

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
)
HAWAII GOVERNMENT EMPLOYEES') CASE NOS.: RA-03-52
ASSOCIATION, AFSCME LOCAL) RA-04-52
152, AFL-CIO,)
) DECISION NO. 172
)
Petitioner,)
)
and)
)
GEORGE R. ARIYOSHI, Governor,)
State of Hawaii,)
)
Intervenor.)
_____)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On February 17, 1982, the HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME LOCAL 152, AFL-CIO [hereinafter referred to as HGEA] filed a Petition for Clarification or Amendment of Appropriate Bargaining Unit with the Hawaii Public Employment Relations Board [hereinafter referred to as Board].

The petition seeks to change the bargaining unit designations of three Highway Construction Inspector [hereinafter referred to as HCI] IV positions, Position Nos. 16851, 16852 and 19145, which are currently included in Unit 3 (Nonsupervisory employees in white collar positions). The HGEA alleges that the subject positions perform supervisory functions and are thus more appropriately designated within Unit 4 (Supervisory employees in white collar positions).

On March 8, 1982, GEORGE R. ARIYOSHI, Governor, State of Hawaii [hereinafter referred to as State], filed

a Petition for Intervention in the instant case with the Board. By Order No. 439, dated March 12, 1982, the Board granted the Petition for Intervention since the State, as the respective Employer, alleged a sufficient interest for its participation in the proceedings.

A prehearing conference was held on March 10, 1982. Hearings were held on April 13, 1982 and July 7, 1982. A posthearing brief was submitted by the HGEA on August 5, 1982. The State did not submit a posthearing brief.

Upon a full review of the record in this case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The HGEA is and was, for all times relevant, the exclusive representative, as defined in §89-2(12), Hawaii Revised Statutes [hereinafter referred to as HRS], of employees in bargaining units 3 and 4.

The three positions in question, Position Nos. 16851, 16852 and 19145, are each entitled Highway Construction Inspector IV and are located within the State Department of Transportation. The positions are currently included in bargaining unit 3 (Nonsupervisory employees in white collar positions). Board Exhibit 1.

GEORGE R. ARIYOSHI is and was, for all times relevant, the public employer, as defined in §89-2(9), HRS, of employees of the State of Hawaii which includes employees in bargaining units 3 and 4.

On September 30, 1981, Chester C. Kunitake, Contracts Officer, HGEA, submitted a request to Donald A.

Botelho, Director, State Department of Personnel Services [hereinafter referred to as DPS], to change the bargaining unit designations of the three positions in question. As of the date of the filing of the instant petition, February 17, 1982, no reply had been received by the HGEA. Board Exhibit 1.

As reflected in their respective position descriptions, these positions serve as supervisory inspectors on a major construction project and other medium and minor projects. Their major duties and responsibilities and the percentage of time spent in those activities are as follows:

1. Construction Inspection, 75% of the time.

The duties include supervising subordinate inspectors on construction projects as well as supervising the preparation of documents supporting the projects such as the construction inspection diaries and material sample cards;

2. Inspection Supervision, 15% of the time.

The duties include planning, scheduling, assigning, directing, training, coordinating and reviewing the work of subordinate inspectors as well as instructing or reviewing the contractor's plans to maintain detours, barricades and other devices during construction for public safety;

3. Administrative duties, 5% of the time.

The duties include investigating and reporting accidents of inspectors; checking on compliance by inspectors

with the safety regulations; investigating complaints and problems and making a recommendation for resolving them to the Resident Engineer; and investigating and resolving grievances of inspectors before formal grievance filing; and

4. Other duties as assigned by the Resident Engineer, 5% of the time.

Position No. 16852 is currently occupied by Keichi Nakasone. Tr. II,^{*} p. 31. He is currently assigned two major and four minor construction projects. Tr. II, pp. 28-29.

He is currently assigned to direct five HCI III's and one HCI II. Tr. II, p. 29.

He testified that his job is to coordinate, organize and assign the highway construction inspectors working under him to the projects and to ensure that the projects are being constructed according to the plans and specifications. His subordinate inspectors do the inspectional work and he reviews their work. He does actual inspectional work only in emergencies. Tr. II, pp. 30-31.

His other duties include checking his subordinate inspectors' diaries, conducting job-site inspections, resolving complaints from the contractors and the public, handling the paperwork to ensure compliance with federal directives and obtaining certifications for material samples. Tr. II, pp. 44-50.

* As used herein the citation to Tr. II refers to transcript volume no. II from the hearing held on July 7, 1982.

Position No. 19145 is currently occupied by Francis Pang. Tr. II, p. 64. He is currently assigned one major and a few minor construction projects. Tr. II, p. 60.

He is currently assigned to direct only one highway construction inspector since his major project has just been completed. Tr. II, p. 61.

He testified that his duties and responsibilities include delegating and planning the jobs for his subordinates, which are HCI III's and II's. Tr. II, p. 60. As much as possible, he tries to let his subordinate inspectors do all of the inspectional work while he oversees them. Tr. II, pp. 61-62.

His other duties include checking his subordinate inspectors' diaries, checking the force account, conducting job-site inspections, preparing reports to the federal government and resolving construction problems with the contractor. Tr. II, pp. 69-74.

Position No. 16851 is currently occupied by Harry Mow. Tr. II, p. 85. He is currently assigned one major construction project which has been suspended due to deficiencies. The highway construction inspectors who were assigned to him were reassigned to other projects. Tr. II, p. 84.

He testified that his duties and responsibilities include being in charge of highway construction inspectors assigned to his projects. Tr. II, pp. 83-84.

His other duties include resolving complaints from the public and checking material sample cards to ensure that materials have been tested for quality control. Tr. II, pp. 92-94.

Diana Kaapu, Chief, Classification Branch, DPS, testified that the criteria used to make bargaining unit determinations for supervisory employees are: (1) whether supervisory tasks, as enumerated in §89-2, HRS, are present in the position; (2) whether independent judgment appears to be exercised in the performance of those supervisory tasks; and (3) the percentage of time involved in those supervisory tasks as required by §89-6, HRS. Tr. II, p. 102. Generally, a person would not be considered supervisory for bargaining unit purposes unless the person spends fifty percent or more of the time in supervisory duties. Tr. II, p. 103. Further, it has been her experience that supervisors do not spend more than half of their time in supervisory functions unless they have four or more subordinates. Tr. II, p. 104.

She agrees that the incumbents of the three positions assign and review the work of others and that these duties are supervisory functions. Tr. II, p. 119. She does not believe, however, that the performance of those supervisory tasks involves a majority of their work time. Tr. II, p. 126.

She further testified that certain types of tasks that the three positions perform such as obtaining certifications, dealing with complaints from the public, dealing with the contractor's complaints and collecting data do not meet the statutory definition of a supervisory task. Tr. II, pp. 114, 129-130.

She acknowledges that the number of subordinates assigned to each HCI IV is not consistent throughout the life of the project which affects the amount of time the

HCI IV's spend in performing supervisory duties. Tr. II, pp. 111-112.

CONCLUSIONS OF LAW

The instant petition seeks to change the bargaining unit designations of three HCI IV positions from Unit 3 (Nonsupervisory employees in white collar positions) to Unit 4 (Supervisory employees in white collar positions). Upon review of the entire record, the Board finds that the State has nowhere indicated whether it agrees or disagrees with the HGEA's requested change in bargaining unit designations. However, based upon the testimony of the State's witness, the Board assumes that the State opposes the change and the following conclusions reflect this assumption.

The State and the HGEA generally agree that the three subject HCI IV positions assign work to and direct subordinate inspectors. These are duties possessed by a supervisory employee which is defined in §89-2(20), HRS, as follows:

- (20) "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.

Diana Kaapu testified that the DPS is required by §89-6(a), HRS, to look at the percentage of time an employee

is involved in supervisory tasks. Said subsection provides, in pertinent part:

. . .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.

Based on her interpretation of this subsection, Kaapu testified that generally an employee is considered a supervisor if the employee spends fifty percent or more of his or her working time in supervisory duties. Kaapu further testified that it has been her experience that supervisors do not spend more than half of their time in supervisory functions unless they have four or more subordinates.

With respect to the subject positions, the State, after reviewing the number of subordinate inspectors assigned to the HCI IV's over a two-year period, questioned whether the three HCI IV's perform supervisory duties for fifty percent or more of their time because the three did not supervise four or more subordinates at all times. The State recognized, however, that since the staffing requirements of construction projects vary over the life of the project, the State must also examine the specific duties assigned to the three positions.

Kaapu acknowledged that the three perform supervisory duties. She did not believe, however, that those supervisory duties involved a majority of their work time. Kaapu testified that other duties assigned to the three HCI IV's such as dealing with the contractors' and residents'

complaints and collecting data do not meet the statutory definition of a supervisory task.

Thus, the State apparently argues that while the three positions perform supervisory tasks, they are not supervisory employees under Chapter 89, HRS, because the positions are not engaged in these supervisory tasks for fifty percent or more of their working time as allegedly required by §89-6(a), HRS.

To the contrary, the HGEA argues that the three positions are engaged in supervisory tasks for fifty percent or more of their working time. The main disagreement between the parties concerns the nature of duties which constitute supervisory duties.

At the outset, the Board finds the State's requirement that an employee must be engaged in supervisory duties for fifty percent or more of the time in order to be considered a supervisor is overly restrictive in light of the statutory requirements. The Board has interpreted §89-6(a), HRS, to mean that the Board shall consider, in addition to the nature of the work, whether a major, greater or larger portion of the working time of a supervisory employee is spent as part of a crew with nonsupervisory employees in a nonsupervisory capacity. See Hawaii Fire Fighters Association, 1 HPERB 52 (1972), at 61.

The Board notes that while the State's requirement is one of the ways a supervisory employee can satisfy the conditions set forth in §89-6(a), HRS, it is not the only way. Further, although it may be helpful to consider the percentage or amount of time an employee spends in supervisory duties in order to satisfy the requirements

of §89-6(a), HRS, the Board finds it more appropriate to consider the amount of time an employee spends as part of a crew or team with nonsupervisory employees in a nonsupervisory capacity.

In the instant case, the parties agree that the positions perform supervisory duties which require the use of independent judgment. The only question remaining is whether a major, greater or larger portion of their working time is spent with their subordinates in a nonsupervisory capacity.

Based on the position descriptions of the three positions and the testimony of the three incumbent HCI IV's, the Board finds that the HCI IV's time spent in performing duties in a nonsupervisory capacity as part of a crew with nonsupervisory employees is minimal since the HCI IV's rarely or only in emergencies perform actual inspectional work together with their subordinates. The remainder of the HCI IV's time is spent in duties which the parties have agreed are supervisory and other duties which include resolving complaints from the contractor and the public, preparing reports to the federal government and obtaining material certifications. While the State has argued that these other duties are nonsupervisory, the resolution of whether the duties are supervisory or not is not determinative in the instant case since the HCI IV's do not perform these duties as part of a crew together with their subordinates. Thus, the Board concludes that the three HCI IV's do not spend a majority of their working time as part of a crew or team together with their subordinate inspectors in a nonsupervisory capacity.

If the Board was to make a determination of the nature of these other duties, the Board would find that these duties are supervisory in nature. The Board agrees with the State that standing alone, duties such as preparing reports to the federal government, resolving complaints from the contractor and the public and obtaining material certifications are not necessarily supervisory. However, the Board takes into consideration the duties in relation to the overall responsibilities of the three positions. In this case, the Board finds that these duties are associated with the uncontested supervisory duties of the three positions and since the HCI IV's must use their independent judgment in performing these duties, the Board concludes the duties are supervisory in nature.

The Board does not now adopt a hard and fast rule that a position needs a particular number of subordinates to be considered supervisory. The Board stresses that the determination of whether duties are supervisory should be made on a case-by-case basis. The duties must be carefully analyzed in relation to other duties and responsibilities assigned to the particular position and in relation to other duties and responsibilities of the class.

Thus, the Board concludes that inasmuch as the three subject HCI IV positions (1) possess supervisory authorities as delineated in §89-2(20), HRS, which require the use of independent judgment and (2) a major, greater or larger portion of their working time is not spent as part of a crew or team with nonsupervisory employees in a non-supervisory capacity, the three positions are supervisory positions under Chapter 89, HRS, and the inclusion of the

positions in Unit 4, as requested by Petitioner, is consistent with §§89-2(20) and 89-6(a), HRS.

ORDER

The three HCI IV positions, Position Nos. 16851, 16852 and 19145 are transferred from Unit 3 to Unit 4.

The effective date of the transfer shall not be earlier than the date of this decision.

DATED: Honolulu, Hawaii, April 26, 1983.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES R. CARRAS, Board Member

CONCURRING OPINION

I concur in part that the above case brings to light a practice initiated many years ago by the State Department of Personnel Services [hereinafter referred to as DPS] which, in my view, has been based on a misinterpretation of provisions of Chapter 89, HRS.

When determining whether an employee should be placed in a supervisory or nonsupervisory unit, proper reference must be directed to statutory language specifically established for this purpose.

Statutory provisions directly affecting this case are §§89-2(20) and 89-6(a), HRS. No other provisions of Chapter 89, HRS, define a person's status as a supervisor or a nonsupervisor.

Historically, supervisors have been excluded from collective bargaining privileges and have not been eligible for union membership in the private sector. While this fact may seem irrelevant to this particular case, it becomes relevant when we understand that Hawaii's Collective Bargaining law (Chapter 89, HRS)--unlike laws of other jurisdictions allows supervisory personnel to be included in collective bargaining and eligible for union membership. It becomes more understandable when we appreciate the fact that much of the language contained in Chapter 89, HRS, came directly from the law which governs collective bargaining in the private sector. As an example, I refer to the most prominent section of Chapter 89, HRS, which defines a supervisor.

Subsection 89-2(20), HRS, sets forth the definition of "supervisory employee" and reads as follows:

"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.

This definition, which is substantially the same as the one found in the private sector, has the opposite effect when applied to our law (Chapter 89, HRS) because (and unlike the private sector) we have extended eligibility privileges to supervisors. It should be noted that if the same definition were applied to the private sector, all those meeting the stated qualifications would be ineligible for collective

bargaining and unionization. Subsection 89-2(20), HRS, however, given proper weight and scrutiny, virtually makes every employee in government service eligible for unionization and collective bargaining privileges. This, in my opinion, includes most of the employees who would normally be considered managerial or supervisory in the private sector. Certainly, the first portion of this section would make these people eligible.

Under our law, the majority of supervisors who have been placed into supervisory units have been deemed eligible because they have met the qualifications found in the second portion of §89-2(20), HRS.

Regarding the case before us, I am of the opinion that DPS's arguments in determining supervisory status, essentially meant that a 50% supervision criteria be met notwithstanding other statutory provisions. I am of the strong opinion that should an employee meet the qualifications established in §89-2(20), he must serve in a supervisory capacity and further, his work functions must be supervisory related within the meaning of Chapter 89, HRS. The 50% qualification established by DPS without regard to the type of supervision or supervisory related functions comes directly in part from §89-6(a), HRS, which reads as follows:

. . .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.

As mentioned earlier, much of the language contained in our law came directly from the private sector or

was influenced by collective bargaining practices in the private sector. This section especially needs to be properly defined and logically understood.

First of all, I very strongly disagree with the idea that from this section comes the qualification that all supervisors must supervise for 50% of the time before they are placed into appropriate supervisory units. This section does not in any way imply this. It is my view that this section coincides with language in the private sector which essentially allows all lead-man positions (classes) to be nonsupervisory in nature and thus eligible for collective bargaining and union membership.

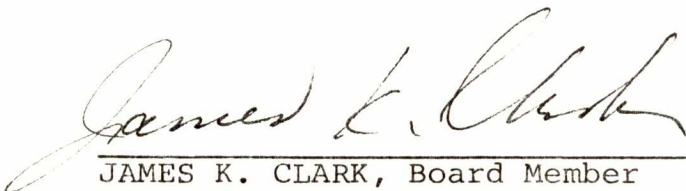
It is my understanding that §89-6(a), HRS, was deliberately inserted as a precautionary measure specifically to alert this Board that working foreman-type classes who are required as a major portion of their work to supervise and participate with work crews should not be regarded as supervisors within the meaning of Chapter 89, HRS.

The part of this section referring to a "major portion of the work time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees" does not establish a 50% criteria for all supervisory employees. I submit that this language establishes working foreman-type classes (lead-man, crew leaders, etc.) who are supervisors assigned to work crews, thus requiring them to supervise for 50% or more of their time are not and should not be considered supervisors within the meaning of Chapter 89, HRS. This is consistent with such classes in the private sector. To allow the 50% supervisory criteria established by DPS to stand would greatly question the

validity of such classes (working foreman classes) being placed in Unit 1 rather than Unit 2. Should the criteria established by DPS be used, it is very possible for many of them to meet the criteria found in §89-2(20), HRS, thus making this group of employees eligible for supervisory units, something the law was not intended to do.

In summary, it is my position that the 50% supervisory criteria used by DPS in determining supervisory status of employees is no longer valid.

DATED: Honolulu, Hawaii, April 26, 1983.



JAMES K. CLARK, Board Member

Copies sent to:

Chester C. Kunitake, HGEA
Christobel K. Kealoha, Esq.
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