

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
FRANK F. FASI, Mayor of the	)	Case No. <u>RA-11-27</u>
City and County of Honolulu,	)	
	)	
Petitioner,	)	Decision No. <u>108</u>
	)	
and	)	
	)	
HAWAII FIRE FIGHTERS	)	
ASSOCIATION, LOCAL 1463,	)	
IAFF, AFL-CIO,	)	
	)	
Exclusive	)	
Representative.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER

This case concerns a petition by Frank F. Fasi, Mayor of the City and County of Honolulu, to amend Unit 11 (firefighters) to exclude 15 presently included battalion chiefs in the Fire Department of the City and County of Honolulu.

Mayor Fasi's petition was filed with this Board on September 14, 1978. A contested case hearing was held on December 11, 1978, and briefs were received from the Petitioner on February 9, and from the Exclusive Representative on February 12, 1979.

Based upon the entire record in this case, the Board makes the following:

FINDINGS OF FACT

Mayor Fasi (sometimes the terms City or City and County will be used to refer to the public employer) is a

public employer within the meaning of Section 89-2(9), Hawaii Revised Statutes (hereafter HRS) of employees in optional collective bargaining unit 11 (firefighters).

The Hawaii Fire Fighters Association (hereafter HFFA or Union) is the exclusive representative of the employees in Unit 11.

The 15 battalion chiefs who are the subject of the Mayor's petition presently are included in Unit 11. Their inclusion is the result of a stipulation of the City that they should be included and Decision 8 of this Board which was rendered on February 4, 1972. At the time of their exclusion, their title was Fire Division Commander.

It is obvious from the history of the City's alteration of its positions on the status of the 15 battalion chiefs that the City has had several changes of mind. During the proceedings which led to Decision 8, the City took the interesting position, and stipulated, that the battalion chiefs (then known as fire division commanders) were includable supervisors and that captains and lieutenants in its fire suppression and fire alarm bureaus were non-supervisory employees. Had the City's view on the status of captains and lieutenants prevailed, it would have meant that the battalion chiefs the City now seeks to have excluded as top-level managerial employees would have been mere first line supervisors. This Board, however, disagreed with the City's view and held that the lieutenants and captains were supervisors. In 1977, five years after the issuance of Decision 8, as evinced by facts discussed more fully below, the City evidently concluded that the operation of its fire department would be more efficient if it had additional excluded personnel. Thus, it

modified the position descriptions of the 15 battalion chiefs in an attempt to prove that they are now confidential or top-level managerial employees. However, in the presentation of its case, the City's witnesses made the 1977 changes appear to be mere paper changes which had never been implemented in actual practice in the fire department.

The record developed herein shows that the 971 person Fire Department is divided into the following structural components: Office of the Fire Chief, the Administrative and Services Bureau, the Fire Prevention Bureau, the Fire Alarm Bureau, the Training and Research Bureau, and the Fire Operations Bureau. (Petitioner's Exhibit 8)

The Honolulu Fire Department is headed by an excluded fire chief and an excluded deputy fire chief. (Tr. 7) Its Administrative and Services Bureau is headed by an excluded assistant chief and an excluded battalion chief. (Tr. 11) Besides these four excluded employees, there are two other excluded employees in the department.

The Administrative and Services Bureau is responsible for administrative matters including the department's personnel matters. (Tr. 10)

As previously above, this Bureau is headed by an excluded assistant chief and an excluded battalion chief.

The specific functions of the Administrative and Services Bureau are the following:\*

Provides executive assistance to the Fire Chief and the Fire Deputy Chief; provides administrative services for the entire

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\*All quoted statements of functions are from Petitioner's Exhibit 8.



department; participates in departmental budget development, review and control; effects liaison with City departments, government agencies and private organizations; prepares regular and special reports; plans, directs and coordinates departmental activities by studying, evaluating and reporting on work programs, organizations and procedures; plans, directs and coordinates programs on personnel management, capital improvements, general administration, building and equipment maintenance, property and supply.

The functions of the Fire Prevention Bureau are:

Enforces fire regulations; inspects and abates existing and potential fire hazards; develops fire prevention programs, checks buildings plans for compliance with fire regulations; investigates fires to determine causes and recommends corrective measures; develops and conducts fire safety education programs; provides public fire information services.

The Fire Alarm Bureau performs the following functions:

Operates as the central communication center; receives fire and emergency calls and dispatches proper types and number of fire companies; receives business calls and directs to proper bureaus and companies; conducts periodic tests of communication facilities; maintains cross-index files of streets, hydrants and other instant guides for the rapid and accurate dispatching of units.

The Training and Research Bureau performs these functions:

Develops plans for fire suppression techniques; develops, evaluates and administers training programs; develops specifications for firefighting apparatus and equipment; conducts research and experiments to improve fire operations; coordinates civil defense activities; maintains library of fire periodicals and research materials.

The Fire Operations Bureau is responsible for the following functions:

Provides fire suppression, rescue and emergency services, conducts dwelling inspections; prepares commercial and industrial pre-fire plans, conducts drills and keeps abreast of fire prevention programs, firefighting techniques; sources and adequacy of water supply; maintains grounds, buildings, apparatus and equipment.

The Fire Prevention Bureau, Fire Alarm Bureau and Training and Research Bureau are each headed by a single battalion chief. In the Fire Operations Bureau, there are 12 battalion chiefs. It is these 15 battalion chiefs who are the subject of this case.

The battalion chiefs in the Fire Operations Bureau work on an assigned shift basis and are located at four battalion headquarters on the island of Oahu: Central, Waikiki, Aikahi and Waipahu. Under the command of each battalion chief are 9 or 10 fire stations. In each station, there are several companies of fire fighters such as engine companies, ladder companies, and rescue companies. The stations and companies are under the command of captains. (Tr. 12-14)

On August 6, 1976, the Fire Chief issued General Order No. 2 which amended the Rules and Regulations Governing the Fire Department to give chief officers, including battalion chiefs, for the first time, authority to summarily relieve [suspend] a subordinate of his duties if said subordinate had committed an offense serious enough to warrant such action.

On April 4, 1977, the City amended the class specifications for the fire division commander to give the class the new title of "battalion fire chief" and to modify certain of the duties and responsibilities of the class in the following manner. Under the portion of the amended specification entitled "Illustrative Examples of Work," the

City has stated that the Battalion Fire Chiefs do the following things which were not contained in their previous class specification:

- 1) Make temporary assignments, transfers and movement of personnel to meet daily operational requirements;
- 2) make permanent transfers and movements as required;
- 3) recommend and/or implement organizational and operational changes;
- 4) execute management-employee relations and administers equal and effective application of collective bargaining agreements, civil service rules and regulations, and departmental policies and procedures;
- 5) review and investigate complaints and grievances and takes appropriate action for their resolution;
- 6) suspend subordinates;
- 7) approve leaves and time offs;
- 8) hold periodic meetings with subordinate officers to inform, enforce and direct compliance with departmental policies and rules;
- 9) provide input to and/or serves on departmental committees relating to
  - a. selection and promotions,
  - b. investigation of complaints,
  - c. review of policies and procedures,
  - d. review of collective bargaining proposals. (Petitioner's Exhibit 3)



Despite the changes made by the April 4, 1977 amendments of the class specifications (Exhibit 3) for battalion chiefs, the case presented to this Board revealed a lack of implementation by the Fire Department of the changes which were designed to make the battalion chiefs top-level managerial or confidential employees or both. This apparent lack of implementation was perhaps due to poor preparation of the case or a lack of communication between the personnel experts in the Department of Civil Service and the Fire Department Managers. The City focused upon the top-level managerial criteria exclusively and seemed to abandon the possibility of excluding the employees on the basis of confidentiality.

A year and five months passed after the amendments were made to the class specifications and before this case was filed. In all that time, it appears that the Fire Department management made no effort to implement the changes.

Petitioner's Exhibit 3 notwithstanding, the testimony of Fire Chief Aiu and Assistant Chief Sing shows that the battalion chiefs are not doing all of the things listed in the amended class specification. The broad language of the amendments does not accurately reflect the authority conferred in actual practice upon the battalion chiefs.

For example, contrary to what is stated in item 9(d), ("review of collective bargaining proposals"), the battalion chiefs do not review collective bargaining proposals. These are deliberately kept from them because of their included status. Chief Aiu did not indicate whether even he is privy to such proposals. What he did indicate was that when negotiations are going on, he hides bulletins and notices he receives from the City administration from

persons such as battalion chiefs. (Tr. 50-51) He also withholds from the battalion chiefs information he receives from the administration on such things as overtime constraints even though he does not know whether such information is confidential. (Tr. 44-45, 51)

As to item 9(a), respecting the selection and promotion of personnel, the class specification amendment does not accurately reflect the limitations which in actual practice are imposed upon the battalion chiefs. The fire chief allows the battalion chiefs to see the names of persons who are eligible for interviews for promotions, but he will not let them see the entire list of eligible persons he receives from the Department of Civil Service. (Tr. 47)

As to item 4, ("executes management-employee relations and administers equal and effective application of collective agreements, civil service rules and regulations, and departmental policies and procedures"), the battalion chiefs only function at step one of the four step grievance procedure. (Union's Exhibit 1, Tr. 16)

The battalion chiefs' attendance at monthly Officers' Meetings with the Chief, Deputy Chief and Assistant Chiefs is voluntary if they are not on duty when the meetings are held and they are given compensatory time off for attending them. (Petitioner's Exhibit 10)

Minutes of said meetings which were introduced by the Union showed that personnel were selected to attend training without the battalion chiefs being permitted to make recommendations. (Union's Exhibit 2)

Respecting fire suppression, the department permits the battalion chiefs to be in charge of fire fighting



only until the assistant chief arrives on the scene and he will not permit any "serious fire" to be handled by the battalion chiefs alone without his supervision. (Tr. 163)

The testimony of Chief Aiu on the duties of battalion chiefs is a more credible reflection of what the battalion chiefs do than that contained in the 1977 amendments of their class specifications. The Chief said at page 15 of the transcript:

Very basically, a battalion fire chief may manage a bureau or he may command a fire fighting battalion. Specifically, they are to administer and apply rules and regulations that govern the Fire Department, rules and regulations of the civil service, collective bargaining agreement, specific items that deals with company manning, vacations, sick leaves, call-out, exchange of work schedule, overtime. This is all that comes to my mind at the present time.

#### CONCLUSIONS OF LAW

The City seeks to exclude the 15 battalion chiefs from Unit 11 pursuant to Subsection 89-6(c), HRS, which, in relevant part, states:

"No . . . representative of a public employer, including the administrative officer, director, or chief of a state or county department or agency, or any major division thereof as well as his first deputy, first assistant, and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations . . . shall be included in any appropriate bargaining unit or entitled to coverage under this chapter." (Emphasis added)

The employer in this case put on no evidence that the battalion chiefs were individuals concerned with confidential matters and so will be presumed to have abandoned

any claim that the battalion chiefs are confidential employees. If anything, the employer created a record replete with instances of material which the Chief considered confidential being deliberately withheld from these employees.

In interpreting the exclusionary language of Subsection 89-6(c), HRS, this Board has enunciated tests which must be met in order to justify an exclusion. In Decision 95, the Board stated:

In Decision 75, this Board described the following test to be used to determine whether an individual occupies a top-level managerial or administrative position:

This Board believes that the proper test of whether an individual occupies a top-level managerial and administrative position includes measuring the duties of the position against the following criteria:

1. The level at and extent to which the individual exercises authority and judgment to direct employees, determine methods, means and personnel by which the employer's operations are to be carried out; or

2. The extent to which the individual determines, formulates and effectuates his employer's policies.

Consideration also will be given to the extent to which placement of an individual in a collective bargaining unit would create a strong possibility of a conflict of interest arising.

Respecting the problem of conflict of interest, the subjectivity of the individual employee is not significant. What would be significant would be true incompatibility between the functions of the individual's position and inclusion in a unit. Both employers and exclusive representatives are entitled to representatives, on the one hand, and constituents, on the other, who are not by unit determination placed on both sides of the issues in collective bargaining.

Whether a particular position satisfies these criteria is a question of fact to be determined on a case by case basis by this Board. (Footnotes omitted)



To the above criteria, the Board considers it necessary to add the following refinements and amplifications.

In order to be determined to be a top-level management or administrative position, a position must:

(1) be at or near the top of an on-going, complex agency or major program and formulate or determine policy for that agency or program; or

(2) direct the work of a major program or an agency or a major subdivision thereof with considerable discretion to determine the means, methods and personnel by which the agency or program policy is to be carried out; or

(3) operate in a management capacity in a geographically separated location, such as a Neighbor Island, and be responsible for representing management in dealing with a significant number of employees.

As stated in Decision 75, exclusions based on managerial attributes are not restricted to positions which work in the field of labor relations.

Because policy formulation is an important factor in the determination of managerial status, the meaning to be given to the term policy is important and warrants discussion.

The New York PERB, in a leading case of that Board, has defined the term policy which this Board adopts. The New York PERB stated in State of New York, 5 PERB 3001 (1972) at page 3005:

We will first discuss the "policy" criterion and later the other three criteria. It would appear desirable to first consider the term "policy". Policy is defined in a general sense as "a definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions". In government, policy would thus be the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.



The term "formulate" as used in the frame of reference of "managerial" would appear to include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. It would not appear to include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal. (Footnotes omitted)

The Board also said in Decision 95:

The Board will also designate positions as top-level managers or administrators if the incumbents assist directly in the preparation for and conduct of negotiations or have a major role in the administration of agreements or in personnel administration or meet and confer with union representatives as required by Section 89-9(c) provided that such role is not a routine or clerical nature and requires the exercise of independent judgment.

The City failed to present credible evidence that the battalion chiefs play a meaningful role in formulating and effectuating policy for the Honolulu Fire Department or exercise substantial authority and judgment in determining the methods, means and personnel by which the department's operations are to be carried out. Most of the managerial functions the employer proved they perform place them within the definition of "supervisory employee" contained in Subsection 89-2(18), HRS, and supervisors, under our law, are included in units. The definition provides:

"Supervisory employee" means any individual having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline

other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the fact that the battalion chiefs may suspend employees, alter their work schedules, adjust step one grievances,\* and exercise limited discretion in the deployment of personnel or equipment does not make them top-level managerial employees.

Our view that the battalion chiefs are not managerial employees is based upon the record developed by the City in this case. The facts presented fell far short of establishing top-level managerial status for the 15 battalion chiefs. Significantly absent was evidence of a meaningful role in policy development and the freedom to use a meaningful measure of independent judgment in policy implementation.

The City's witnesses established that in the Honolulu Fire Department, very little supervisory authority, let alone managerial authority, has been delegated downward. Many of the duties performed by the battalion chiefs are

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\*See, Metropolitan Suburban Bus Authority, and Subway-Surface Supervisors Association 7 PERB 4016 (New York, 1974):

PERB also drew a clear distinction between the function of (1) mere observance of the terms of a collective agreement and (2) interpretation of the agreement both within and without the grievance procedure. It pointed out that the former "is largely a routine and ministerial function," and that "it does not appear . . . that supervisors who participate in first step grievances exercise [the requisite] independent judgment". Only a person who implements an agreement so as to "necessitate a change in . . . procedures or methods of operation" is managerial (5 PERB at 3006). (Footnote omitted)



essentially ministerial and routine. The overall role played by them is closely circumscribed by the para-military structure of the department. They essentially apply existing rules, regulations, contractual provisions, and directives in routine circumstances. On the record developed by the City, they have, at best only a minor role in policy formulation and it would appear that, in some instances, that is afforded reluctantly.

The Board appreciates that top management in the Department would like to have a larger group of excluded employees. The Department's primary interest in this respect appears to be to want to have the battalion chiefs excluded so they can be available to help develop contingency plans in the event of strikes. This is an insufficient reason to justify exclusions. Also, management's preferences, unsupported by actual practice, are not a proper or workable basis for exclusions.

The Board understands that additional exclusions in the Department may be required for its efficient operation. But before it can make those exclusions, this Board must be presented with a factual record which demonstrates that such exclusions would be lawful. Words in class specifications which appear to create grounds for exclusions cannot serve as a basis for making such exclusions when the current practices, in fact, show that the exclusions are unjustified. While it was not critical to the disposition of this case, the attitude of the City's witnesses concerning the status of the battalion chiefs, if anything, tended to show that the actual management of the department did not regard or treat the battalion chiefs as part of the management team.



The Board further appreciates that discipline may be easier to maintain when supervisors are not in the same unit with their subordinates. The inconvenience\* caused by the mix of supervisory employees with nonsupervisory employees found in optional units is a product of the Legislature's decision to create such units and cannot be remedied by this Board unless a proper case for exclusions is made out in the hearings before it. In this case, the City failed to prove that the battalion chiefs were top-level managerial employees. The City's remedy for any inconvenience it may be experiencing because of the mix in this optional unit lies with the Legislature.

ORDER

This case is dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
James K. Clark, Board Member

Dated: May 10, 1979

Honolulu, Hawaii

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\*The inconvenience experienced by the City cannot have been too great. It waited for more than a year after amending the battalion chief class specifications before bringing this case to the Board.

DISSENTING OPINION

Subsection 89-6(c), HRS, in pertinent part, reads as follows :

No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director, or chief of a state or county department or agency, or any major division thereof . . . shall be included in any appropriate bargaining unit or entitled to coverage under this Chapter. (Emphasis added)

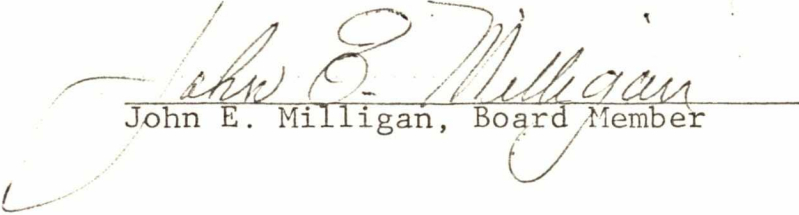
In my judgment, this language clearly eliminates the top organizational level of any department and the first administrative level under that from the arena of collective bargaining.

The Board is not required to examine the duties of such positions, it is only required to fix them in the organizational structure.

At the moment, only the Chief's office, including his immediate deputies and assistants, is excluded from collective bargaining as top management.

I believe the Board erred in the first instance and is continuing the error now by including battalion chiefs in the bargaining unit, as they are clearly major divisions of the Fire Departments and the second line of management under the office of the Chief.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
John E. Milligan, Board Member

Dated: May 10, 1979

Honolulu, Hawaii