasn't able to give her much advice or help in that area because Gene was the one who really controlled that, and I was not really a part of the conversations about hiring at that time, at that level." [Tr. 456]

Questioned about Grievant's performance as a faculty member, she stated:

“. . . I really do think that Monique is one of the real bright spots at West Oahu. She works incredibly hard. Her work on the Sustainable Community Food System's degree program and her work with Ma'o Farms was really above and beyond what she was required to do, but she put in countless hours on it. And that's pretty much my impression of Monique, that she does give her hundred percent. . . . she was well respected by her colleagues. They promoted her twice. And I know for a fact that her teaching was well respected, and her service was exemplary. And her colleagues in her division voted for her to represent them in the Faculty Senate, so I think she [sic] trusted her as well. . . .” [Tr. 457]

On cross-examination, Dr. Kilpatrick agreed that matters such as hiring or transferring a faculty member into a tenure-track position is the Chancellor's decision, that she is not aware of the faculty evaluation committee's or vice-chancellor's recommendation on Grievant's promotion to assistant professor, that she was not involved in the decision to promote Grievant to associate professor, and that it is within the purview of the Chancellor and vice chancellors to determine whether to form a search committee. (Tr. 459, 461)

G. Monique Mironesco

Dr. Mironesco testified about her employment with UHWO – the courses she taught and/or developed and her promotions, what she was told and by whom regarding converting her temporary position to a permanent position, how she understood her employment status would be affected, how she became aware that the Division received two permanent positions, what were the initial and subsequent recommendations how those two permanent positions were to be use, what her reaction was and what action she took sequentially, the administration's response to her initiatives – including conversations with her Union and Dr. Johnsrud, her perspective of the September 6 Division meeting, the subsequent actions she took and the emails she received following that meeting and her interpretation of the email content, the November 12 grievance filed and what transpired thereafter, among other matters. As a rebuttal witness, Grievant was questioned on several matters raised by Employer's witnesses and testified about the student projections made by the UHWO's Institutional Research Office pertaining to the political science concentration.

Dr. Mironesco earned her doctor of philosophy degree in Political Science at the University of Hawaii-Manoa in 2003. Her *curriculum vitae* indicates that after earning her Master's degree in Political Science at San Diego State University in 1994, she began employment in Hawaii as a substitute teacher with the Hawaii State Department of Education

while also employed at a private Honolulu school as substitute teacher. In 1998 she taught at the University of Hawaii-Manoa in the Political Science Department (and 2 years later, in the Women's Studies Program) and at a private Honolulu university as a lecturer. She began her employment at UHWO in 2002 as a lecturer in Political Science, and then in 2004 accepted a full-time appointment as an instructor. She was promoted to Assistant Professor in 2007, then to Associate Professor in 2012. (Union Ex. 1, 2, 3, 5) She identified the courses she taught, the courses she developed and taught, and the courses she proposed to teach during the 2014 Fall semester. (Tr. 247-250) When hired as an instructor, she understood she was being hired for one academic year, in a non-tenure track position, and would be reappointed if there were sufficient funds. She testified receiving annual letters of employment renewal through academic year 2009-2010, but no such letters thereafter. (Tr. 258-259)

Grievant testified that prior to 2011, she had informal conversations with more senior colleagues about her continued employment and employment status. In April 2011, she testified she was informed by Dr. Mobley, who had spoken to Union assistant director James Kardash, that she could "apply for a promotion", without having to wait for a position count, and once the Legislature provides a position count, she would be eligible to be considered for tenure, since she would now be in a permanent position. (Tr. 269, 272, JT Ex. 5, at 9) Grievant testified the subject again was raised in May 2011 during a conversation with Dr. Johnsrud at the UHWO graduation exercise and again in March 2012, during the automobile ride to Ma'o Farms. (Tr. 277-278)

Grievant testified she learned about the two Division permanent position allocations, when Dr. Chinen telephoned her while she on vacation in California. (Tr. 281) Grievant described her reaction to this news (Tr. 283), her contact with the Union (Tr. 322), her request to meet with Dr. Randall, and what transpired at that August 8 meeting (Tr. 286). She confirmed that the matter was referred to the Division for a recommendation, and described what transpired during the September 6 Division meeting. (Tr. 286-288)

Grievant testified about the series of email messages that began on Thursday, September 12 and her perception of Dr. Ahn's messages to her. Grievant's testimony indicated she did not view this email (JT Ex. 5, at 18; [same] ER Ex. K) that read:

“Monique:

If we proceed with the decision below, your current position will be terminated as of 7/31/14, as the new Economics Instructor will start on 8/1/14. Please let me know if you have any questions.

Aloha, Eun”

as providing a reason why her employment would be terminated or as a warning that should she continue to seek conversion of her temporary position, her employment in that temporary position would be jeopardized, because the message said nothing about the political science position or what it had to do with the Economics instructor position. (Tr. 291). In her September 12 email responding to Dr. Musto’s statement and query “I don’t understand Eun’s conclusion. Did the faculty say you should have to apply for your position? Or is this Joyce’s conclusion?”, Grievant responded “Neither the division or Joyce said I should apply for the position. This is Eun and Linda’s position.” (JT Ex. 5 at 18) Questioned about her reaction to the next email she received from Dr. Ahn dated September 13 which read:

“Monique:

If I don’t hear from you by Monday (9/16), we will proceed with the search process explained to you in an email sent on September 16th (see copy below) by your Chair, Dr. Joyce Chinen.

Aloha, Eun”

[JT Ex. 5 at 25; [same] ER Ex. M)

Grievant testified she was “shocked” at how little time she was being given to make a career impacting decision whether to pursue seeking to have her temporary position converted to a tenure-track position. (Tr. 292) Grievant testified she did respond by email dated September 16 (JT Ex. 5 at 27; [same] ER Ex. P) stating:

“. . . . And I explained to him that . . . I had been promised by previous administrators numerous times in a variety of capacities that . . . ‘just wait, be patient and you’ll get your position as soon as one becomes available’. And I was objecting to the fact that now one was available and I wasn’t being given that position.” [Tr. 293]

Grievant was then questioned about her response to Dr. Ahn’s following email dated September 16 that read:

“Monique:

Please kindly show me where in the contract it states administration is legally obligated to automatically convert a position to a tenure-track position and not be allowed to conduct a national search. I hope you understand it is in the best interest of the Division and the University that a national search be conducted for tenure-track positions.

Aloha, Eun”

[JT Ex. 5 at 34; [same] ER Ex. S]

Grievant testified she responded in a September 16 email (JT Ex. 5 at 35; [same] ER Ex. U) citing the Article XIII B language and that she more than satisfied the requirement of employment in the temporary position for 7 consecutive years. (Tr. 205; JT Ex. 5 at 35, [same] ER Ex. U)

Grievant was then questioned about her reaction to Dr. Ahn's September 17 email, that read:

"Dear Jim and Monique:

It has recently been brought to the attention of the new administration that both of you have been in your temporary positions in excess of seven consecutive years. As the new administration discovers the existence of such situations, we will make every effort to change the status of the temporary positions into permanent tenure-track positions.

VCAA office has decided to halt the current tenure-track, national searches for an Assistant Professor in Economics and an Assistant/Associate Professor in Forensic Anthropology and immediately begin the process of national searches for tenure-track positions for an Assistant/Associate Professor of Political Science and an Assistant/Associate Professor on Anthropology. Both of you are encouraged to apply for the tenure-track openings in your respective fields. Also both of your temporary positions and employment with UHWO will terminate as of 7/31/2014. Should either of you emerge as the top candidate from the national search pools of your respective areas, you will be awarded a new contract with tenure-track status.

Aloha, Eun"

[Tr. 295-296; JT Ex. 5 at 36, [same] ER Ex. V]

Grievant responded she considered the first paragraph "disingenuous" because for the past month "we had been talking about this. So it's not recent". Additionally, she testified that Dr. Chinen's earlier email indicated Dr. Turner had previously been consulted and was not interested in seeking a tenure-track position, therefore Dr. Turner was not involved in the matter at all. (Tr. 296, 326) Questioned what she thought "the administration really wanted to do", she stated: "I think they didn't want me in that position." (Tr. 297)

On cross-examination, Grievant testified the first time she had been informed by any vice-chancellor her employment would end if the temporary position she occupied was converted to a permanent position and she was not selected for the permanent position, was the September 12 email from Dr. Ahn. (Tr. 332-334; JT Ex. 5 at 18, [same] ER Ex. K)

As a rebuttal witness, Grievant testified she requested the Institutional Research Office provide her the number of enrolled political science students from Fall 2004 through Spring 2013 as she prepared her application for the permanent political science position. Grievant testified Union Exhibit 25 is the document the Office provided her. She was asked to compare the number of political science students projected by the Academic Development Plan for Fall 2012,

2013 and 2014 with the number of actually enrolled students identified by the Institutional Research Office in those years – a comparison showing actual enrollment exceeded projected enrollment – and then questioned whether the numbers could support having three political science professors. She testified the numbers could support 3 professors. (Tr. 561)

H. Edward Yuen

Mr. Yuen testified about the 2003 contract negotiations involving the Article XIII B and Article XIII C, and the June 2003 letter he wrote to Dr. Musto.

Mr. Yuen is currently employed by the Research Corporation of the University of Hawaii. His prior position with the University of Hawaii was as Director of Human Resources and Labor Relations, and in that capacity, acted as Employer’s negotiation spokesperson. (Tr. 346, 355)

Mr. Yuen testified that the June 2003 letter he prepared and sent to Dr. Musto actually was drafted at Dr. Musto’s suggestion, stating:

“The letter actually was his idea or his suggestion. I had called him and expressed my concern that in the haste to conclude the contract and settle . . . between the parties, that certain things were unclear and certain things need to be clarified, and I had suggested a contract amendment. And he told me that that would be very difficult for him at that point to do an amendment, and he suggested that I send him a letter clarifying the points, and to do it that way.” [Tr. 349-350]

Questioned about the title to Article XIII Section B (Conversion of Temporary Appointments to Probationary Status) that never changed during the series of proposals and counter-proposals exchanged during the negotiations (JT Ex. 8, tabs A-F) – which appears to refer to faculty appointments, whereas the language in the body of this part of Article XIII refers to conversions of temporary positions – Mr. Yuen reiterated:

“That’s what I wanted to clarify, that even though in the title it mentioned appointments, that what the parties really were referring to in the negotiations were positions and not specific individuals.” [Tr. 364]

He confirmed receiving neither a written nor an oral response from Dr. Musto, and thus prepared a memorandum to the University’s chancellors incorporating what he had written in his letter to Dr. Musto to serve as guidance on how to implement those contract provisions identified in the letter. (Tr. 350-351) When questioned whether there were discussions on Article XIII Section B pertaining to the conversion of particular temporary positions, or of faculty members occupying temporary positions, he testified there were no such discussions. (Tr. 353-354)

I. Joyce Chinen

Dr. Chinen testified about how she became aware of the two positions allocated to the Division, why she did not initially consult with the faculty before providing her initial staffing recommendation to Dr. Ahn, the factors she considered in making her initial recommendation, her email to the faculty to inform them of her recommendation, the September 6 faculty meeting and what transpired during the meeting, and her subsequent communication with Dr. Ahn, among others matters.

Dr. Chinen is currently employed at UHWO, and is also the Director of the Center for Okinawan Studies at UH-Manoa. (Tr. 366) She first met Grievant when Grievant was a graduate student in Women's Studies program at UH-Manoa, had done a number of projects with Grievant while both were with that program, and has no animosity toward Grievant nor has ever been accused by Grievant of being hostile. (Tr. 366-367)

Because she was the Division's chair, Dr. Chinen testified Dr. Ahn telephoned her to advise the UHWO had "received a bunch of G-funded positions from the Legislature", that two positions were being allocated to the Division, and to provide him a recommendation how the positions should be utilized. (Tr. 367-368) She testified that ordinarily she would consult with the Division's faculty, but since Dr. Ahn notified her after the faculty had completed their current year's contract and were no longer obligated to be available on campus, she decided to provide him a tentative recommendation, and then discuss the matter with the faculty at its "next official Division meeting", to be held during the Fall semester of the 2013-2014 academic year. (Tr. 368).

Dr. Chinen explained her initial recommendation was to use the two allocated positions to create a permanent position for a forensic anthropologist and for another economics professor. She explained that UHWO once had two economics positions, but one became vacant when Dr. Ahn vacated the position, and the position was later permanently lost. She cited the Academic Development Plan as showing the projected need for two positions, and accordingly wanted to restore that second position. (Tr. 384) She further testified the forensic anthropology program was transitioning from a provisional to a permanent status, and therefore a tenure-track position was needed, and that in speaking with Dr. Turner who was a cultural anthropologist, he indicated priority should be given to making the forensic anthropology position permanent, as Dr. Turner was satisfied in remaining in a temporary position. (Tr. 380, 383, 392) She testified she had read

the UHPA contract concerning temporary position conversions, but continued to be confused. She contacted the Union and:

“my question to the union staffer [was], could we convert the person in the position. And the answer was, the . . . contract language says ‘convert the position’, and that it was simply enabling language. So I got no . . . it remained fuzzy.” [Tr. 370]

Her initial recommendation was based upon this information and what Dr. Ahn conveyed:

“ and the news from Dr. Ahn was there will probably be more positions . . . in the following years to come. Therefore, after looking at those two things, and consulting with - . . . the previous chair was out of town so I consulted with the . . . chair previous to her which was Linda Nishigaya, and given that we . . . were under review by WASC, the Western Association for Schools and Colleges, accreditation pressure, and that WASC had mandated at least two in each discipline . . .and because we had a vacant Econ position, we needed to fill that, and we had after five years, six years, actually a forensic anthropology program that needed a full-time person, I thought it was the most prudent recommendation to make to go for those two positions, and in the next year, or so when we got more positions, to try to argue for converting person and position when the full division could be . . . able to weigh in on that.” [Tr. 371]

Other factors Dr. Chinen identified were:

“ . . . and preserving the status quo in the Division, since . . . both Jim Turner and Monique Mironesco . . . had just signed . . . up for the next three years and because we had also just had to terminate Kanoa Meriwether.^{4/} [Tr. 372]

. . . . Still want to grow the Division because we’re shorthanded in other . . . selective areas, so I was trying to make the best decision for the Division, or best recommendation. And again, it was subject to, I thought, in the Fall, a final open discussion [with the faculty].” [Tr. 372-373]

Dr. Chinen identified her goal in wanting the Division faculty to endorse her initial recommendation:

“ . . . But that’s what I wanted to have the conversation about, and we needed to have at least a larger conversation to do a recommendation to admin folks. [But] there’s no guarantee. I said there is a chance we can get additional [positions]. And then maybe at that point, maybe with the recommendation . . . but my thinking was if we could get the

^{4/} Dr. Chinen kept the Division’s faculty informed of her thoughts on recommending how to utilize the two allocated permanent positions. In an email dated Sunday, July 14, 2013 (ER. Ex. F) to the Division faculty, she wrote the following:

Big news – we have gotten the go-ahead to search for two G-funded positions. I quickly checked with the HR office, the UHPA staff and based on their responses and parameters provided, went for two new positions (see attached memo). **I spoke with both Monique and Jim, because we had been led to believe we could just convert their positions, but apparently the contract does not explicitly say that, and given what had happened to Econ last year, Kanoa, and other unforeseen items, I felt it was safer at this time to go for the Econ and (Forensic) Anthropology positions. If we can fill these by December, there is a chance we can get additional positions from the Legislature next year, and get our NT folks T’d.** Things are too volatile at the moment, and I didn’t want to take a chance on losing the three NT positions we already have in hand. You’ll see a lot of changes in personnel in the Fall, too many to explain here. (Emphasis added)

Division officially on record with . . . a vote in hand, process established . . . then we could make a recommendation to the administration. That didn't mean that they would take it, but . . . my sense was it would . . . put us in a stronger position to make this kind of argument. Because, again, after checking with the Union and getting the sense that . . . being told that the position was convertible but not the person in it, I was trying to figure out a way where we could do that, . . . I mean . . . these folks have been there for so many years, and I just didn't want to just . . . take a chance losing them." [Tr. 386-387]

Dr. Chinen was questioned about the September 6 meeting. She testified she prepared the meeting's agenda and that it was her idea to have the faculty e-mail Dr. Ahn with their preference on the two positions (Tr. 375-376), that she understood from Grievant's email to her, that Dr. Musto would be present to answer questions and to be a consultant in the faculty's decision-making – but it did not turn out the way. She confirmed that an anonymous poll was not taken at that meeting and that she received an email following the meeting that the administration decided it would convert the temporary political science and cultural anthropology positions - occupied by Grievant and Dr. Turner, respectively – to permanent positions, but that a national search would be conducted for both positions. (Tr. 378, 381)

J. Eun Ahn

Dr. Ahn testified about the extent and scope of the UHWO's Chancellor's authority, the number of permanent positions received from the Legislature and how Chancellor Freitas chose to allocate them, his understanding of Article XIII Section B, the task he was assigned by Vice-Chancellor Randall involving the two permanent positions allocated to the Social Sciences Division, what transpired before and after the September 6 faculty meeting, his recommendation to Chancellor Freitas, and the email correspondence he had with Grievant after September 12, among other matters. Dr. Ahn was not cross-examined.

Dr. Ahn testified he is currently the Associate VCAA and has served in that capacity since June 2013. For six months from January 1, 2013 he worked on administrative projects as assigned by Chancellor Awakuni. Before that, he was a professor of finance. (Tr. 397, 406) He testified the Chancellor is the final authority on UHWO matters including faculty promotion (Tr. 402), that the Vice-Chancellors (for Administrative Affairs, Student Affairs, and Academic Affairs) recommend actions, which are based upon the recommendations those Vice Chancellors receive. For example, the VCAA would typically receive recommendations from the Division chairs, as well as from committee chairs. (Tr. 398-399). He and Grievant were colleagues for about 4 years in the Division, and characterized his relationship with her as "cordial" and

“friendly”, and does not recall having any arguments with Grievant or being accused by her of having animosity or hostility towards her. (Tr. 400)

Dr. Ahn testified that during the 6 month period he worked with Chancellor Awakuni, several permanent positions were transferred from UH-Manoa to UHWO, and after July 1, 2013, the Legislature authorized several permanent positions, of which 5 were allocated to the academic affairs area. Chancellor Freitas allocated two of the five positions to the Division. (Tr. 407) Dr. Ahn further testified that Vice-Chancellor Randall asked him to oversee how those two positions would best be utilized within the Division, and it was decided he would seek the Division chair’s recommendation. He sought and received the Division chair’s recommendation, which was to create “two new lines” in anthropology and economics. (Tr. 412) Upon receiving that recommendation in July, he testified he informed Randall and the Chancellor of the chair’s recommendation, but knew the chair wanted to wait until the Division’s faculty could meet and discuss the recommendation in September, since many faculty were away for the summer. (Tr. 413)

He testified that the Division chair informed him the Grievant “was very upset” upon learning what the chair had recommended, because Grievant felt the positions should be used to convert her temporary position to a permanent one. (Tr. 414) At that time, Dr. Ahn testified he was familiar with Article XIII Section B, although he was not aware how the University system interpreted that provision (Tr. 414-415) but later, in mid September, spoke with Dwight Takeno, the University’s Director of Labor Relations, who informed him that Article XIII Section B conversions apply to positions, and not to the person occupying the position. (Tr. 415)

Dr. Ahn was shown the agenda for the September 6 meeting (ER Ex. I) and questioned whose idea it was to conduct an anonymous poll by having the faculty e-mail him their preferences on the questions:

- “1. Should the SSCI Division terminate the searches in order to use the 2 G-funded positions to convert 2 of the 3 Non-Tenure track positions into Tenure track positions?
2. If Yes on #1, should tenure be given to Monique and Jim immediately? (Note: A “No” on this questions means we should do a national search since all 3 were hired as a result of local searches at [sic] advertised at instructor level (MQ: MA in the field)”

He responded it was Dr. Chinen’s idea, with which he agreed. (Tr. 416)

He testified that the Dr. Chinen informed him about the outcome of the September 6 meeting, and because he was told that no poll had been taken since “the Division refused to

participate in a poll”, he did not have a sense of the faculty’s preference. (Tr. 417) However he began to form an impression, stating:

“So shortly after the September 6 meeting, one by one I had some faculty members . . . come see me [voluntarily] . . . some of it was in the hallways or parking lots . . . and said that meeting on the 6th was very confusing and they were very, very upset about it. I know Dr. Chinen used the word ‘railroad’, but I think the common word I was getting was more [like] ‘bullying’.

Q [by Mr. Katz]: And did they say who was doing the bullying?

A: Dr. Musto.

Q: And did you discuss with them their preferences with regard to the new permanent positions, whether they should go out to search or whether the incumbents in the temporary positions should be just automatically appointed?

A: The handful of people at that point that I had conversation with, expressed their preference for a national search, and said that but that meeting was so intimidating it was difficult to speak up.” [Tr. 420-421]

Dr. Ahn further testified there are 15 faculty members in the Division, that he spoke with 10 members and that 8 expressed a preference for a national search, and he therefore concluded that at least a majority of the faculty favored a national search. (Tr. 422) Dr. Ahn was queried why he stated in a later email to Grievant that a national search was in the best interest of UHWO, and stated:

“Because tenure-track positions are highly sought positions, they’re potential lifetime employment, and I believe, genuinely believe we owe it to the students and taxpayers to find the best candidate for a position that opens that’s tenure track.

Q [by Mr. Katz]: So in your mind then, it doesn’t make a difference whether a person is popular or competent, you want the best qualified person for that position?

A: And the popular, competent person may end up being the best candidate, but I believe we should go through the process of looking for the best candidate [via a national search].” [Tr. 425]

Dr. Ahn was questioned why he sent two emails to Grievant, one dated September 12 following the email Dr. Chinen sent to the Division faculty informing them the administration decided to convert Grievant’s political science temporary position to a permanent position and that a national search would be conducted for that position, and a second email dated September 13, and stated:

“. . . I wanted to make sure she understood, because as Dr. Herman testified, when he came and visited me, I said . . . I really want to talk to Dr. Mironesco because I want her to know exactly what she’s doing, and the options and the alternatives, and what are the benefits and consequence of risk of her actions, and as he testified, I was genuinely concerned. I wanted to make sure she’s taking the path that she desires. So that’s why I was asking her to contact me, and if she doesn’t, I will assume this is something she does desire.” [Tr. 428]

Dr. Ahn was questioned why he sent an email dated September 17 (ER Ex. V) to both Grievant and James Turner set forth at page 31, *infra*. He stated:

“[Until] about mid-September, I was dialoguing with [Dr Chinen] and had not . . . kept the Chancellor informed to every last conversation I had had with Dr. Chinen. . . . On September 16th, which is Monday - we always have senior staff meetings on Monday - at that meeting I disclosed everything that has [sic] been happening with Social Science and the conversations I've had with Dr. Chinen to Chancellor Freitas in front of all senior staff.

At that point, Chancellor Freitas said given everything that you just disclosed here, here's what I want, and all other senior staff members agreed. So therefore, the very next day I wrote this e-mail saying that it was brought to the attention of the administration, and this is what the new administration now wants, following basically, Chancellor Freitas' orders, which all vice chancellors were also on board.

* * * * *

Q [by Mr. Katz]: Now, up until September 17, the position that you had expressed to Dr. Chinen was to convert Dr. Mironesco's . . . temporary position to a permanent position and to do a national search, is that correct?

A: Yes.

Q: Right. And prior to September 17, what was the position you had expressed to Dr. Chinen regarding Dr. Turner's position?

A: I was at that point willing to support Dr. Chinen's position, which she based off a conversation with Dr. Turner – which is to not convert his position.

Q: So going into the senior staff meeting on Monday, September 16, at that point the plan . . . was to convert Dr. Mironesco's position and do a national search, but not to convert Dr. Turner's position because . . . his preference was not to do so . . . and instead to just do a national search for another Anthropology position, is that correct?

A: Correct, and that's what I recommended at the meeting, but also disclosed.

* * * * *

Q: But Dr. Freitas did not accept that recommendation, did he?

A: Correct.

Q: Instead he told you that – what did he tell you?

A: He said he would like both positions converted and nationally searched.”

* * * * *

Q: Did he tell you what the basis of his decision was or what it was based on?

A: Yes.

Q: And what did he tell you?

A: The contract.”

[Tr. 432-434]

Dr. Ahn was questioned whether he had a role in the formation of the search committee for the permanent political science position, and if so, what was it. He testified he contacted Dr. Chinen to ask her recommendation of committee members, and based upon her feedback, told her to be careful about who she recommends, because he did not want her to recommend anyone who may have animosity towards Grievant. He testified that she provided the names of five individuals, that he agreed with her recommendations, and that he contacted those faculty members to inquire

whether they would be willing to serve on the committee. One declined, and four agreed to serve. He further testified that three individuals had Ph.Ds in political science, and that he was “fairly confident they had very good relationships with [Grievant]”. (Tr. 436-439)

K. Linda Randall

Dr. Randall testified about how she initially addressed the two permanent positions allocated to Division, what she did following her August 8 meeting with Grievant and J.N. Musto, what she did upon learning about the Division’s September 6 meeting, how it was determined to convert the cultural anthropology position and what became of the forensic anthropology position, her role in the formation of the national search committees for the converted political science and cultural anthropology positions, Grievant’s Limited Term Contract, and on certain Union exhibits, among other matters.

Dr. Randall testified she has been the Vice Chancellor for Academic Affairs at UHWO since June 5, 2013. She previously served as VCAA from August 2008 through December 31, 2010, and as a faculty member in the Division’s Business concentration from January 1, 2011 through June 4, 2013. (Tr. 472-473) She provided a brief description of the UHWO management structure, identifying the three vice chancellor positions and the one associate vice chancellor position, and testified the Chancellor has the ultimate authority to determine what faculty positions are filled. (Tr. 474)

Dr. Randall testified that in June 2013, five permanent faculty positions were allocated to UHWO – that the Social Science Division was allocated two positions, and that Informational Technology, Public Administration and the Science sub-unit were each allocated one position. (Tr. 476, 539) She assigned Dr. Ahn to work with the Division chair and to obtain the chair’s recommendation on how the two positions would be utilized. Upon receiving Dr. Chinen’s recommendation on July 1, she reviewed it, accepted it and asked Dr. Ahn to continue to ‘move forward’ with it. (Tr. 477-478) In mid-July upon receiving Grievant’s email regarding converting her political science temporary position she asked Dr. Ahn to contact J.N. Musto to obtain more information (Tr. 478), and upon receiving Dr. Ahn’s report, she contacted Mr. Kardash at the Union and then Ms. Nakasone, the UHWO’s Human Resources Director (Tr.480) to obtain information on Article XIII. She testified that at her August 8 meeting with Dr. Musto, Grievant, and Dr. Ahn, she told them what she had learned about converting a temporary position, and

confirmed she wanted the Division to address the matter by way of a vote. (Tr. 481) Upon learning no vote was taken at the September 6 Division meeting, Dr. Ahn saying that a number of faculty approached him following that meeting and after speaking with Ms. Nakasone, she testified she told Dr. Ahn to take a faculty survey to obtain their views (Tr. 482). She testified that Dr. Ahn reported to her the Division wanted to convert the political science position, and to fill the position through a national search. She agreed. (Tr. 483) Dr. Randall further testified this recommendation was communicated to Chancellor Freitas at the September 16 staff meeting, and stated:

“We were just reporting back , just basically saying that Eun did the survey, and based upon the survey, that we were going to basically . . . convert a position for Political Science, and they were going to do a national search,

And [Chancellor Freitas] said, basically, are there any other non-tenure track positions or people that are in a similar situation based on the UHPA contract . . . and we said Jim Turner. And bottom line, he said everybody has to be in the same boat. And so at that point, we went back and informed Joyce that Jim would have to apply for the position in Cultural Anthropology, if he wanted to. . . .

* * * * *

Q [by Mr. Katz]: So if I understand correctly, Dr. Freitas decided that there would be a conversion of both - -

A: Positions.

Q: - - positions that Dr. Turner had previously filled - - and that Dr. Mironesco had previously filled?

A: Yes, yes.

Q: And they would both go through a national search.

A: Yes, and they both went through a national search.” [Tr. 487-488]

She testified she asked Dr. Ahn to notify both Grievant and Dr. Turner of the decision that their temporary positions would be converted and that a national search would be conducted to recruit for each converted position. (Tr. 489)

Dr. Randall testified that she asked Dr. Ahn to work with the Division chair to form search committees, that she would be the person to approve the composition of the search committee, that her goal was to ensure the committee would be objective, and that she approved the search committee membership for the political science position. Questioned whether she felt the committee composition favored Grievant, she stated:

“the chair of that search committee had a Poli-Sci degree and was not in the Social Sciences Division and that I also liked the fact that Louis Herman, who I heard and know was . . . what I considered the strongest advocate for Monique was on the committee and was a member of Social Science. . . .

* * * * *

. . . .I go back to the fact that the one member on the committee who was part of the Social Sciences Division was Monique’s strongest advocate, and so the other members on the committee did not have a vested interest in the outcome because that person, whoever

would be selected, is not going to be part of their division. So in some ways, if you have people who are not vested, . . . you can't get any more objective than that. And then the one person who is a strong advocate is on there, I said this looks pretty good. It looks like a good strong committee that would be fair. And if you want to say 'slanted', yes, but I just thought this is a solid committee and I was very proud of what happened."

[Tr. 491-492]

On cross-examination. Dr. Randall denied being aware of any verbal assurances previous VCAAs allegedly gave Grievant and Dr. Turner concerning converting their temporary positions and not conducting a national search to fill the converted position, and did not follow-up on Dr. Herman's assertion of such alleged assurances as identified in his September 16 email to her^{5/}. (Tr. 505-507) When directed to Grievant's email to her dated November 4, 2013 which read:

" . . . Please read through the thread – it indicates the assumptions of years past about positions being converted with people in them, rather than doing a national search. . . ."

which contained an email from Dr. Mobley to Grievant dated April 5, 2011, stating:

"No special forms required – just use the materials that are posted on the online Faculty Handbook. In the beginning section of forms for tenure/promotion, just check off that you've "consulted with the VCAA" regarding eligibility and indicate that you're seeking promotion without tenure (the tenure part would come later)."

and an earlier email from Dr. Mobley to the Division chair, also dated April 5, stating;

"Per our discussion at this morning's meeting, I've consulted with Jim Kardash of UHPA as well as Nancy in HR, and have confirmed both Jim's and Monique's eligibility for promotion from I-3 to I-4 without seeking tenure at this time. So both Jim and Monique can apply for promotion in the fall which presumably will be their 5th year in rank thereby meeting that requirement. Once a position count is obtained from the legislature, hopefully next year, they will then be eligible for tenure consideration as well." [Union Ex. 14]

and questioned whether those were indications of converting a temporary position and filling the converted position with the faculty member who was in the temporary position, Dr. Randall testified she interpreted the statement as a description of a process which could include a national search, and not an assurance the incumbent is placed in the converted position. (Tr. 509-510) And because she read nothing in the email thread indicating that converted temporary positions included conversion of the individual occupying the position, she disagreed with Grievant's view. (Tr. 531)

^{5/} On redirect examination, Dr. Randall testified that by the time she received Dr. Herman's September 16 email, she had already attended that morning's 8:00 a.m. senior staff meeting with the Chancellor where he directed that national searches be conducted to fill the converted temporary positions. (Tr. 530)

Dr. Randall was questioned about a July 15, 2014 letter she signed, written to a Jennifer Byrnes, who at the time, was residing in the State of New York. The letter notified Ms. Byrnes of her hire as a tenure-track assistant professor in Forensic Anthropology beginning the 2014 Fall Semester. (Union Ex. 21) Dr. Randall was questioned why Byrnes was appointed to a tenure-track position, when in September 2013 the Forensic Anthropology position was to be advertised as non-tenure track and at the instructor level. She responded:

“Okay. Basically I worked with HR and they said because . . .Forensics was a high demand area, what we can do is go out at non-tenure-track, which is what we did, and go out and then do it as a national search. Typically non-tenure-track are not national searches, but go out as a national search and say if we’re able to get a line from the next legislative session, because we’re doing a national search, because we’re doing everything as if, that if all worked out, then we could potentially offer, without having to do another national search for this individual, and that’s what we did.” [Tr.520-522]

On re-direct examination, she was asked:

“Q [by Mr. Katz]: Let me make sure I understood what you had testified to. . . . Was it your testimony that you were informed by Human Resources that if you were successful in obtaining an additional permanent position for Forensic Anthropology, you could start it as a national search for a non-tenured position, and then if you got the permanent position, because you had already done a national search, you could then just appoint based on that national search and not have to do another one?

A: Yes.

Q: That was your understanding?

A: Yes, that was my understanding.

Q: Based on what, this is Nancy Nakasone, told you?

A: Nancy Nakasone.” [Tr. 532]

Dr. Randall would not answer the question asked on re-cross examination whether the process used in Byrne’s hire – recruitment for a temporary non-tenure-track position through a national search, selection of the ‘best-qualified candidate’, conversion to permanent tenure-track position because permanent positions were allocated in May 2014, and then notification of hire in the permanent position – was the process identified by Article XIII Section B. She deferred to the Human Resources personnel, indicating she had followed their advice. (Tr. 533-539)

VIII. FINDINGS OF FACT

Article XIII

1. The title of Article XIII Section B, “Conversion of Temporary Appointments to Probationary Status” is descriptive of changing the employment status of a faculty member^{6/} from the status of not being eligible to achieve tenure, to the status of being eligible to achieve tenure.

2. The body of Article XIII Section B, identifies the criteria by which a faculty position not designated as tenure-track may become designated as tenure-track. That criteria is either:

“1. The position has a permanent designation and is fully funded through State general funds; or

2. Where evidence of continuing need has been demonstrated by consistent funding of the position for seven (7) consecutive years that includes an average of at least seventy-five percent (75%) State general funding.”

3. During the course of the negotiations on Article XIII in 2003, written proposals and counter-proposals were sequentially offered by the Union’s chief negotiator and the University’s spokesman. The initial proposal was submitted by the Union. There are 5 subsequent versions of Article XIII, each version showing a date. All proposals and counter-proposals set forth Article XIII in its entirety. Additions to, or deletions of, a word or phrase in the prior version did not follow a “Ramseyer Rule” form of editing in the next version. The first, second, third and fourth versions are designed “UHPA Contract Proposal”. The fifth and sixth versions are designated “Employer Counter”. Only the sixth version dated April 18, bears the signed initials of the Union’s chief negotiator and the Employer’s spokesman. (JT Ex. 8F)

a. The Union’s initial proposal dated January 26, 2003, identified the title to proposed Article XIII Section B, as “Conversion of Temporary Appointments to Probationary Status”. That title remained unchanged throughout the Union’s various versions of its proposal, and Employer’s counter-proposals. Likewise, the sentence “The Employer shall make every effort to convert positions to tenure track status where:” remained unchanged from the initial version to the final signed version.

b. What did change was the language to criteria 2 – “where evidence of continued need has been demonstrated by consistent funding of the position for seven consecutive years that includes at least seventy five (75%) percent state general funding.” That change was made in version 3, and once made, remained intact through the final version dated April 18, and is reflected in FOF No. 2, *infra*.

4. A Memorandum dated July 29, 2003 issued by Employer’s spokesman Edward Yuen addressed to the Chancellors of the various community colleges and University system campuses, informed the recipients, *inter alia*, about the newly negotiated provision entitled “Faculty Appointments Not Eligible for Tenure” (which is the title of Article XIII). The Memorandum followed Yuen’s letter dated June 16, 2003 to J.N. Musto and in reference to Section B, both the letter and the Memorandum contain the identical statement “This section refers

^{6/} Article III Section A.1. footnote 1, identifies as faculty members covered by the Contract, the following categories of individuals designated by Board of Regent policy: **C** (all faculty at the Community Colleges); **I** (instructional); **R** (researcher); **S** (specialist); **B** (librarian); **A** (county extension agent); **M** (clinical medicine); and **J** (legal instruction).

to the conversion of positions and not individuals, to probationary status despite the use of the term 'appointments' in the title of the section.”

5. A Memorandum dated April 30, 2004 issued by David C. McClain, University Vice-President for Academic Affairs addressed to all Chancellors, provided guidelines to be followed when implementing Article XIII Section B. The Memorandum directed the recipients to “proceed to fill your qualifying positions with tenure-track faculty as soon as possible.” The Memorandum, *inter alia*, contained instructions identifying certain kinds of positions that are not to be converted to tenure track status regardless whether general funds are expected to be available, identified what conditions must exist before the temporary position is converted and identified how the converted position is to be filled. The pertinent three numerical points of the four point instructions state:

“2. Permanent position counts are required for all positions converted to probationary status. Campuses should first use any long-term, unfunded permanent position counts on the campus in making the conversions. If permanent, unfunded positions counts are not available on the campus, the campus should request the reallocation of permanent position counts from the Chief of Staff.

3. All positions converted to probationary status should be openly recruited with the exception that any faculty member who has occupied a position or multiple positions with the same scope of responsibilities for five or more years at full-time FTE and who has been promoted, may be converted to probationary status without further recruitment.

4. All converted positions, whether filled by open recruitment or direct conversion of the incumbent, are considered probationary appointments and subject to all contractual terms regarding the length of probation and application for tenure.”

6. There is no evidence that refutes the Union’s assertion that the purpose of Article XIII is to provide a level of job security for faculty members not eligible for tenure.

a. There is a measure of job security when an individual is employed pursuant to an employment contract. Article XIII Section C obligates Employer to offer – to full time faculty members and to part-time faculty members, who are not eligible for tenure and who meet certain Contract criteria – three-year “rolling” contracts of employment, designated as a Limited Term Contract. Lecturers, who satisfy certain criteria, are also entitled to receive a Limited Term Contract spanning a time period from one year to up to three years.

b. There is a level of job security for the faculty member appointed to non-tenure-track temporary position *if* Article XIII Section B is construed to mean that when that temporary position is converted to a permanent position, the faculty member who occupied that temporary position will occupy the permanent position – because that faculty member avoids the risk of non-selection since the converted permanent position is not subject to recruitment, and because that faculty member is now afforded the opportunity to achieve tenure.

7. Union Exhibit 17 is a chart obtained from Employer, that shows the various Schools or Colleges at the UH-Manoa, and identifies the School, College or the Office where a position conversion occurred before 2013. The chart also identifies the name of the faculty member who had occupied the temporary position that was converted to a permanent position. A total of 8 individuals were identified. One individual was in the School of Law, two were in the College of Natural Sciences, two were in the College of Social Sciences, one was in the Institute for

Astronomy, and two were in the Office of Undergraduate Education, Interdisciplinary Studies Program. Four faculty received promotions while in their non-tenure-track position and were then directly converted to a permanent position. Four other faculty who had not been promoted while in their non-tenure-track positions, were directly converted to a permanent position. One of the four who had been promoted while in her temporary position and was then converted, completed probationary status and achieved tenure after two years in probationary status.

8. The Step 2 Decision Maker, relied upon Yuen's and McClain's memoranda in concluding that a direct conversion of the incumbent from the temporary position the incumbent occupied into the converted position, was not the intent of Article XIII B, when stating:

"It is clear that VPAA McClain's implementation guidelines and Director Yuen's clarification Memorandum of July 29, 2003 consistently state that granting individuals probationary status without recruitment is not the intent of the negotiated language governing Article XIII, Section B. and that it is instead a managerial decision of each campus to decide whether or not conversion of an individual should be considered."

The Step 2 Decision Maker did not address the exception identified in point 3 of the McClain Memorandum nor articulate why it did not apply to Grievant.

9. Monique Mironesco occupied a temporary political science position at UHWO from Academic Year ("AY") 2004-2005 through AY 2013-2014. She was a full time employee teaching in a full-time position, and had been employed throughout those academic years under a Limited Term Contract. Mironesco was promoted from Instructor to Assistant Professor in AY 2007-2008, and from Assistant Professor to Associate Professor in AY 2012-2013.

10. When employed during AY 2013-2014, Grievant was employed pursuant to a rolling Limited Term Contract that began on August 1, 2013 and ended on July 31, 2016.

The Utilization of Allocated Permanent Positions

11. Dr. Chinen, the Division's Chair recommended that the two permanent positions the UHWO Chancellor allocated the Division be used to create permanent positions in the Forensic Anthropology and in the Economics disciplines based upon the Academic Plan and what she considered to be in the best interests of the Division. She made that recommendation by memorandum dated July 1, 2013 addressed to Dr. Randall through Dr. Ahn shortly after he requested her recommendation. In that memorandum she also asked that additional General Fund positions be obtained as soon as possible to convert certain Division faculty who occupied temporary positions. The names of three faculty members and the temporary positions they occupied were identified in an attachment to her memorandum. Also attached were draft advertisements for an Assistant Professor of Economics and for an Assistant/Associate Professor of Forensic Anthropology for the Fall 2014.

a. Both she and Ahn acknowledged that was an initial recommendation, since she desired a consensus from the Division's faculty after the faculty could discuss the matter. A faculty meeting was scheduled for September 6, 2013 at the beginning of the 2013-2014 academic year.

b. On July 1 she telephoned Grievant, who was on the mainland, to inform Grievant of her proposed recommendation. Grievant did not agree with her proposed recommendation, and Chinen was willing to discuss the matter with Grievant upon Grievant's return to Hawaii.

c. By email dated July 14, Chinen communicated her initial recommendation to the faculty. However, by email dated July 13, Grievant had contacted Vice-Chancellor Randall requesting a meeting to resolve matter, informing Randall she will be accompanied by Union Executive Director Musto. On August 8 Grievant and Randall met, and Grievant expressed her concerns on why her temporary position should be converted. Randall expressed that she wanted to learn what the Division faculty's view is, and notified Grievant by email dated August 13 that once she and Ahn are informed of the faculty's discussion, she will make her decision on the matter.

12. The Division faculty met on September 6 as scheduled to discuss, *inter alia*, how the two allocated permanent positions should be utilized. No consensus was reached whether the allocated positions should be used to convert the temporary position occupied by Grievant, or to proceed with Chinen's recommendation of creating two permanent positions in other disciplines, or to recommend another course of action. A number of faculty members were dissatisfied with the meeting's outcome. The four witnesses who attended the meeting – Grievant, Musto, Chinen, and Dr. Herman – had slightly different perceptions of what transpired at the meeting and the meeting's outcome.

a. Based upon the feedback Ahn received from a "handful" of Division faculty who informally approached him after the faculty meeting, Ahn took an informal poll from other faculty. Of the 10 individuals he asked, 8 indicated they were in favor of a national search as a recruitment tool should the temporary positions be converted.

b. In an email dated September 12, Chinen informed the faculty that Ahn had just contacted her with the Vice Chancellor's decision how they would proceed – that her initial recommendation to make the Forensic Anthropology a permanent position was not changed, but that Political Science temporary position will be converted to a permanent position; and that recruitment for each position will be done through a national search.

13. At a September 16 senior staff meeting, Ahn recommended to Chancellor Freitas that the Forensic Anthropology position be made a permanent position because Dr. Turner was not seeking to have his Cultural Anthropology temporary position converted. The Chancellor did not accept that recommendation, and directed that both temporary positions be converted and that recruitment for those permanent positions be conducted by a national search.

a. By email dated September 17, Ahn notified both Grievant and Turner that the Vice Chancellor's office decided to convert both the temporary political science and the temporary cultural anthropology positions to permanent positions, and that a national search would be used to recruit for the positions. Both Grievant and Turner were notified their employment under their respective limited term contracts would terminate effective July 31, 2014. Both Grievant and Turner were invited to apply for the permanent positions.

b. By email dated September 24, Chinen notified the Division faculty members, *inter alia*, that the temporary positions will be converted and that Grievant and Turner's employment will be terminated. Chinen also informed the faculty members that two temporary positions "will 'open up' on July 31, 2014", and those positions would be allocated to the Economics and Forensic Anthropology disciplines and that non-tenure track instructors would be recruited.

14. Turner applied for the Cultural Anthropology position, and was selected by the national search committee. By letter dated May 27, 2014, he was offered an initial two year appointment to that position effective August 1, 2014. He accepted.

15. Grievant applied for the Political Science position, but was not selected by the national search committee in April 2014, when the committee met and recommended another individual.

16. On July 15, 2014, an individual who resided in New York was hired as an assistant professor of Forensic Anthropology in a tenure-track permanent position. Her appointment was effective August 1, 2014.

17. The data provided by the UHWO's Assessment and Institutional Research Office in October 2013 shows 43 students enrolled in the political science concentration during the 2013 Fall Semester. The UHWO's Academic Plan prepared in 2011 forecasted enrollment of 33 students for the Fall 2013, and 43 students for the Fall 2016 semesters. The data shows the number of students in the Fall 2013 already exceeded the number projected for Fall 2016. Grievant opined that both the number of students and the curriculum can support a third position in political science. Her opinion was corroborated by Dr. Herman who also testified that neither he nor Dr. Kato teach the political science courses of Women and Politics, Politics of Food, Agroecology, and Constitutional Law, subjects that Grievant had taught and some of which she developed.

IX. DISCUSSION AND OPINION

A. Did Employer Violate Article II of the Agreement by Discriminating Against Grievant for Exercising Her Contractual Rights?

The Union presents a plausible argument for retaliation – outlining a scenario that begins with the Social Sciences Division chair's recommendation to use the allocated permanent tenure positions for the Forensic Anthropology and Economics concentrations, Grievant's questioning why one of the allocated permanent positions was not used to convert the temporary position she held, having the Union's Executive Director advocate on her behalf which placed the UHWO administration into the choice of abandoning its plans or "persuading" Grievant to abandon hers. And when she did not, increasing the pressure. And when Grievant still "would not back down, exacting punishment on her by raising the stakes as high as possible" – first by sending Grievant thinly veiled emails that her employment contract could be terminated if she persisted in having her temporary position converted, and she would need to compete for the converted position, then by terminating the employment contract of colleague Dr. Turner. (Union Br. at 38-44) The Union points to evidence of continued retaliation after Grievant was notified her employment would cease – other faculty members employed as lecturers on lesser duration limited term contracts who were rehired for the Fall 2014, and when Grievant was recommended by the new

incoming Division chief to teach a course she had developed and previously taught, Dr. Randall rejected the recommendation without explanation. (Union Br. at 46-47)

Although the facts could be parsed and Employer might disagree with certain characterizations, and while others could be rationalized by notions of collegial collaboration and shared governance in decisions of this sort, closer attention would have been given to this issue, were it not for the discussion and opinion that follows.

B. Did Employer Violate Article III Section B of the Agreement by Not
Placing Grievant in the Converted Permanent Position?

Courts and commentators have opined how collective bargaining agreements ought to be interpreted.

In construing a collective bargaining agreement the primary objective is to ascertain and effectuate the intentions of the parties as manifested by the agreement in its entirety. *University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii* 66 Haw. 214, 219 (1983). The agreement should be construed as a whole and its meaning determined from the entire context not from one part, word, phrase, or clause. *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n* 997 F.2d. 581, 588 (9th Cir. 1993). Furthermore, it is axiomatic that “all words used in an agreement should be given effect, and no provision rendered meaningless”. Elkouri and Elkouri, *How Arbitration Works* 463-464 (6th ed. 2003).

Article XIII was introduced by the Union during the 2003 Contract negotiations. Its focus was upon those faculty members not eligible for tenure – either because of the faculty member’s status^{7/}, or because of the position to which the faculty member is appointed^{8/}. The Union’s Executive Director’s testimony that the Union proposed Article XIII, and that its purpose was to provide a level of job security to persons not eligible for tenure, is uncontradicted. It is clear to this Arbitrator that Section C of Article XIII offers the not eligible for tenure employee a sense of job security for a fixed period, during the span of time that employee’s employment contract is in force. Section B would likewise provide the not eligible

^{7/} A part-time appointment; an appointment to fill the vacancy of another faculty member having ‘return rights’ to the position; a ‘visiting faculty’; or being paid on a lecturer’s fee schedule. Article XIII Sections A.2., A.4., A.3., and A.1. A faculty member specifically hired on a research grant or a training grant, or through an external contract. Article XIII, Section D.

^{8/} A position not designated as permanent by the funding agency; a position that is part of a program that has only probationary approval by the Board of Regents. Article XIII Sections A.5., A.6.

for tenure employee a sense of job security by providing that employee an avenue to achieve tenure, if that employee is placed in the permanent position ‘created’ when the temporary position is converted.

At issue is whether Section B by its language allows that to occur, or if as contended by Employer Section B only pertains to the conversion of a position – from temporary to permanent – allowing Employer the option of appointing the employee to the converted position, or opening the converted position to recruitment.

To accept Employer’s contention is either to ignore the title to Section B “Conversion of Temporary Appointments to Probationary Status”, or to accept Mr. Yuen’s letter and testimony that the section only pertains to the conversion of positions, despite the term ‘temporary appointments’. And for the reasons that follow, such an interpretation is contrary to the tenets of contract interpretation, and the evidence. *First*, Mr. Yuen’s attempt at clarifying the Section B by his June 16, 2003 letter, after the Contract had been signed (or the final version of the proposal had been signed), is contrary to the manner in which Agreements may be modified. *See* Article XXVII in Appendix A. *Second*, not only did Dr. Musto not provide written acknowledgment to Yuen’s letter, his testimony of speaking with Yuen and informing Yuen he was not responding to the letter, that the Contract speaks for itself, and that as each matter arises it will be addressed individually and if there is a disagreement then it will be grieved, is credited. *Third*, giving the word “appointments” the meaning Yuen wanted Musto to accept, ignores that it is actually the second word of the term “temporary appointments” – a term specifically defined by the Contract identifying certain categories of faculty not eligible for tenure. *Fourth*, construing the word “appointments” to reference an instructional position rather than as a reference to personnel, creates an inconsistency and a conflict with the term “probationary status” in Section B’s title. The term “probationary status” refers to the particular stage of the faculty member’s road to tenure – the probationary period. The title to Article XIII becomes nonsensical if it is construed to mean that a kind of instructional position can be converted to a form of personnel status. *Fifth*, as FOF #1 states, the title of Article XIII Section B is descriptive of changing the employment status of a faculty member from not being eligible to achieve tenure, to the status of being eligible to achieve tenure. *Sixth*, construing the title to Section B and the body of Section B, as a whole does not produce an inconsistent or an absurd result. The title is descriptive of the change in a faculty member’s employment status; the body of the section denotes there must be a

change in the characterization of the position in order for an employment status change to occur^{9/}, and identifies the criteria that is to exist before there is a position conversion. *Seventh*, former University Vice-President for Academic Affairs McClain’s April 30 2004 Memorandum implementing Article XIII B, despite its title “Conversion of Temporary *Positions* to Probationary Status”, recognized an exception to the general practice of open recruitment for a newly created/converted permanent position – when the faculty member occupied the temporary position full time, for five or more years, and had been promoted while in that position – the faculty member may be converted to probationary status thereby filling the converted position without a need for recruitment. Furthermore, use of the phrase ‘direct conversion of the incumbent’ when used in the context of point 4 of the McClain Memorandum directing that personnel in converted positions are to be considered in a probationary appointment status, makes it exceedingly clear that both the temporary position as well as the person occupying that temporary position are to be converted when the conversion criteria are met. *Eighth*, recognizing such an “exception” benefits both Employer and the incumbent – high performing, quality faculty who have proved their value to the institution are retained, given the opportunity to obtain tenure, and provided recognition and motivation. Their risk of loss to another institution is lessened and the individual gains a sense of employment security. *Ninth*, the history of position conversions together with personnel status changes at the Honolulu Community College and the manner in which it was done – each individual and each position scrutinized before conversion – served as the Union’s impetus to propose the Article XIII provision and its model for implementation. And after Article XIII became a part of the 2003-2005 Agreement, a number of non-tenure track UH-Manoa faculty in subsequent years were given probationary status when their temporary positions were converted to permanent positions.

In FOF #9, the Arbitrator determined that Grievant met the administrative requirements identified in Vice-President McClain’s April 2004 Memorandum for direct conversion to a converted permanent position. The Arbitrator is in accord with Union counsel’s observation and argument that:

“it is further undisputed that Grievant developed the online Political Science program, was the driving force to establishing the Sustainable Community Food Systems program, and that her student evaluations and work in the community was well received.” (Union Br. at 28)

^{9/} A faculty member must be in a tenure-track position in order to obtain tenure status.

Thus open recruitment was not needed. Both the risk to Grievant of non-selection and the cost to Employer in terms of resource expenditure – both monetary and faculty time – is avoided, had Grievant been granted probationary status upon conversion of the political science position.

The Arbitrator does not agree with Employer's arguments that construing Section B to allow conversion of the temporary position's incumbent might lead to undesired consequences such as an unqualified incumbent being given probationary status, or having national searches conducted for temporary positions consistently funded for 7 consecutive years, or ending an incumbent's temporary contract before the incumbent reaches his/her seventh [sic] year so as to avoid have to convert someone not the best candidate for permanent position. (ER Brief at 22-23) *First*, adherence to the McClain Memorandum identifies 3 criteria the incumbent is to meet before there is consideration for direct conversion; *Second*, the Chancellor as the appointing authority retains the option not to appoint the incumbent that satisfies the three McClain criteria, as long as cogent reasons are provided why he considers the incumbent not qualified so to avoid the challenge of acting in an arbitrary or capricious manner; *Third*, a national search is not required for every temporary position that meets the Section B conversion criteria – *e.g.* the incumbent had not occupied the position for five or more years, does not have a terminal degree or lacks the qualifications for the converted position, or the position is or will become vacant, or has an incumbent who may lack interest – like Dr. Turner who preferred to remain in a temporary position so that the allocated permanent position could be directed to a more needed concentration; *Fourth*, if it is perceived that the incumbent does not have the skills or attributes to eventually become a candidate for probationary status, that individual's limited term contract can be terminated or the individual could be transferred to another position prior to reaching the 5th year in the temporary position. Additionally, the Arbitrator is not particularly persuaded by Employer reference to Employer's Exhibit A, titled *Recruitment, Selection, & Appointments*, prepared by the University's Office of Human Resources, that national searches are a general requirement for tenure-track positions at four-year campuses. That document is dated May 2002, before Article XIII was negotiated. The McClain Memorandum, on the other hand, is clearly after the 2003 Contract was negotiated and signed, and contains criteria that seemingly satisfies concerns about incumbents unqualified for direct conversion.

In view of the foregoing reasons and the principles of construing contract language in collective bargaining agreements, this Arbitrator determines that Employer misapplied Article XIII Section B by not directly converting Grievant when the temporary non-tenure-track position she occupied was converted to a permanent tenure-track political science position, and thereby violated the CBA.

X. DECISION AND AWARD

1. The Union's grievance is granted. Employer misapplied Article XIII Section B of the Contract by not placing Monique Mironesco in the permanent Political Science position when the temporary Political Science position Dr. Mironesco occupied was converted.
2. Employer shall remedy its violation of the Collective Bargaining Agreement, by appointing Dr. Mironesco to a permanent political science position at UHWO, and granting her probationary status.
3. Employer's termination of Dr. Mironesco's August 1, 2013 through July 31, 2016 Limited Term Contract is rescinded. Dr. Mironesco remains employed under the terms of said Limited Term Contract, to include all forms of compensation, remuneration or benefits provided thereunder, until she receives an employment contract in accordance with Article XII, Section C.3 of the Collective Bargaining Agreement and pursuant to applicable provisions of Employer's personnel policy for probationary status tenure-track faculty members.
4. Employer may offset the salary it is obligated to pay Dr. Mironesco under said Limited Term Contract beginning August 1, 2014 by the amount of unemployment compensation Dr. Mironesco may have received, and by any wages she may have earned after July 31, 2014 from part-time teaching position(s) other than the part-time teaching position(s) she held during Academic Year 2013-2014. Dr. Mironesco shall provide Employer, through its attorneys with this information, forthwith.
5. Employer shall not retaliate against Dr. Mironesco in any future personnel action(s) because she filed this grievance.

6. The Arbitrator will retain jurisdiction for 45 calendar days from the date of this Decision and Award, for the purposes of resolving any dispute in the compensation Employer is to pay Dr. Mironesco and/or of clarifying this Award. Either party may request the Arbitrator to extend this period for this purpose.

DATED: December 18, 2014

A handwritten signature in black ink that reads "Frank Yap, Jr." with a stylized flourish at the end.

Frank Yap, Jr.
Arbitrator
P.O. Box 3589
Honolulu, Hawaii 96811

The following provisions of the 2009-2015 Collective Bargaining Agreement (“CBA”) relevant to this proceeding are as follows:

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 XII – TENURE AND SERVICE

A. DEFINITIONS

As used in this Agreement, the term:

1. “Academic tenure” means the right of Faculty Members to permanent or continuous service in the University;
2. “Probationary period” means the period of assessment of eligible Faculty Members prior to the awarding of tenure.
3. “Temporary appointments” mean Faculty Members on Limited Term Contracts, Visiting Faculty, and lecturers who are not eligible for tenure.

* * * * *

C. PROBATIONARY PERIOD

1. Probationary Service.

- a. The probationary period begins when the Faculty Member first holds a tenure track appointment effective on or after July 1 and prior to October 2 of full-time service.
- b. The probationary period ends by the granting of tenure, the refusal of tenure by the Employer, or the non-renewal of appointment. During this period, probationers do not have a claim to their position and the Employer, through its officers, may exercise its prerogative of non-appointment without a statement of reasons.
- c. “Full-time probationary service” eligible for credit toward academic tenure must consist of teaching and/or research and/or extension and/or specialized work in the University in Ranks 2, 3, 4 and 5 in the A, B, or S classification, or in Ranks 3, 4, and 5 in I or R classification, or in Ranks II, III, IV and V of the C classification in the Community Colleges. In the absence of agreement to the contrary, service on a terminal year contact does not count as probationary service.

2. Duration of Probationary Period.

* * * * *

3. Contracts During Probationary Period.

Initial appointment to the Faculty, by contract, shall be for a two-year (2) period. In the C and I classifications, the initial contract will usually be effective August 1 and continue through July 31 of the last year of the initial contract. If the Faculty Member is to be reappointed, a new contract will be offered which becomes effective August 1.

For Faculty Members at Rank 2 or 3, this contract shall be for two (2) years and may be followed by one-year (1-year) contracts effective August 1, with the terminal year usually ending July 31.

Faculty at all other ranks who are to be reappointed shall be given one-year (1-year) contracts effective August 1 with the terminal year ending July 31. Additional contract renewals shall be for one-year (1-year) terms not to exceed seven (7) years of full-time probationary service.

D. EFFECTIVE DATES FOR PROBATION

* * * * *

E. RENEWAL OF CONTRACTS DURING THE PROBATIONARY PERIOD

* * * * *

Article XIII – FACULTY APPOINTMENTS NOT ELIGIBLE FOR TENURE

A. GENERAL

A significant number of individuals in the bargaining unit are not eligible to receive tenure. Such positions are funded through State general appropriations, special funds, revolving funds, and external government and private grants or contracts, or a combination thereof. These include the following:

1. Faculty Members being paid on a Lecturer Fee Schedule;
2. Part-time appointments;
3. "Visiting Faculty";
4. Appointments that fill vacancies where a Faculty Member has return rights to the position;
5. Positions not designated as permanent by the funding agency; and
6. Positions that are a part of a program that has only probationary approval by the Board of Regents.

B. CONVERSION OF TEMPORARY APPOINTMENTS TO PROBATIONARY STATUS

The Employer shall make every effort to convert temporary positions to tenure track status where:

1. The position has a permanent designation and is fully funded through State general funds; or
2. Where a multi-year Limited Term Contract would serve the mutual needs of the Employer and the Faculty Member.

C. LIMITED TERM CONTRACTS

No later than July 1, 2004, Faculty members both on full and part-time appointments not eligible for tenure will be offered multi-year contracts under the following conditions:

1. The Faculty Member has been appointed to the same bargaining unit position for five (5) consecutive years; or
2. Whether a multi-year Limited Term Contract would serve the mutual needs of the Employer and the Faculty Member.

Limited Term Contracts shall be for three (3) years, with the expiration term of the contract rolling forward one (1) year at the end of each year of the three (3) year term.*

**The term "rolling contract" refers to the renewal of the contract at the end of each year of its term. Therefore, each year a three-year rolling contract would automatically be renewed for an additional three (3) years if notice of termination of the contract were not made by the end of that first year.*

A Limited Term Contract may be terminated prior to its expiration, provided that the Faculty Member is given at least four (4) months' notice, and all other temporary contracts of shorter duration in the individual's Program, Division, or Department have been given prior notice of termination.

Limited Term Contracts for a period of one (1) year up to three (3) years, shall be offered to Lecturers who have taught for at least eight (8) semesters over a seven (7) year period in the same unit.

D. RESEARCH GRANTS OR OTHER NON-STATE GENERAL FUNDED CONTRACTS

* * * * *

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.

B. GENERAL

1. Faculty Members 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.

* * * * *

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.

* * * * *

No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

* * * * *

Article XXVII – Entirety and Modification

This document contains the entire agreement of the parties. No provision or term of this Agreement may be amended, modified, changed altered, or waived except by written document executed by the parties hereto.

The “Rule of Reasonableness”

In that part of the Union’s Post-Hearing Brief where it addresses the issue it raised – Did the Employer breach Article XIII, Section B of the Agreement for failure to act in good faith and/or the “Rule of Reasonableness” by refusing to convert Grievant to a tenure track position based on assurances made by the UHWO administration – the Union posits that “Equity Requires Converting the Grievant to a Tenure Eligible Position”.

The Arbitrator considers it instructive to cite the Union’s proposition and support for that proposition in this Appendix A.

At page 30, of its Brief, the Union states:

“It is well accepted that equitable principles are part of every collective bargaining agreement. Arbitrators recognize these principles as a tool for the interpretation of the contract. One labor arbitrator noted that he could not ‘overlook the equity aspects surrounding [the] grievance . . . which serves to guide him in making for a proper and fair interpretation of the language embodied in [the contract]’. *Jim Walter Res.*, 87 Lab. Arb. (BNA) 857,862 (Nicholas, 1986)

The Union provides the following quote from the Elkouri & Elkouri treatise, *How Arbitration Works*, 7th Ed. at pp 9-49 to 9-51:

“The implied covenant of ‘good faith and fair dealing’ is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied part of every collective bargaining agreement is sometime referred to as the **doctrine of reasonableness**. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor. The covenant does not arise out of agreement of the parties, but rather out of the operation of the law.

* * * * *

Arbitration and judicial decision often cite the implied covenant of good faith and fair dealing in a number of other contexts, but the doctrine serves as little more than an interpretative tool to aid arbitrators and judges in their case-by-case determinations of breaches of collective bargaining agreements. . . . Essentially, the implied covenant of good faith and fair dealing serves as a springboard for a case-by-case determination of reasonableness. Thus, the covenant serves as the basis for the proposition that managerial discretion must be exercised reasonably, and discretionary management decisions will be reviewed if they were arbitrary, capricious, or discriminatory.