

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of ) BOARD OF REGENTS, UNIVERSITY ) OF HAWAII, )  ) Petitioner, )  ) and )  UNIVERSITY OF HAWAII ) PROFESSIONAL ASSEMBLY, )  ) Exclusive ) ) Representative ) ) of Unit 7, )  ) and )  HAWAII GOVERNMENT EMPLOYEES' ) ASSOCIATION, LOCAL 152, ) AFSCME, AFL-CIO, )  ) Exclusive ) ) Representative ) ) of Unit 8. ) <hr style="width: 40%; margin-left: 0;"/>	Case Nos. <u>RA-07-37</u> <u>RA-08-37</u>  Decision No. <u>132</u>
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FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

On September 12, 1979, the University of Hawaii Board of Regents (hereafter BOR) petitioned this Board for the reclassification of nine positions currently assigned to Unit 7, Faculty of the University of Hawaii and the community college system, to Unit 8, Personnel of the University of Hawaii and the community college system, other than faculty.

The University of Hawaii Professional Assembly (hereafter UHPA) objects to the proposed transfer.

Based upon the record herein, and after a hearing on due notice, this Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Petitioner BOR is the public employer, as defined in Section 89-2(9), HRS, of employees in Units 7 and 8, as such units are defined in Section 89-6(a), HRS.

UHPA is the exclusive representative of Unit 7.

The Hawaii Government Employees' Association (hereafter HGEA) is the exclusive representative of Unit 8.

HGEA has interposed no objection in the matter at issue.

The duties and responsibilities of the subject positions, all currently assigned to the faculty bargaining unit as "specialists" in the Office of Student Services, are reflected in current position descriptions which have been submitted by Petitioner as part of the documentary evidence in this case.

The positions in question as currently titled are as follows:

Student Housing Specialist, University of Hawaii at Manoa (incumbent Dorothy Nakamura)

Student Housing Specialist, University of Hawaii at Manoa (incumbent Donald Blaser)

Financial Aids Specialist, University of Hawaii at Manoa (incumbent Michael Car)

Financial Aids Specialist, University of Hawaii at Manoa (incumbent Shirley S. Taniguchi)

Financial Aids Specialist, University of Hawaii at Manoa (incumbent George Higa)

Financial Aids Specialist, University of Hawaii at Manoa (incumbent Tom Baca)

Financial Aids Specialist, University of Hawaii at Manoa (incumbent Doris Ikenaga)

Financial Aids Specialist, Kapiolani Community College (incumbent Cynthia Kimura)

Financial Aids Specialist, Windward Community College (incumbent Sandra Toporcer)

All but one of the position descriptions contain certifications of accuracy signed by the incumbents in said positions, their immediate supervisors, and the proper Dean, Director or Reviewing Officer. The one exception is the Windward Community College Financial Aids position description of the position held by Sandra Toporcer, which is signed by the incumbent and Provost Leroy J. King only.

The specialist positions in the Student Housing Office presently occupied by Dorothy Nakamura and Donald Blaser were in existence on July 1, 1970, the date of enactment of Chapter 89, HRS.

Of the five specialist positions in the Financial Aids Office of the Manoa Campus, the specialist position presently occupied by Doris Ikenaga came into existence as a half time position on September 3, 1974, and as a fulltime position on June 17, 1977. The four specialist positions in the Financial Aids Office at the Manoa Campus presently occupied by Michael Car, Shirley Taniguchi, George Higa, and Tom Baca were in existence on July 1, 1970.

The specialist position in the Financial Aids Office at Kapiolani Community College presently occupied by Cynthia Kimura was in existence on July 1, 1970.

The specialist position in the Financial Aids Office at Windward Community College presently occupied by Sandra Toporcer came into existence on September 1, 1972.

In 1968 the BOR adopted a classification system for administrative, professional and technical (APT) personnel who did not fit either the faculty or civil service classifications. President's Memo No. 26 for BOR meeting of December 9, 1976, Pet. Ex. 2.

The Public Administration Service (PAS) conducted studies of the classification of APT positions at the University of Hawaii in 1967 and 1976. The 1976 study resulted in a revision of the APT classification system, including, for the first time, an inventory of existing positions and the establishment of class specifications describing duties, responsibilities, nature and level of work, and qualification requirements. Tr. 3/17/80, p. 23.<sup>1</sup>

Pursuant to powers conferred upon the BOR in Sections 304-11 and 304-13, HRS, a revised classification plan for APT personnel was promulgated in 1976. Business Instruction 2123, Pet. Ex. 4. The BOR delegated authority to the President, in regard to the APT plan, to:

- (1) revise class specifications and adopt class standards,
- (2) abolish classes, and
- (3) classify and reclassify positions.

The establishment of new classes, assignment of classes to salary ranges, and reassignment of classes to salary ranges due to changes in class concepts were made subject to BOR confirmation. An appeals board was also established to adjudicate appeals of classification of individual decisions.

(President's Memo No. 26 for BOR meeting of December 9, 1976, Pet. Ex. 2; "2123 Procedure for Maintenance of the APT Classification and Pay System," Pet. Ex. 4.) The President recommended and the BOR approved the new APT plan effective January 1, 1977. BOR minutes, June 16, 1977, Pet. Ex. 3.

Under the prevailing APT classification plan, a student service specialist series with four levels is

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<sup>1</sup>All following transcript citations refer to the transcript of 3/17/80.

provided for, along with class specifications relating to the series. Pet. Ex. 5A, 5B, 5C, 5D. The class specifications of the APT student services specialists series are similar to the position descriptions now at issue in respect to duties, responsibilities, supervision received, and work requirements. Pet. Ex. 5A, 5B, 5C, 5D, Board Ex. 1, attachments.

The Faculty Handbook for Manoa and Hilo campuses, 1969 Revision, and Faculty Handbook for Manoa and Hilo campuses, 1973 Interim Revision, describe faculty as follows:

#### The Faculty of the University

The Faculty of the University of Hawaii includes all professional workers primarily engaged in instruction, research, or professional service, or in those various activities directly supporting, organizing, or administering instructional, research and public service programs. This includes instructors; those engaged in research; agricultural or home demonstration agents; specialists in such fields as Cooperative Extension, student personnel, various areas directly involved in research activities, certain highly specialized aspects of Libraries and of Continuing Education, and in other areas where the minimum standard requirements for appointment include graduate work beyond the baccalaureate degree and familiarity with the nature and operation of a university, and where the duties and responsibilities include advisory or instructional work with students or work with other faculty members as peers.

Specifically, the Faculty includes all persons classified as Instruction (I), Research (R) or Specialist (S)--see Part 3 below--from grade 2 through senior rank, all classified as County Agents or Home Economists (A), and all administrative officers whose salaries are set specifically by the Board of Regents rather than by pay schedule.<sup>2</sup> Qualified members of the

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<sup>2</sup>The 1969 edition includes the following passage at this point: "This last group includes the President, Vice-Presidents; Assistants to the President, Comptroller; Deans; Directors; Associate and Assistant Directors; Associate and Assistant Deans; and others in similar positions as they may

staff of affiliated institutions who have specialized in those fields in which the University offers the doctorate are often, by special action, made affiliate members of the faculty of the Graduate Division, or of other faculties of the University. Academicians temporarily on campus by appointment as "visiting colleagues" (non-salaried) may be accorded the use of University facilities. However, neither they nor affiliate faculty members are eligible to serve in the Faculty Senate, or to elect its members. (p. 1-6, both editions) (Emphasis added)

The faculty classification system is described in the same Faculty Handbook editions as follows:

The Board of Regents faculty classification system includes three general categories, with grades within each category:

1. Instruction (I), includes graduate assistants, lecturers, instructors, assistant professors, associate professors, and professors.
2. Researcher-Specialist (R-S), includes assistants in research, junior researchers, assistant researchers, associate researchers, researchers and corresponding grades of specialist. When applicable, the R series titles substitute the special area for the word "researcher," for example, "Assistant Agronomist," "Associate Meteorologist," or "Plant Pathologist." The S series is used for specialties not primarily involved with research, for example, "Associate Specialist in Student Personnel," or "Assistant Specialist in Library Science."
3. County Extension Agent or Home Economist (A), includes assistants in extension work, assistant county extension agents or assistant home economists, associate county extension agents or associate home demonstration agents, and county agents or home economists. (p. 3-1, both editions)

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Footnote 2 continued

be established. Excluded are technicians, clerical and secretarial workers, janitors, grounds keepers, and similar workers who come under the provisions of the APT (see p.3-1) classifications or of the state civil service, except as in individual cases the duties and responsibilities of the position may require faculty status for effective performance."

The same Faculty Handbook editions further describes specialists as follows:

### C. SPECIALISTS

The instructional and research functions of the University in some areas require the support of certain persons with full professional training or experience, but who do not themselves teach or conduct research. Frequently persons in these positions must be familiar with the processes of teaching and research in order to render required support effectively. Examples of such positions are the counselors and other professional positions in the Office of Student Affairs; specialists in the Library; non-research but highly specialized positions in research units; technicians serving instructional laboratories; and like positions which provide professional services auxiliary to instruction or research programs, such as those in the Instructional Resources Services Center. (p. 3-8, both editions)

Engagement in teaching, research, and community service, or direct support of those activities, is the operative definition of faculty work in the University of Hawaii system. The work done by personnel in the subject positions does not fit this definition. See e.g., Tr. pp. 106, 109, 111-114, 129, 137, 154, 166-167. While the 1973 Faculty Handbook is not the most current (a 1977 edition is in existence) the employment of the same criteria therein offers persuasive supporting evidence for this finding as to the definition of faculty work. See also Decision 21, 1 HPERB 210, at 215, identifying instruction, research, and public service as the primary functions of the University.

The two student housing specialists' work is not directly related to teaching, research, and community service in the traditional sense of those terms. The position held by Dorothy Nakamura is that of educational development officer. Pet. Ex. 8B. The bulk of her work entails recruitment, selection, and training of housing staff and other personnel matters. Tr. p. 109, 178, Pet. Ex. 8B. She also is involved

in organizing programs for the training of staff and students (Tr. pp. 174-176, 184) and other programs for dorm residents dealing with various matters, including study skills and security problems on campus. Tr. p. 180.

The other student housing position description indicates that 40% of work time is spent on the dormitory room assignment process. Pet.'s ex. 8A. Another 49% of time is spent on duties involved in correspondence and communication with students and the public regarding student housing and other "general housing office responsibilities," including the preparation of statistical reports and the formulation of housing office policies and procedures. Pet. Ex. 8A.

Neither are the five financial aids position at the University of Hawaii at Manoa directly related to teaching, research, and community service. Duties in these positions are primarily administrative and managerial, revolving around the oversight of government loan and grant programs, the assessment of students' financial needs and the creation of financial aids packages and the development of procedures, guidelines and information systems related thereto. Four of the incumbents gave a time breakdown of 20% to counseling while one gave a time breakdown to counseling of 10%. Pet. Exs. 7A, 7B, 7C, 7D, and 7E. Counseling sessions involve discussion of long-range goals and academic and personal problems as they relate to financial aids. An example of a counseling topic was given at hearing of the possible jeopardizing of financial aid for failure to make satisfactory academic progress. Tr. pp. 160-161. "Informational" and financial counseling involved can thus be distinguished from academic or personal



counseling, for which referrals to academic or personal counselors can be made. Tr. pp. 97-98, 159, 164-165.

The two community college financial aids positions conform in essential respects to the five financial aids positions at Manoa. Pet. Ex. 6A, 6B.

It is a reasonable assumption that the duties of the subject positions have not changed substantially since the position descriptions were drawn up. Tr. p. 67. The one incumbent questioned in this regard, Dorothy Nakamura, was in agreement. Tr. p. 196.

Evidence was adduced at hearing from Robert Prahler, Associate Director of Personnel Since 1971 and Personnel Officer from 1968 to 1971, that based on his review of original APT classification plans and consultant studies, student services personnel were originally placed within the faculty classification because of a then existing policy of the Dean of Students that student services personnel teach at least one quarter time. Tr. p. 11. That policy with respect to student personnel no longer is operative. Tr. pp. 11, 69, Pet. Ex. 6, 7, 8.

Mr. Prahler further testified that in 1972 when bargaining representative elections first occurred under Chapter 89, HRS, the placement of positions as between Units 7 and 8 was made, pursuant to stipulation between the University and the unions, merely on the basis of their class title and class description in the faculty handbook rather than on the basis of a survey of individual positions. Tr. p. 20. See Decision 21, 1 HPERB 202.

#### CONCLUSIONS OF LAW

UHPA contests this Board's authority to reclassify personnel as to bargaining units with respect to classifications

which predated the enactment of Chapter 89. This argument is rejected after analysis which runs as follows:

The BOR is authorized by Sections 304-11 and 304-13, HRS, to appoint members to the faculty at the University of Hawaii and to classify faculty personnel according to a classification and compensation plan.<sup>3</sup>

Section 89-6(a), HRS, establishes the 13 public employee bargaining units. This section reads as follows:

§89-6 Appropriate bargaining units.  
(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

- (1) Nonsupervisory employees in blue collar positions;
- (2) Supervisory employees in blue collar positions;
- (3) Nonsupervisory employees in white collar positions;

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<sup>3</sup>§304-11 Faculty. The faculty of the university shall be under the direction of a president who shall be appointed by the board of regents. The board shall appoint such deans, directors, other members of the faculty, and employees as may be required to carry out the purposes of the institution, prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment, make and enforce rules governing sabbatical leaves with or without pay, consistent with the practice of similar institutions on the mainland, and notwithstanding the laws of the State relating to vacations of the officers and employees of the State.

§304-13 Classification schedule. The board of regents shall classify all members of the faculty of the university including research workers, extension agents, and all personnel engaged in instructional work as defined in section 76-16 and adopt a classification schedule conforming, as nearly as may be practical, to the schedules set forth in chapter 77. The department of personnel services of the State shall, upon the request of the board of regents, render such assistance as may be practicable in connection with such classification. The adjustments of compensation to conform with the classification shall be made in general accordance, so far as may be practical, with chapter 77, relating to state employees.

Annual increases of compensation shall be allowable, and shall be allowed, in general accordance, so far as may be practical, with chapter 77, providing for the allowance of annual increases to state employees for efficient service, and the board of regents shall adopt a fair and reasonable plan for rating the efficiency of individual employees affected by this section.

- (4) Supervisory employees in white collar positions;
- (5) Teachers and other personnel of the department of education under the same salary schedule;
- (6) Educational officers and other personnel of the department of education under the same salary schedule;
- (7) Faculty of the University of Hawaii and the community college system;
- (8) Personnel of the University of Hawaii and the community college system, other than faculty;
- (9) Registered professional nurses;
- (10) Nonprofessional hospital and institutional workers;
- (11) Firefighters;
- (12) Police officers; and
- (13) Professional and scientific employees, other than registered professional nurses.

Because of the nature of work involved and the essentiality of certain occupations which require specialized training, units (9) through (13) are designated as optional appropriate bargaining units. Employees in any of these optional units may either vote for separate units or for inclusion in their respective units (1) through (4). If a majority of the employees in any optional unit desire to constitute a separate appropriate bargaining unit, supervisory employees may be included in the unit by mutual agreement among supervisory and nonsupervisory employees within the unit; if supervisory employees are excluded, the appropriate bargaining unit for such supervisory employees shall be (2) or (4), as the case may be.

The compensation plans for blue collar positions pursuant to section 77-5 and for white collar positions pursuant to section 77-13, the salary schedules for teachers pursuant to section 297-33 and for educational officers pursuant to section 297-33.1, and the appointment and classification of faculty pursuant to sections 304-11 and 304-13, existing on July 1, 1970, shall be the bases for differentiating blue collar from white collar employees, professional from nonprofessional employees, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty. In differentiating supervisory from nonsupervisory employees, class titles alone shall not be the basis for determination, but, in addition, the nature of the work, including whether or not a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall also be considered.

The public employee bargaining units are thus legislatively created. Section 89-6(a) creates 13 general classes of

employees which individual employees are to fill. While Section 89-6(a) establishes the bargaining units, it does not designate which job positions or individual employees fill which units. Such designation is determined by the employer under its authority to classify and reclassify employees pursuant to Section 89-9(d), HRS,<sup>4</sup> and after consultation with the employer's exclusive representatives pursuant to Section 89-9(c), HRS.<sup>5</sup>

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<sup>4</sup>Section 89-9(d) reads in relevant part:

Excluded from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable.

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The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

<sup>5</sup>Section 89-9(c) reads:

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

Should a dispute arise as to the designation of the appropriate bargaining unit for specific employees and positions, this Board is given by statute full and express authority to resolve the dispute, and is required by statute to so resolve the dispute. This mandate is contained in Section 89-5(b)(1), which reads:

§89-5 Hawaii public employment relations board.

\* \* \*

(b) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;

UHPA argues that this Board has no power to disturb the classification of personnel as to bargaining units in instances where such classification into bargaining units was already determined by July 1, 1970, the date of enactment of Chapter 89, HRS. UHPA argues that the seven positions now at issue which are currently designated as in Unit 7 and which were in existence on July 1, 1970 cannot be transferred on HPERB's order to Unit 8. This position is taken by UHPA on the basis of the following passage in Section 89-6(a):

The compensation plans for blue collar positions pursuant to section 77-5 and for white collar positions pursuant to section 77-13, the salary schedules for teachers pursuant to section 297-33 and for educational officers pursuant to section 297-33.1, and the appointment and classification of faculty pursuant to sections 304-11 and 304-13, existing on [July 1, 1970], shall be the bases for differentiating blue collar from white collar employees, professional from nonprofessional employees, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from non-faulty. (emphasis added)

If UHPA's interpretation is correct, however, a direct conflict is created between Section 89-6(a) -- freezing, in UHPA's reading, employees and positions into bargaining units set as of July 1, 1970, and Section 89-5(b)(1) -- requiring this Board to exercise its authority to resolve "any" dispute concerning the application of Section 89-6 to "specific employees and positions." Such a construction creates an absurdity within the scheme of Chapter 89 and so by statutory mandate is not to be recognized. Section 1-15(3), HRS.<sup>6</sup>

The passage of Section 89-6(a) relied upon by UHPA should more properly be read with a literal meaning being applied to the word "bases," i.e., the compensation and classification plans referred to therein are to be the foundation or starting point in regard to unit determination questions, but not the final and binding determinant in resolving such questions. They served as a ready framework for the initial representational elections for public employees under Chapter 89 and now serve as a point of reference for unit determination questions. (See Decision 40, 1 HPERB 403, at 410, regarding other measures taken to expedite initial unit determinations and representational elections under Chapter 89.) This Board has acted consistently with this interpretation of Section 89-6(a) in regard to questions of appropriate bargaining units since the inception of Chapter 89.

If the faculty-nonfaculty differentiation existing on July 1, 1970 as applied to then existing positions or

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<sup>6</sup>§1-15 Construction of ambiguous context. Where the words of a law are ambiguous:

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(3) Every construction which leads to an absurdity shall be rejected.

employees is deemed permanent, not only is conflict with Section 89-5(b)(1) created, but also conflict with Sections 304-11 and 304-13, which themselves vest the classification power in the BOR rather than the Legislature.

Nor can it be argued that the BOR's power to classify faculty only applies to new positions and that classifications once set are permanent. The BOR's power to classify is not so circumscribed in the wording of Section 304-13, or Chapter 89, neither of which attach any qualifications in references to the BOR's classification function. The distinction between positions existing before and after July 1, 1970 is not a distinction contemplated by Section 89-6(a) in regard to the scope of the BOR's authority to classify personnel. Nowhere is it stated that the classification of personnel existing on the date of enactment of Chapter 89 is permanent, or that Chapters 89 and 304 apply only to bargaining unit disputes arising after July 1, 1970.

The purpose of Section 89-6(a) is clearly to establish bargaining units and has no additional purpose of freezing certain classification actions. The committee report cited by UHPA supports the conclusion that Section 89-6 sets bargaining units but not the positions and employees who are to fill them:

Appropriate bargaining units. Your Committee realizes that the determination of appropriate bargaining units by the public employment relations board, according to criteria such as community of interest, history of collective bargaining, etc., is the prevailing practice throughout the states which have enacted collective bargaining laws. A review of the effectiveness of such criteria and the inherent problems and disputes arising out of such determination, shows that the creation of many bargaining units as there are ways to interpret such criteria results and unnecessary fragmentation makes administration efficiency impossible [sic]. For the purposes of maintaining the merit principles and the principle of equal pay for equal

work, avoiding multiplicity of bargaining units which would be administratively unmanageable, and minimizing jurisdictional disputes, your Committee has, in the public interest, designated those units which shall be appropriate for the purpose of collective bargaining. The designated units are occupational categories based on existing compensation plans, the nature of work involved, and the essentiality of services provided to the public. All designated units are applicable statewide to maintain uniformity among the several counties and to discourage "leap-frogging" tactics among employee organizations which may otherwise be representing employees within the same occupational category in different counties. (Senate Standing Committee Report, 745-70, Act 171.) (Emphasis added)

UHPA further argues that while the Board is statutorily restricted from resolving disputes regarding the appropriate bargaining unit for personnel under the authority of the BOR, such dispute-solving authority of this Board exists, but only in regard to Units 9 through 13. However, Section 89-5(b)(1) states no such limit on Board power; the provision states that the Board "shall. . . resolve. . . any dispute concerning the designation of an appropriate bargaining unit and the application of Section \_\_-6 to specific employees and positions" (emphasis added).

In support of its position in this regard, UHPA cites this passage from Section 89-6(a):

Because of the nature of work involved and the essentiality of certain occupations which require specialized training, units (9) through (13) are designated as optional appropriate bargaining units. Employees in any of these optional units may either vote for separate units or for inclusion in their respective units (1) through (4). If a majority of the employees in any optional unit desire to constitute a separate appropriate bargaining unit, supervisory employees may be included in the unit by mutual agreement among supervisory and nonsupervisory employees within the unit; if supervisory employees are excluded, the appropriate bargaining unit for such supervisory employees shall be (2) or (4), as the case may be.

This passage, neither by express provision nor implication, supports UHPA's argument.



Neither is the policy of joint decision-making, expressed in Section 89-1, HRS, subverted by the Board's conclusions herein. One of the results of the exercise of the Board's dispute-solving authority under Sections 89-5(b)(1) and 89-6(d)<sup>7</sup> is to insure a just decision arrived at after participation of interested parties. Thus any alterations of wages and working conditions of the individuals involved herein will not have been effected without an opportunity for argument and advocacy of positions regarding the employer's proposed reclassification. It should be further noted that the University has previously consulted with UHPA and HGEA over the transfer of employees and positions as between Units 7 and 8, including the subject positions. Tr. pp. 32-33, 70-73.

The Board thus concludes that it has the inherent authority to transfer the subject positions to a new unit.

Faculty are traditionally defined as all professional workers primarily engaged in instruction, research, or professional service, or in those various activities directly supporting, organizing, or administering instructional, research and public service programs.

The BOR elicited testimony and produced evidence indicating that the nine positions at issue involve work that is similar if not identical to that of positions in the student service series of the APT classification system and that the duties had no direct academic involvement.

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<sup>7</sup>§89-6 Appropriate bargaining units.

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(d)Where any controversy arises under this section, the board shall, pursuant to chapter 91, make an investigation and, after a hearing upon due notice, make a final determination on the applicability of this section to specific positions and employees.

UHPA, on the other hand, points out that specialists comprise one of three categories in the faculty classification system, and that the nine positions at issue are so classified. UHPA notes that the Faculty Handbook states that "Examples of such positions [specialists] are the counselors and other professional positions in the Office of Student Affairs." Id. at 3-8. The implication is that the faculty specialist designation, once conferred, cannot be changed. This is a conclusory argument which, as discussed above, does not withstand an examination of relevant provisions of Sections 89-5 and 89-6, HRS, which allow transfer between bargaining units regardless of the date of their creation, pursuant to Board approval.

It might also be noted in this context that the original APT plan consisted of five broad classes, one of which was labeled "specialists." (Minutes of Regular Meeting of Board of Regents, April 18, 1968, Pet. Ex. 1) and that the current APT plan contains a "student services specialist" series (Pet. Ex. 5). Thus the fact that a position is termed a specialist position does not, standing alone, necessarily indicate its bargaining unit.

UHPA introduced no evidence indicating that the nine positions involved engagement in the faculty pursuits of teaching, research, and community service, or that the positions were designed to "directly support" such pursuits. Nor does the work of the nine subject positions entail direct involvement with other faculty members "as peers." 1973 Faculty Handbook, pp. 1-6. UHPA instead stresses the "educative role" that personnel in the nine positions play in students' lives. Thus it was noted that financial aids and housing specialists aid students in integrating practical experience with classroom learning. However, there is a difference between

personnel playing an academic role involved in teaching, research, and community or public service as compared to personnel playing a more general educative role in support services, such as APT personnel. This difference is of course implicit in Section 89-6(a) wherein separate bargaining units are provided for faculty and non-faculty. The proof adduced herein indicates that the nine positions at issue are the latter. See Northeastern University, 89 L.R.R.M. 1862 (1975), Case No. 1-RC-13190, 218 NLRB No. 40 (academic administrators and academic counselors held not to have a sufficient "community of interest" with classroom teachers to warrant their inclusion in a faculty bargaining unit under the National Labor Relations Act); see also Mount Vernon College, 95 L.R.R.M. 1349 (1977), Case No. 5-RC-9627, 228 NLRB No. 153 (academic advisor-career counselor held, without discussion, to not have a sufficient community of interest with other members of faculty bargaining unit to be included therein under the National Labor Relations Act).

Because Sections 304-11, 304-13 and 89-6(a) give the BOR express authority to classify faculty, UHPA cannot cause such classification actions to be invalidated on the basis of the possible impairment of union contract rights of subject personnel. Contracts have no effect to contravene laws concerned with public order. Section 1-5, HRS.<sup>8</sup> The Board's grant of authority to make unit determinations cannot be usurped by contract provisions. Decision 67, 1 HPERB 598, 604.

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<sup>8</sup>§1-5 Contracts in contravention of law. Private agreements shall have no effect to contravene any law which concerns public order or good morals. But individuals may, in all cases in which it is not expressly or impliedly prohibited, renounce what the law has established in their favor, when such renunciation does not affect the rights of others, and is not contrary to the public good.

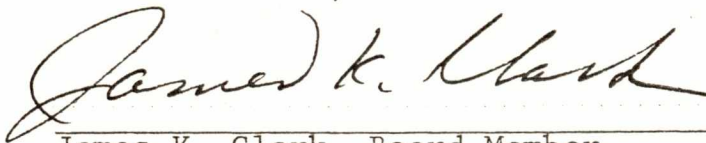
ORDER

The nine subject positions shall be transferred from bargaining Unit 7 to bargaining Unit 8. The procedure, including the effective date of said transfer, shall be worked out among the BOR, UHPA and HGEA, provided that in no event shall the effective date of the transfer be earlier than the date of this decision. If the parties fail to agree upon the mechanics of the transfer, any of them may make a motion before this Board for assistance in resolving the dispute.

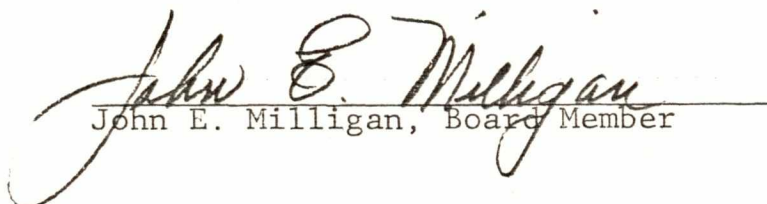
HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD



Mack H. Hamada, Chairman



James K. Clark, Board Member



John E. Milligan, Board Member

Dated: July 18, 1980

Honolulu, Hawaii