

• **NEW CASE HIGHLIGHTS:**

**(6-18-99) Contract Renewal of Probationary Faculty**

This arbitration is about a probationary faculty member who submitted an early application for tenure and promotion in the fall, later withdrew it, and applied for promotion only. Before final action was taken on the promotion application, the faculty member was notified in the spring to submit materials for the contract renewal evaluation. Ultimately, the faculty member was granted promotion but the faculty member's contract was non-renewed.

Prior to the arbitration hearing, the parties had stipulated that the Employer had complied with the contract renewal procedures contained in Article XII.B. of the Agreement. The main issue before the Arbitrator was whether a nonrenewal decision is grievable for reasons other than noncompliance with paragraph B of Article XII. The Union contended that the decisions to grant promotion and nonrenew the faculty member's contract were inconsistent, and thus, arbitrary and capricious. The Employer maintained that such issues were not grievable and, therefore, not arbitrable.

On March 12, 1999, Arbitrator E. John McConnell denied the grievance finding no violation of the Agreement. He recognized the clear language in the Agreement to narrowly restrict the grievability of negative contract renewal decisions. Except in limited circumstances involving illegal acts, bad faith or other serious public policy matters, a nonrenewal decision can be grieved only for procedural violations under paragraph B of Article XII. He also sustained the Employer's decisions to simultaneously grant promotion and nonrenew the faculty member's contract by finding that the standards for promotion and contract renewal are separate and distinct.

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**(6-18-99) Sabbatical Leave and Leave Without Pay**

This grievance resulted from the denial of a faculty member's application for sabbatical leave to attend professional school. The application for sabbatical leave was filed in February 1998 contingent on admission into the graduate school program and coverage of the faculty member's duties. Following the faculty member's acceptance into the professional school, efforts continued unsuccessfully from March through July to arrange coverage. In August, the application for sabbatical leave was denied based in part on the lack of adequate coverage due to budgetary constraints. Subsequently, the faculty member applied for partial LWOP for professional improvement which was not acted upon by the Employer. In the meantime, the faculty member began attending professional school and was permitted to take half-time vacation leave in order to perform certain aspects of the position. Upon exhaustion of vacation leave, the Employer placed the faculty member on full-time LWOP and hired another individual to perform certain functions of the position on a half-time basis.

The sabbatical issue before the Arbitrator was whether the Employer violated the Article V.A.7 of the Collective Bargaining Agreement which states that the decision on a sabbatical leave application "shall normally be rendered within four months" after receipt. The leave without pay

issue was whether the Employer violated the tenure and disciplinary provisions of the Agreement by unilaterally placing the faculty member on full-time LWOP status.

On January 25, 1999, Arbitrator E. John McConnell agreed with the Employer that the delay in acting upon the sabbatical application was justified by efforts to resolve the coverage problem. However, while recognizing the wide discretion of the Employer in granting or denying LWOP applications, the Arbitrator found that the faculty member's application for partial LWOP should have been considered, and that the full-time LWOP violated Article VI.A. of the Agreement. He directed the granting of the partial LWOP application and half-time backpay.

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**(7-22-98) Sajean Geer v. State of Hawai'i, The University of Hawai'i, The Research Corporation of the University of Hawai'i, Perrin, Mleynek, Sakamoto, Civ. No. 96-155K:**

Following a two-week jury trial before Judge Ronald Ibarra in Kona, the Circuit Court of the Third Circuit ruled in favor of the University of Hawai'i and the Individual defendants named in this lawsuit on all counts. The Plaintiff had alleged discrimination based on sex, race, national ancestry, breach of contract, wrongful discharge in violation of public policy, retaliation, and the intentional infliction of emotional distress. The Plaintiff, a female of Chinese ancestry, was employed by RCUH as the West Hawai'i business consultant for the Small Business Development Center which is a cooperative partnership between UH-Hilo and the U.S. Small Business Administration. Specifically, she alleged that she was not considered for training and employment opportunities, that she was wrongfully terminated in retaliation for reporting violations of state and federal laws to external agencies, and denied promotional opportunities.

The University of Hawai'i, RCUH, and the named Defendants were represented by Janice Kemp and Douglas Inouye, Deputy Attorneys General, and the Plaintiff was represented by Francis Jung, Esq. and Joseph Fagundes, Esq.

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**(7-22-98) Maupin v. University of Hawai'i, David Bess, Kenneth P. Mortimer, and Doe Defendants, Civ. No. 96-00258:**

On June 18, 1998, the U.S. District Court of the District of Hawai'i granted the University's motion for summary judgment which dismissed all the Plaintiff's claims against the University of Hawai'i and Defendants Mortimer and Bess in their individual and official capacities. This case arose from the termination of the Plaintiff, a tenured professor in the College of Business Administration, who allegedly abandoned her position. She claimed violations of due process rights in her termination; a conspiracy to deprive her of such rights; and the intentional infliction of emotional distress. The University had reinstated the Plaintiff to her position and subsequently, she retired from the University of Hawai'i. The evidence before the Court indicated that the defendants had reason to believe that the Plaintiff had abandoned her teaching position in the Fall of 1995. Defendants' evidence showed that the Plaintiff had missed classes without explanation, failed to respond to the University's attempts to contact her, and that students had complained about these absences and the lack of a class syllabus. It was not until November that

the University was made aware of her medical condition.

The University of Hawai'i and the individually named Defendants were represented by Maria Cook, and Douglas Inouye, Deputy Attorneys General, and the Plaintiff was appearing Pro Se.

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**(6-12-98) Lamb v. University of Hawai'i, Watanabe, Hippensteele, Goodman, Foster and Maaka, No. 97-15068, D.C. No. CV-95-00884-ACK:**

The Ninth Circuit Court of Appeals has affirmed the lower court's judgment for the University and the individual defendants named in this lawsuit which was filed back in November of 1995. The Plaintiff, a professor, had alleged, *inter alia*, that he was deprived of his First Amendment right of academic freedom by employees of the University in processing a sexual harassment complaint, conducting the investigation and holding panel proceedings under the Mānoa sexual harassment complaint procedures. The internal complaint was brought by a student who alleged that the Plaintiff had sexually harassed her during a classroom discussion on rape and sexual harassment, and by sexually assaulting her. The lower court dismissed the lawsuit in its entirety by granting summary judgment for the University based on Eleventh Amendment immunity and for the individual defendants in their personal capacity on qualified immunity grounds. The Eleventh Amendment shields the University as a state entity and University officials acting in their official capacity against liability in federal court, and the doctrine of qualified immunity protects public officials acting in their personal capacity from individual liability provided that their conduct does not violate a clearly established statutory or constitutional right.

The sole issue on appeal was whether the lower court erred in its finding that University officials were entitled to qualified immunity with respect to the First Amendment issue. On May 28, 1998 the Ninth Circuit Court of Appeals ruled that the University officials had the duty to investigate the charges once a sexual harassment complaint was filed by the student. In addition, since case law has not clearly established the scope of a professor's right to free speech in the classroom, the Court rejected the Plaintiff's First Amendment claim. Thus, the lower court had properly granted qualified immunity to the individual defendants.

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**(01-23-98) Nabil El-Ramly v. University of Hawai'i and David Bess, U.S.D.C. 96-00440 SPK:**

This is a civil rights case filed in federal court by a retired faculty member claiming discrimination based on age, race, and national origin arising out of his employment as a professor at the University. The complaint alleged violations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act and claims for defamation, negligence and infliction of emotional distress.

On January 20, 1998 following a two week trial, the jury returned a verdict favorable to the University and Dean Bess. The Defendants were represented by Gary Hynds and Kathleen Sato, Deputy Attorneys General, and the Plaintiff by Jeffrey Damasiewicz, Esq.

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**(01-23-98) Board of Regents of the University of Hawai'i v. University of Hawai'i Professional Assembly, Civ. No. 94-3873-09:**

President Clinton by Proclamation 6677 closed federal offices on April 27, 1994 as a day of mourning for the late Richard Milhous Nixon. The University of Hawai'i Professional Assembly (UHPA) filed a grievance under the Unit 07 Collective Bargaining Agreement claiming that the faculty should also have been given that day as a holiday. The University filed this action in Circuit Court for declaratory relief for a determination of whether a holiday for state employees, as opposed to merely a day of mourning, had actually been declared. UHPA had the case removed to federal court; however, the case was later remanded to state court.

On August 12, 1997, Judge Kevin Chang found that President Clinton's proclamation did not designate April 27, 1994 as a national holiday and that the issue was not subject to arbitration under the Collective Bargaining Agreement. Therefore, he granted summary judgment in favor of the University. The University was represented by Douglas Inouye, Deputy Attorney General, and UHPA by Wade Zukeran, Esq. The court appeal and grievance were recently withdrawn by UHPA.

**(01-23-98) Donald A. Wallace, Jr. v. University of Hawai'i, John Burns School of Medicine, Christian L. Gulbrandsen, M.D.; University of Hawai'i, et al, Civ. No. 95-2996-08:**

This case arose from the academic dismissal of Plaintiff Wallace, a third-year medical student, from the MD program of the John A. Burns School of Medicine. His dismissal was based on his failure to earn academic credit for an Internal Medicine course, which was preceded by a six-year history of academic deficiencies.

This action came to trial on July 21-29, 1997 before Judge Dan Kochi. He found that there was not a "scintilla of evidence that Dean Gulbrandsen's decision was motivated by malice or otherwise improper purpose" or that he abused his discretion in dismissing the Plaintiff. Thus, on August 13, 1997, judgment was ordered in favor of the Defendants and against the Plaintiff as to all counts in the Complaint. The University was represented by Harriet Lewis and Martin Basiszta, Deputy Attorneys General, and the Plaintiff by William Meheula, Esq. and Andrew Winer, Esq. This case is on appeal.

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**(7-25-97) Return to Faculty Position**

This is a summary of a recent arbitration decision involving the return of a faculty member to an academic position upon resignation from an administrative one. This grievance arose under Article IX (now XI), Section I, "Appointment to Administrative Duties," of the 1993-95

Collective Bargaining Agreement which reads in pertinent part:

**Upon return to the academic position from an administrative position a Faculty Member's salary in Rank will be that which most closely corresponds with that which would have been received had the Faculty Member not assumed administrative duties (taking into account such increase as would have been received in the interim) with such adjustments as may be equitable under the circumstances.**

The Union challenged the amount of the fall-back salary set by the University. In the Arbitrator's Decision dated July 7, 1997, Arbitrator Keith Hunter sustained the grievance in part and denied it in part. Briefly, although Arbitrator Hunter found no violation of the Collective Bargaining Agreement, he ruled that the Employer was bound by the Dean's action in offering a fall-back salary of \$110, 052 to the faculty member who was returning from a managerial position to a faculty position instead of the \$99, 936 authorized by the President. The University of Hawai'i Professional Assembly had argued that the Grievant was entitled to \$112, 344 which included an equitable adjustment.

The Arbitrator recognized that the granting of equitable adjustments is clearly discretionary with the President or Board of Regents and would not substitute his judgment on this issue. However, as stated above, the Arbitrator found that the Dean had made a commitment to the faculty member and that the commitment was binding on the University.

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### **(6-23-97) Transfer of Locus of Tenure**

UHPA filed a class grievance on behalf of two faculty members in the School of Public Health alleging that deteriorating working conditions resulting from budget cutbacks interfered with their ability to perform their professional responsibilities. They claimed that Article III, Section A, Maintenance of Rights and Benefits, had been violated and requested that the Arbitrator transfer their loci of tenure to either the John A. Burns School of Medicine or the Pacific Biomedical Research Center as their remedy. The Employer argued that the transfer of locus of tenure is governed by Article IX, Tenure and Service, Section J, which was not cited in this grievance. Further, the Employer argued that the lack of "signing authority" in the Dean, reduction in secretarial support and student help do not constitute rights or benefits provided by a written rule, regulation or policy formally adopted by the Board of Regents within the meaning of Article III.

On May 25, 1997, Arbitrator Ambrose Rosehill agreed with the Employer's position and denied this grievance. He found that UHPA failed to prove a violation of Article III, Section A, and that neither the Union nor the Agreement can restrict the University's right to maintain the sufficiency of governmental operations and determine the methods, means and personnel by which operations are to be carried out.

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**(6-23-97) Contract Renewal**

This grievance arose from a contract nonrenewal of a faculty member in the College of Education. Despite initial claims of sex discrimination, harassment, and disability discrimination, the primary issues in this arbitration were whether the actions of the University violated the contract renewal procedures under Article X, Section B, (e.g. reviewers had used different standards, employed a “magic number” formula for publications, Dean had met with the DPC) or the grievance procedure under Article XXI, Section B.1 of the Agreement by failing to agree to mediation. The Union also argued that the University had the burden of proof in this case because a nonrenewal constituted a “termination.”

Arbitrator Edward King, in his decision dated June 6, 1997, stated that the University’s decision on contract renewal must be presumed to be a valid and proper exercise of the University’s discretion, and that the burden of proof rested with the Union to establish that the decision was made in bad faith or was arbitrary. The question, according to the Arbitrator, is not whether one agrees with the DPC or with the Employer’s priorities, values, or judgment in evaluating the Grievant’s performance. The University’s decision must be upheld unless it is shown to be arbitrary, capricious, or irrational. The Arbitrator found that the reviewers were guided by known standards; no numerical formula was employed in assessing publications; and that the meeting between the Dean and the DPC had no prejudicial effect on the contract renewal process. Accordingly, the Arbitrator denied the grievance.

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**(5-14-97) Lam v. University of Hawai‘i, Kenneth P. Mortimer, and Lawrence C. Foster, Civil No. 89-00378 MLR**

On April 24, 1997, U.S. District Court Judge Manuel Real ruled in favor of the Defendants and dismissed this discrimination lawsuit without submitting it to a jury. Deputy Attorneys General Gary Hynds and Elton Suzuki represented the University and other Defendants in this case which arose from two searches which were conducted to hire a director for the Pacific- Asian Legal Studies program at The William S. Richardson School of Law. Plaintiff Lam alleged that the hiring committee discriminated against her on the bases of race, sex, and national origin. Further, she alleged retaliation by the University for her critical comments on the first search. Previously, the Court had granted Summary Judgment in favor of the Defendants on the first search. In the trial that followed on the claims related to the second search, the Court again ruled in favor of the Defendants. The Plaintiff appealed both the granting of summary judgment and the judgment of the Court. The U.S. Court of Appeals affirmed the ruling as to the second search, but reversed the ruling as to the first search. The case was remanded for this trial before Judge Real.

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**(5-14-97) Grievance of Nonrenewal of Limited Term Contract**

The faculty member was hired as an Associate Professor in the School of Medicine on a limited term appointment in March of 1994 and not renewed for the 1995-96 academic year. She grieved under the CBA alleging that her contract nonrenewal was due to the exercise of her right to engage in outside employment. The Employer maintained that the faculty member could not grieve the nonrenewal of her contract. In holding that she could grieve, Arbitrator Stern found that the CBA specifically provides that the nonrenewal of probationary employees are not grievable, except for procedures. Because she was a limited term employee and not a probationary employee the provision in the CBA did not apply to her. "If the matter in dispute affects the compensation or job security of an employee it is logical to assume that the matter is covered by the agreement unless there is language to the contrary." Upon finding the matter arbitrable, he went on to establish the following standard for contract nonrenewal" [T]he Employer determination on nonrenewal should not be set aside by an arbitrator unless that determination is arbitrary, capricious, discriminatory or in violation of a specific contractual right."

Arbitrator Stern rendered his decision on December 13, 1996 concluding that the Employer did not violate the terms of the CBA and denied the grievance.

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**(5-14-97) Grievance of Nonrenewal of Probationary Faculty**

A faculty member in the College of Business Administration, was not renewed and the 1996-97 academic year was to be her terminal year. She claimed that the extension of her probationary period should automatically result in an appointment or contract renewal. The Arbitrator found no technical violation of paragraph B of Article X of the CBA, i.e., no procedural violation. He also found no evidence to support her position that the extension of probationary period automatically results in contract renewal. There also was no evidence to support charges of wrongdoing or discrimination by the Dean. There was substantial documentary evidence reflecting ongoing concerns about the research ability of this faculty member.

Arbitrator Patrick K.S.L. Yim rendered his decision in the above-referenced case on December 17, 1996 dismissing the grievance of this probationary employee, as nongrievable.

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**(5-14-97) The "2 in 7" Rule**

The so-called "2 in 7" rule refers to the unwritten policy limiting leaves with or without pay to not more than 2 years in any 7-year period. Exceptions to this rule require approval by the Board of Regents. This arbitration consisted of two grievances which arose from the denials of applications for a sabbatical leave and a leave without pay. In each instance, the leave requested would have constituted the third year of leave in a 7-year period for the faculty member. The

Union grieved the application of the so-called "2 in 7" rule and the failure of the administration to transmit the request to the Board of Regents for approval. The arbitrator sustained the denials of these requests for a third year within a 7-year period. Further, he upheld the established practice that general personnel matters within policy limits are delegated to the University Administration and are not forwarded to the Board of Regents; and even exceptions to policy are not forwarded to the Board unless positively recommended by the University Administration.

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**(5-14-97) Compensation for .50 FTE Directors**

This class action grievance was brought by the Union on the behalf of five .50 FTE Directors in the School of Hawaiian, Asian and Pacific Studies (SHAPS) when the University recalculated their monthly differential from 100% to 50% of the differential between a 9-month and 11-month appointment under Administrative Procedure A9.590, Appendix B, "Nine-/Eleventh-Month Salary Differential." This procedure sets forth the formula for the salary differential of instructional faculty who are assigned part-time administrative duties which require the individual's presence for 11 months. The Union also sought unsuccessfully to add newly hired Directors to the class. The Arbitrator granted relief to the five Directors because he found that the University was attempting to reduce their compensation provided to them as a matter of policy through the actions of the former Dean and Acting Dean. However, it is important to note that such relief was restricted to the named grievants and limited to the effective period of the 1993-95 Collective Bargaining Agreement. A9.590, Appendix B, "Nine-/Eleventh-Month Salary Differential" remains in full force and effect. This arbitration decision illustrates how departures from established policies and procedures not only result in liability to the University, but also affect the administration's ability to correct them.

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**(5-14-97) Guilty Pleas and Proper Cause**

In a more controversial case, the University proceeded to terminate a tenured faculty member for proper cause on the grounds that he pled guilty in 1993 to two federal felonies under the 1989-1993 Collective Bargaining Agreement. The arbitrator concluded that he was an "unknowing participant" in the "kickback" scheme and reinstated the grievant to his tenured position with a one semester suspension without pay. It is significant that the 1993-1995 Collective Bargaining Agreement contains a new provision which specifically allows the University to suspend without pay or discharge a faculty member with just cause upon a conviction or guilty plea. The arbitrator in his decision commented that, at the time of the hearing in this case, felony convictions were not, ipso facto, proper cause for either summary removal from the payroll or summary termination.

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