

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of	)	
	)	
HAWAII FEDERATION OF COLLEGE TEACHERS,	)	
Local 2003, American Federation of	)	
Teachers, (AFL-CIO),	)	Case No. <u>R-07-12</u>
	)	
Petitioner,	)	Decision No. <u>21</u>
	)	
and	)	
	)	
HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION,	)	
Local 152, HGEA/AFSCME,	)	
	)	
AAUP-UHFA ALLIANCE and	)	
	)	
COLLEGE & UNIVERSITY PROFESSIONAL	)	
ASSOCIATION (HEA-NEA),	)	
	)	
Intervenors,	)	
	)	
and	)	
	)	
BOARD OF REGENTS,	)	
UNIVERSITY OF HAWAII,	)	
	)	
Employer.	)	
	)	

CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE  
AND ORDER TO NEGOTIATE

A representation proceeding having been conducted pursuant to a Direction of Election in the above-entitled matter by the Public Employment Relations Board in accordance with the Hawaii Public Employment Relations Act and the Rules of Procedure of the Board, and it appearing that an exclusive bargaining representative has been selected; pursuant to the authority vested in the Board by the Hawaii Public Employment Relations Act, IT IS HEREBY CERTIFIED that the HAWAII FEDERATION OF COLLEGE TEACHERS, Local 2003, American Federation of Teachers, (AFL-CIO), has been designated and selected by a majority of the employees of the above-named employer, in the appropriate

bargaining unit described herein, as their exclusive bargaining representative for the purpose of bargaining collectively on questions of wages, hours, and other terms and conditions of employment.

UNIT:

Included: All Instructional, Research, and Specialist personnel, County Extension Agents and Home Economists, Assistants to the Deans of Social Work, Director and others whose position titles are included on Exhibit A attached herewith and those employed half-time or more, except those determined not to be eligible.

Excluded: All administrative personnel and others whose position titles are included on Exhibit B attached herewith, members of boards and commissions, part-time employees, and temporary employees of three months duration or less.

Further, IT IS ORDERED that the above-named public employer shall bargain collectively with the Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers, (AFL-CIO), and enter into a written agreement with such employee organization with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under the Act.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

By Mack H. Namada  
Mack H. Namada, Chairman

Carl J. Guntert  
Carl J. Guntert, Board Member

John E. Milligan  
John E. Milligan, Board Member

Dated: November 30, 1972

Honolulu, Hawaii

EXHIBIT A

INCLUDED Personnel in the following classifications and positions are included in Unit 7.

A. UNIVERSITY OF HAWAII (General)

Instruction<sup>1</sup>

Instructor

Assistant Professor  
Associate Professor  
Professor  
Senior Professor<sup>2</sup>

Research

Junior Researcher  
Assistant Researcher  
Associate Researcher  
Researcher  
Senior Researcher<sup>3</sup>

Specialist

Junior Specialist  
Assistant Specialist  
Associate Specialist  
Specialist

County Extension Agent and Home Economist

Assistant in Extension  
Assistant County Extension Agent  
Assistant County Home Economist  
Associate County Extension Agent  
Associate County Home Economist  
County Extension Agent  
County Home Economist

Assistants to the Deans of Social Work for

Admissions  
International Programs  
Registration

Directors of

Admissions and Records  
Asian Studies Program  
Campus Center, Manoa Campus  
Center for Governmental Development  
Center for Labor Management Education  
Center for Research and Early Childhood Education  
Counseling and Testing Center  
Courses and Curricula (College of Cont. Educ. & Comm. Serv.)  
Clinical Training Program (Psych. Dept.)  
Economic Research Center  
Division of Field Services (College of Educ.)  
Education Research and Development Center  
Environmental Center  
Ethnic Studies  
Foreign Contracts Office  
Instructional Resources Services Center

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<sup>1</sup>Includes visiting Assistant Professor, Associate Professor and Professor.

<sup>2</sup>Appointments to this rank were made in the past by special action of the Board of Regents on recommendation by the President. New appointments to this rank are no longer made.

<sup>3</sup>supra

(EXHIBIT A continued)

Land Study Bureau  
Look Laboratory  
New College  
Overseas Career Program  
Pacific and Asian Linguistics Institute  
Pacific Urban Studies and Planning Program  
Population Genetics Laboratory  
Sea Grant Program  
Sensory Science Laboratory  
Sinclair Library  
Student Health Service  
Student Services (College of Cont. Educ. & Comm.  
Serv.)  
Survey Research Office  
Water Resources Research Center

Executive Secretary, International Advisory Council  
Associate Director of Overseas Career Program  
Assistant Director of Center for Governmental Development  
Superintendent, Agricultural Experiment Station  
Program Director of Community Services (College of Cont.  
Educ. & Comm. Serv.)  
County Extension Chairmen  
Division Chairmen (Community Colleges and Hilo College)  
Department Chairmen  
Lecturers teaching 7 or more credit hours per semester  
at the University of Hawaii, including Hilo College,  
and Lecturers teaching 8 or more credit hours per  
semester in the Community College System

B. UNIVERSITY OF HAWAII AT HILO

Directors of  
General Education (Hilo College)  
Development (Hilo College)  
Continuing Education and Community Service (Hilo  
College)  
Continuing Education and Community Service (Hawaii CC)  
Student Services (Hawaii CC)  
Head Librarian, Academic Support (Hawaii CC)

C. COMMUNITY COLLEGE SYSTEM

Assistant to Provost (Leeward CC)  
Director of Continuing Education and Summer Session  
(Kapiolani CC)

EXHIBIT B

EXCLUDED Personnel in the following classifications and positions are excluded from Unit 7.

A. UNIVERSITY OF HAWAII (General)

President

Vice Presidents

Secretary of the University

Secretary of the Board of Regents

Assistant Secretary of the Board of Regents

Chancellors

Office of the Chancellor<sup>4</sup>

Deputy Chancellor, East-West Center

Assistant Chancellor, Hilo

Deans

Associate Deans

Assistant Deans

Assistants to the Deans of Social Work for  
Administrative and Community Affairs  
Fiscal Affairs  
Practicum

Provosts

Assistant Vice Presidents for  
Academic Affairs  
Business Affairs

Special Assistants to the President

Special Assistant to the Vice President for Business  
Affairs

University Librarian

Associate University Librarian

Assistant University Librarian

Executive Director, Leahi Hospital

Directors of  
Center for Engineering Research  
Curriculum Research and Development Group (College  
of Educ.)  
Hawaii Institute of Geophysics  
Hawaii Institute of Marine Biology  
Industrial Relations Center  
Institute of Astronomy  
Pacific Biomedical Research Center  
Student Housing

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<sup>4</sup> Newly-created positions in the Office of the Chancellor,  
Manoa Campus.

(EXHIBIT B continued)

Director and Manager of Educational Television

Associate Directors of

- Cooperative Extension Service
- Hawaii Agricultural Experiment Station
- Hawaii Institute of Geophysics
- Hawaii Institute of Marine Biology
- Pacific Biomedical Research Center

Assistant Directors of

- Cooperative Extension Service
- Hawaii Agricultural Experiment Station

Staff of Industrial Relations Center

Ombudsman

Graduate Assistants

Resident Assistants

Lecturers teaching less than 7 credit hours per semester at the University of Hawaii, including Hilo College, and Lecturers teaching less than 8 credit hours per semester in the Community College System

B. UNIVERSITY OF HAWAII AT HILO

Directors of

- Business and Management Affairs
- Continuing Education and Community Service
- Center for Cross-Cultural Training and Research
- Student Services (Hilo College)

Deputy Director of Center for Cross-Cultural Training and Research

Administrative Officers of

- Center for Cross-Cultural Training and Research
- Hawaii Community College
- Hilo College

Head Librarian, Academic Support (Hilo College)

C. COMMUNITY COLLEGE SYSTEM

Directors of

- Administrative Services (Kapiolani CC)
- Administrative Services (Leeward CC)
- Business Affairs (Honolulu CC)
- Business and Fiscal Affairs (Kauai CC)
- Community College Services (Central Office)
- Facilities and Maintenance (Honolulu CC)
- Facilities and Management Planning (Maui CC)
- Fiscal and Business Affairs (Central Office)
- Fiscal Planning and Management (Maui CC)

State Director for Vocational Education (Central Office)

Administrative Assistant (Kapiolani CC)

Personnel Officer (Honolulu CC)

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ORDER AFFIRMING HEARINGS OFFICER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS  
AND DIRECTION OF ELECTION

For the Employer:	Kenneth K. Lau and Nobuki Kamida, Board of Regents, University of Hawaii
For Petitioner:	Victor J. Van Bourg and John S. Edmunds, Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers (AFL-CIO)
For Intervenors:	Benjamin C. Sigal, Hawaii Government Employees' Association, Local 152, HGEA/AFSCME
	Jeffrey N. Watanabe, AAUP-UHFA Alliance
	Stephen M. Nassau, College & University Professional Association (HEA-NEA)

Pursuant to Chapter 89, Hawaii Revised Statutes, a hearing was held before the Hearings Officer of the Hawaii Public Employment Relations Board, hereinafter referred to as the Board, at Honolulu, commencing on March 15, 1972.

On July 17, 1972, the Hearings Officer issued his Findings of Fact, Conclusions of Law and Recommendations in the above-entitled matter. None of the parties filed exceptions.

We have reviewed the entire record, the findings, conclusions and recommendations of the Hearings Officer and the briefs submitted by the parties and we find that no prejudicial error was committed. We hereby adopt the Hearings Officer's Findings of Fact, Conclusions of Law and Recommendations for the reasons set forth herein.

#### FINDINGS OF FACT

The Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers (AFL-CIO), the Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, the AAUP-UHFA Alliance and the College & University Professional Association (HEA-NEA) are employee organizations within the meaning of Chapter 89, Hawaii Revised Statutes.

The Board of Regents, University of Hawaii, is a public employer within the meaning of Chapter 89.

The above-named employee organizations, respectively, petitioned the Board on July 13, January 5, November 9 and July 16, 1971, for certification as the exclusive bargaining representative of the faculty of the University of Hawaii and the community college system, Unit 7.

At the commencement of the hearing, a list of unit inclusions and exclusions to which all parties stipulated was accepted by the Hearings Officer and entered into the record. The parties during the hearing, further agreed that resident assistants, lecturers who teach less than 7 credit hours per semester at the University or less than 8 credit hours per semester at a community college and the University ombudsman should



be excluded from Unit 7. At the conclusion of the hearing, the parties still disagreed on whether the following should be included or excluded from Unit 7:

- (1) Associate and assistant deans,
- (2) Department chairmen,
- (3) Graduate assistants and
- (4) Paul P. Tinning, Labor-Management Education Specialist.

The dispute regarding associate and assistant deans concerned the question of the number of such positions that should be excluded from the unit. All parties stipulated to the exclusion of one associate or assistant dean for each of the deans excluded from the unit. The public employer and the Hawaii Federation of College Teachers sought to exclude all of the associate and assistant deans.

With respect to department chairmen, the public employer's position was that the administrative and managerial functions of department chairmen warranted their exclusion under section 89-6(c) as "other top-level managerial and administrative personnel." All of the employee organizations, on the other hand, sought the inclusion of department chairmen along with the rest of the faculty since they did not consider department chairmen to be "top-level managerial and administrative personnel".

The Hawaii Federation of College Teachers was the sole petitioner to seek the inclusion of graduate assistants. Its position was that graduate assistants are teachers and are, therefore, part of the faculty. All other parties in interest contended that graduate assistants are primarily students and are not considered part of the faculty and, therefore, they should be excluded from the unit.

The public employer sought the exclusion of Paul P. Tinning, Labor-Management Education Specialist, because it contended that he is an individual concerned with confidential matters affecting employee-employer relations.

Under the facts of the instant case, the Hearings Officer found that associate and assistant deans serve as deputies to the deans. Since all parties stipulated to the exclusion of deans as heads of major divisions,

he concluded that associate and assistant deans should be excluded from the unit as deputies to the heads of major divisions pursuant to section 89-6(c)\*. The Hearings Officer also found that while department chairmen possess some indicia of supervisory authority, the nature of their supervisory duties were not sufficient to make them top-level managerial or confidential employees subject to exclusion under section 89-6(c). Furthermore, he found that graduate assistants should be excluded from the unit since they are classified on a different compensation schedule, the nature of their appointments and work differ from that of the faculty. In the case of Paul P. Tinning, upon a review of the entire record, the Hearings Officer found that insufficient facts existed for his exclusion from the unit as an individual concerned with confidential matters affecting employee-employer relations.

#### CONCLUSIONS OF LAW

We concur with the Hearings Officer's conclusion that associate and assistant deans should be excluded from the unit since they are deputies to the deans, who all parties have stipulated are heads of major divisions. However, in reaching the same conclusion as that of the Hearings Officer, we are reluctant to rely primarily upon the parties' stipulation and we find it necessary to clarify the basis for our determination that deans are heads of major divisions.

Our dissenting colleague feels that associate and assistant deans should be included in the bargaining unit, since they are not deputies to

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\*"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 as well as his deputy, first assistant, and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations, part time employee working less than twenty hours per week, temporary employee of three months duration or less, or any commissioned and enlisted personnel of the Hawaii national guard, shall be included in any appropriate bargaining unit or entitled to coverage under this chapter." [Emphasis added]

heads of major divisions. While he does not dispute the finding that associate and assistant deans serve as deputies to the deans, he is of the opinion that the academic colleges headed by the deans cannot be considered as major divisions in view of the statewide organizational structure of the University. He finds that the major divisions are the University of Hawaii's Manoa Campus, the University of Hawaii at Hilo, the East-West Center and the Community College system.

In the instant case, we are of the opinion that we must look beyond the University's organizational structure, particularly when it is based, in part, on geographical considerations, in order to arrive at a meaningful determination as to what constitutes a major division of the University. Our review of relevant cases in other jurisdictions and testimony in the record reveals that universities do not conform to traditional authority structures. The unique manner of university governance, i.e., the collegiality of the decision-making process, makes it difficult to reconcile the organizational structure of universities with traditional organizational assumptions which prevail in the area of collective bargaining.

A cogent example is discussed in Adelphi University, 195 NLRB 107, 79 LRRM 1545 (1972), wherein the National Labor Relations Board stated:

" . . . The difficulty both here and Post may have potentially deep roots stemming from the fact that the concept of collegiality wherein power and authority is vested in a body composed of all of one'[s] peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world. The statutory concept of 'supervisor' grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.

"Because authority vested in one's peers, acting as a group simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us. Indeed, the more basic concepts of the organization and representation of employees in one group to deal with a 'management' or authoritarian group would be equally hard to square with a true system of collegiality. Nevertheless, both here and in Post, the collegial principle is recognized and given some effect."

The record discloses that University of Hawaii President Cleveland was similarly aware that collective bargaining concepts as to who sits on

which side of the bargaining table are not readily applicable to the University because of its unique manner of governance. His answer to the following question supports our conclusion that we must look beyond the University's organizational structure in our determinations:

"Who are your top level policy-makers at the University with respect to wages, hours and conditions of employment?"

President Cleveland replied:

"Well, your concept of top level, you see, kind of violates the way things operate or are operating at the University. . . . Well, you think of it as a hierarchy, and I know that's hard to get away from, because it's -- you know, we all grow up in one culture. But this is a different culture -- . . . University governance. . . . -- and marrying the culture of the University governance with the industrial union culture, which essentially is the background of this collective bargaining law, is the creative problem we have before us. Not an adversary problem, but a problem that's going to require creating something new under the sun that isn't part of previous collective bargaining experience and isn't part of previous university governance experience either. . . ."

We note that in its designation of appropriate bargaining units, the Legislature specified that supervisory and non-supervisory employees in blue collar and white collar positions should constitute separate units; that educational officers and teachers should constitute separate units; and that employees in optional appropriate bargaining units may include supervisory and non-supervisory employees in the same optional unit only if it is mutually agreeable among such employees. However, in the appropriate bargaining units for the University, the Legislature included both supervisory and non-supervisory employees in the same units. This indicates that the lawmakers were cognizant of the University's unique manner or governance, i.e., governance by peers, and therefore avoided segregating supervisory and non-supervisory employees in the University units.

In view of the unique structure and mode of governance at the University, we are of the opinion that we must look at the functional importance of sub-parts of the University, such as colleges, to their operations rather than merely their place on an organizational chart, to arrive at a meaningful determination as to whether such sub-parts are major divisions of the University.

The record shows that the primary functions of the University are threefold: instruction, research and public service. In terms of the instructional function, there can be no doubt that an academic college is a major division in any university. However, we note that a majority of the deans are not heads of academic colleges. Many who hold the title of dean head other types of divisions. For example, the heads of the four professional schools, which comprise the College of Health Sciences and Social Welfare, are deans. It is obvious that these professional schools and the academic colleges are not equivalents on the University's organizational chart. It appears, however, that these professional schools and the academic colleges are equivalent in terms of their functional importance to the operations of the University. These professional schools not only provide instruction, but they are also instrumental in carrying out public service functions of the University. Additionally, we note that the title of dean is conferred upon heads of other divisions, such as the Dean of Academic Development, the Dean of Graduate Division and Director of Research and the Dean of Students because they head divisions which are of major importance in carrying out primary functions of the University -- instruction, research and public service. On the basis of the relative importance of units headed by deans in carrying out the University's mission, we find such units to be major divisions of the University. We find that the deans discussed herein are heads of major divisions.

As chief administrative officers of major divisions, deans are responsible for providing managerial direction over operations and personnel within their respective jurisdictions. They report directly to their respective chancellor or provost. They formulate, determine and effectuate the policies under which their divisions are to be run. Additionally, they have a major role in the formulation, determination and effectuation of campus-wide and system-wide policies, which are subject to approval by higher level management. No one disputes the proximate

relationship of deans to higher level management in the University system nor their top-level managerial and administrative status as heads of major divisions of the University.

The dispute is over the number of associate and assistant deans who should be excluded from the unit. The number of associate and assistant deans serving under a dean varies according to the amount and complexity of activity involved.

The purpose for which associate and assistant deans exist is explicit in their titles. Webster's New Seventh Collegiate Dictionary defines "assist" as "to give aid or support to" and "associate" as "to join as a partner, friend or companion." Hence, the purpose of associate and assistant deans is to give aid or support to, or to join, the deans in the complex administration of major divisions of the University.

As such, they serve as deputies to the deans. In Ahai v. Cain, 27 H. 770, at 773 (1924), "deputy" is defined as:

" . . . One, who by appointment exercises an office in another's right, having no interest therein but doing all things in his principal's name and for whose misconduct the principal is answerable."

Though there are no standard duties assigned, each deputy performs a portion of the dean's administrative duties for which the dean is responsible as head of a major division -- curriculum, personnel, fiscal matters and student services. Because the nature of duties are primarily administrative in nature, holding faculty status is not a prerequisite to appointment as an associate or assistant dean. Many of the associate and assistant deans do not teach and those who do teach, limit their teaching assignment as do the deans.

The following testimony by the Dean of Engineering clearly reveals the deputy relationship of associate and assistant deans with the deans:

"I look on the four of us in administration for the college, again, as sharing, not the responsibility, but sharing the work that needs to be done within the so-called 'framework.' So there is quite a bit of interchangeability of what Dean Yuen or myself do."

The record shows that there is no significant difference between an associate or assistant dean. The dean determines the rank each of his deputies is to hold and the manner in which he shall utilize them. No hierarchy of authority exists between associate and assistant deans. Each reports directly to his respective dean and each serves at the dean's pleasure. In the dean's absence, any one of his deputies may be designated by him to serve as head of the division.

The dean and his deputies together comprise a management team for the effective administration of a major division. As a management team, they have a close working relationship. They are located in the same office complex, they share common secretarial services and common files are maintained for their use. The assistant and associate deans assist the dean in formulating, determining and effectuating policies under which the major division headed by the dean is to be run and assist him in making policy recommendations which are subject to approval by higher level management.

The proximate relationship of associate and assistant deans to the deans is further supported by the Faculty Handbook. Therein, the associate and assistant dean level is not mentioned in the formal line of communication or in the decision-making process of the University, since an associate or assistant dean is part of a dean's office. Decisions, policies or recommendations, as the case may be, are issued from the dean's office by the dean himself, after advice from and consultation with his deputies, or the dean may designate one of his associate or assistant deans to act in his behalf.

The deans have been excluded from the unit. If their deputies are included in the unit the possibilities of conflicts of interest are real and serious. The inclusion of associate and assistant deans would defeat the purpose for which their positions were created, i.e., to serve as deputies to a dean, to act in his interest, and to act in an advisory or consultative capacity to him. When any matter concerning collective

bargaining arises, and the dean is expected to act thereon, as a representative of the employer, he cannot utilize his assistant or associate deans, in most instances, because they in effect will be on the other side of the table. Chapter 89, Hawaii Revised Statutes, clearly mandates the avoidance of creating situations which place employees in conflicts of interest and which render people in management useless to their chiefs in the field of employee relations.

The National Labor Relations Board cautioned against such potential conflict of interest in Textron, Inc., 196 NLRB 127, 80 LRRM 1099 (1972), wherein it stated:

"But throughout any attempted analysis must run the common thread of an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. That is the fundamental touchstone."

For the reasons set forth above, we hereby conclude that associate and assistant deans should be excluded from Unit 7, Faculty of the University of Hawaii and the Community College system.

Based on our review of the entire record and in the absence of exceptions, we adopt the Hearings Officer's findings, conclusions and recommendations without addition or modification with respect to the inclusion of department chairmen and Paul P. Tinning in the bargaining unit and the exclusion of graduate assistants therefrom.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
John E. Milligan, Board Member

Dated: September 15, 1972

Honolulu, Hawaii



### DISSENTING OPINION

I dissent from my colleagues' majority decision that Assistant and Associate Deans should be excluded from Unit 7, Faculty of the University of Hawaii and the Community College System.

The exclusionary language of Section 89-6(c), Hawaii Revised Statutes, with which we are herein concerned, inter alia, states:

"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 as well as his deputy, first assistant, and any other top-level managerial and administrative personnel, . . ."

The basis on which my colleagues relied for the exclusion of Assistant and Associate Deans is that they are deputies to the Deans, who are chiefs or administrative officers of major divisions of the University. I would agree with my colleagues that Deans are heads of major divisions if the bargaining unit involved only faculty of the Manoa Campus. However, if we follow the language of Section 89-6(c), supra, "a major division thereof" means a major division of a state or county department or agency. In the case of the University, a major division must be viewed in the context of the statewide University System, which includes the various community colleges, the University of Hawaii at Hilo and the East-West Center, in addition to the University of Hawaii, Manoa Campus. Therefore, I believe the Chancellors of the University of Hawaii, Manoa Campus, the University of Hawaii at Hilo and the East-West Center and the Vice President for Community Colleges (not the Deans of the academic colleges of the Manoa Campus) are heads of major divisions of the University System.

The Chancellor of the University of Hawaii at Hilo and the Vice President for Community Colleges are assisted by Provosts. The Chancellor of the University of Hawaii, Manoa Campus, is assisted by the Deans of the various academic colleges. Under the language of Section

89-6(c), supra, the Provosts and Deans would be embraced under the provision "as well as his deputy, first assistant, and any other top-level managerial and administrative personnel."

Admittedly, Assistant and Associate Deans are deputies or first assistants to the Deans, but as such, they do not fall within the exclusionary language of Section 89-6(c), supra, since "his deputy or first assistant" means a deputy or first assistant to the administrative officer, director, or chief of a state or county department or agency, or any major division thereof, i.e., a deputy or first assistant to the President of the University, a Chancellor or the Vice President for Community Colleges. I contend that the Dean, himself, is the deputy or first assistant to the Chancellor, who is the head of a major division of the University System.

I move now to the contention in the majority decision that "even if the Associate and Assistant Deans were found not to be deputies, the functions performed by them in the administration of their divisions would require their exclusion as managerial employees."

Section 89-6(c), supra, specifically excludes "top-level managerial and administrative personnel." In our earlier decision rendered for the policemen's bargaining unit,\* we stated the following:

"In view of these aforementioned differences which indicate that the Legislature intended comparatively broad coverage under our Act, it is our opinion that the exclusionary language of Section 89-6(c), supra, should be narrowly construed particularly for optional appropriate bargaining units. Hence, unless the evidence in the record demonstrates that an employee has managerial and administrative responsibilities substantially different from supervisory employees per se, his exclusion from the unit would not be consistent with the policy of the Act. . . ."

The same reasons for our opinion cited above exist in the case at hand. Although Unit 7 is not an optional appropriate bargaining unit, Unit 7 is similar to optional appropriate bargaining units in that it

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\*Hawaii Public Employment Relations Board, Case No. R-12-8, Decision No. 18 (June 6, 1972).

includes both supervisory and non-supervisory employees. The Legislature did not establish separate units for supervisory and non-supervisory personnel of the University of Hawaii and the Community College System as it did for Units 1 through 4 nor did it establish a separate unit for officers apart from teachers as in the case of the Department of Education. In view of the policy of the Act with respect to supervisory bargaining rights and the Legislature's silence on the matter of separate units for supervisors and non-supervisors in the case of the University of Hawaii, we can assume, as in the case of optional appropriate bargaining units, that the Legislature must have been of the opinion that the affinity of such supervisory and non-supervisory employees, due to the nature of their work and specialized training, was greater than any conflict of interest which traditionally exists between other supervisory and non-supervisory employees.

Therefore, I am of the opinion that the same criteria we utilized in differentiating managerial employees from supervisory employees in the policemen's unit can guide us again in delineating top-level managerial and administrative personnel of the University. In the policemen's decision, we stated that our determination as to who were managerial employees, i.e., "those who formulate, determine and effectuate an employer's policies," would be confined to the limitations set forth in Textron, Inc., 196 NLRB 127, 80 NPM 1099 (1972). Therein, the National Labor Relations Board made it clear that it did not intend its definition of a managerial employee to be too encompassing.

"...But the question which faces us in North Arkansas Electric and which faces us again here, is whether there is a basis in the statute or in commonsense for denying statutory protection and representational rights to all employees who have any discretion in the formulation, determination and effectuation of any employer policy.

"It is clear enough, as the legislative commentary and commentary in several of our own decisions has explained, that there is sound basis for the exclusion of those concerned with management policies in the labor relations area. There, the potential for conflict of interest is apparent and thus an orderly administration of this Act requires the exclusion of such personnel from coverage."

Inasmuch as the exclusionary language of Section 89-6(c), supra, concerns "top-level" managerial and administrative personnel, our exclusion of managerial employees should be confined to those individuals who have considerable discretion in the formulation, determination and effectuation of an employer's policies.

In delineating top-level management of the University, two significant factors should be considered in conjunction with the implied legislative intent that Section 89-6(c), supra, be narrowly construed. The first factor, which has been previously discussed, is that the unit involved is a statewide unit, i.e., the entire University System.

The various levels of authority in the University System can be seen in the normal line of communication, which is described in the Faculty Handbook as:

"The normal line of communication is from the faculty member to his department chairman; from the department chairman to the dean of the college; from the dean of the college to the Academic Vice-President (or, as he may designate, to the Dean for Academic Development or the Director of Research); from the Academic Vice-President to the President; and from the President to the Board of Regents. . . ."

If we include the Chancellors and Associate and Assistant Deans along with the above levels of authority, a hierarchy of authority for the University System would result as follows:

Board of Regents  
President  
Vice Presidents  
Chancellors  
Deans  
Associate and Assistant Deans  
Department Chairmen

In view of the above, I cannot agree that Associate and Assistant Deans are "top-level managerial and administrative personnel."

Webster's Seventh New Collegiate Dictionary defines "top" as:

"the highest point, level, or part of something";  
"the highest position (as in rank or achievement)"; or  
"a person or thing at the top".

While it would be absurd to apply "top-level" in its strictest sense, if Associate and Assistant Deans are excluded as "managerial and administrative personnel", on the other hand, the descriptive term "top-level"

immediately preceding "managerial and administrative personnel" would, in my opinion, be rendered meaningless. This, in essence, is comparable to saying that any individual performing managerial and administrative duties above that of department chairman, the lowest administrative level, should be considered as "top-level managerial and administrative personnel".

The second factor which I deem significant in delineating top-level managerial employees is the so called "collegiality" of the university setting. While the majority decision gave due consideration to this factor in its determination to include department chairmen in Unit 7, I feel this factor was overlooked in the determination to exclude Associate and Assistant Deans from the unit. The "collegiality" of the university setting emphasizes faculty participation at all academic levels in policy determination and decision-making.

Policy determination and decision-making are oftentimes initiated at the faculty level and terminate at higher rungs of authority above the Assistant and Associate Deans level, depending upon the matter involved. Usually, decision-making not only involves participation from the faculty at various levels in the normal line of communication, but also participation on the part of various advisory bodies, such as, the Council of Deans, the Faculty Senate and faculty committees. The Faculty Handbook describes the role of the Faculty Senate and the Council of Deans in policy determination and decision-making as follows:

"The Senate is the policy-recommending body of the University faculty. It has the responsibility, on behalf of the faculty of considering all proposed changes in the policies of the University and may suggest such changes on its own initiative. It has the sole responsibility on behalf of the faculty of recommending policy changes to the President of the University for consideration by the Board of Regents. 'Policy,' under its charter, means general rules for the conduct of the University, its faculty, student body, or administration, so far as they affect the following: (a) the purposes or goals of the University; (b) the nature and scope of its curricula and programs; and (c) its standards of teaching, research, and scholarship. It has the responsibility of considering all basic policy changes proposed by college senates when proposals affect the University. The Senate, furthermore, may consider and recommend specific means of ensuring the continuance of academic freedom at this University."

"The Council of Deans advises the Vice-President for Academic Affairs on all matters of academic policy. . . .

"The Council advises on curricular programs and requirements, policies affecting faculty members, and such other matters as may be brought before it. The Council is especially concerned with problems of coordination among the various colleges and divisions of the University."

Hence, decision-making entails consideration of recommendations from individuals in the line of communication, within which the Associate and Assistant Deans would comprise the second lowest administrative level, and from advisory bodies such as the Faculty Senate, the Council of Deans and faculty committees.

For example, the Faculty Handbook describes the administrative procedure with respect to promotions as follows:

"The department chairman or other immediate supervisor is responsible for having a promotion recommendation form completed in detail for each member of his department or division who is being considered for promotion. He submits these to the college dean, accompanying them with his own recommendation for or against promotion. The college dean then adds his own recommendation for or against promotion, and forwards the completed forms to the Dean for Academic Development, who removes the confidential recommendations made by the department chairman and dean, forwards these recommendations directly to the President, and prepares multiple copies of the other materials for distribution to the members of the Faculty Personnel Committee. After this committee deliberates, each member submits his individual confidential recommendations to the President, who gives consideration to all recommendations reaching him, including those from any other individuals whom he may wish to consult, prepares his own recommendations, and submits these to the Board of Regents."

The above illustrates the participation of various academic levels in the line of communication. The ultimate decision in promotion is based on separate recommendations from various levels in the line of communication as well as recommendations from members of the faculty personnel committee. One recommendation does not nullify the other. All recommendations are reviewed and considered.

It should be noted that Assistant and Associate Deans are not mentioned in the formal administrative procedure for promotion. Their participation, if any, with respect to promotional matters is limited to informal consultation as revealed in the following testimony:

Q Using promotion as an example, say, from associate professor to professor, do the associate or assistant deans participate in that decision-making process?

A Yes. Again informally, or I confer with the associate and assistant deans in decisions that are the recommendations that come through. As you are probably aware, we have a rather involved procedure . . .; and I confer informally with my assistant and associate deans; . . .

Q Do any of the deans, or does any one of the deans make a recommendation to you in this regard, or do you just consult with them?

A I consult with them.

Q As you would consult with a department chairman, for example?

A No. It's somewhat different. The department chairmen have a written statement to make, and the University procedure that has been established, the department chairmen is a well-established point in the entire procedure.

My consultation with the associate and assistant deans is separate from this. It's not spelled out in the University procedure, which is the reason it's informal in nature.

The relatively limited role of Associate and Assistant Deans in fiscal affairs is also illustrated in the budget-making process, which is described in the Faculty Handbook as follows:

"Estimates of requirements for the next fiscal year are prepared by the chairman or other appropriate head of the unit in consultation with the members of his unit. . . each submits an estimate to the appropriate dean or director for consideration and consolidation into a college budget request, which is then submitted by the dean to the Vice President for Business Affairs. All budget estimates and requests are consolidated by the Business Vice President and submitted to the President for discussion within his administration, transmission to the Board of Regents for final determination, and submission to the Department of Budget and Finance and the Legislature."

Any participation of Associate and Assistant Deans in the budget-making process is subject to review by several levels of authority, as enumerated above. Since the creation of a Chancellor for the University of Hawaii, Manoa Campus, budgetary matters would also be subject to review by the Chancellor prior to transmittal to higher levels of authority.

With respect to curriculum matters, the role of Assistant and Associate Deans is similarly limited. The processes for course and curriculum changes, as found in the Faculty Handbook, are as follows:

"New courses, modification in courses, or deletion of courses, may be suggested by any student, faculty member, department, curriculum committee, or dean. With the exception of courses established for Summer Session offering only, these suggestions will be made to the appropriate department with supporting data. The department will prepare a proposal which will be transmitted by way of the dean to the curriculum committee of the college in which the department is located. . . . Proposals involving courses carrying graduate credit . . . also require approval of the Graduate Council. After appropriate approvals, the proposal will be transmitted to the Dean for Academic Development for final consideration. . . . Final review of course changes, for policy consideration, is by the Council of Deans.

"Proposals for new curricula and proposals for programs leading to the awarding of a new certificate or degree follow procedures similar to those for course change up to the point where they are submitted by the college dean to the Dean for Academic Development, to the University Senate for its advice on the desirability of the program, and to the Council of Deans. Proposals for new graduate programs also go to the Graduate Council. When feasible, proposals are simultaneously or jointly considered by administrative and Senate bodies. All new curricula or programs leading to a degree or certificate must be approved by the Board of Regents."

On the basis of the foregoing administrative procedures with respect to budget, curriculum and promotion, I fail to see the basis for my colleagues' decision that Associate and Assistant Deans should be excluded from Unit 7 because "their recommendations to the Deans, regarding appointment of personnel, curriculum proposals and changes, fiscal affairs and student services, serve as the basis for administering the respective divisions and are indicia that Associate and Assistant Deans are part of management." Undoubtedly, Associate and Assistant Deans may provide recommendations to the Deans, but so do other members of the faculty and department chairmen. Furthermore, a Dean's recommendation is subject to review by higher authority, i.e., the Chancellor, the Vice President, the President and the Board of Regents, who also may be advised by the Faculty Senate, the Council of Deans and faculty committees. I do not believe that recommendations provided by Associate and Assistant Deans constitute indicia of managerial responsibility of sufficient magnitude so as to warrant their exclusion from the unit as "top-level managerial and administrative personnel", pursuant to Section 39-6(c), Hawaii Revised Statutes.



I am of the opinion that my colleagues failed to give due consideration to the uniqueness of the university setting as the New York Public Employment Relations Board did, In the Matter of State University of New York, 2 PERB 4183 (1969). Therein, the New York Public Employment Relations Board stated:

"This Board has previously stated that '[e]ssentially, managerial exclusions would include those job titles whose duties encompass policy development, or the direction of major programs, divisions, bureaus, installations or institutions.' This definition is, however, of limited application in a university setting insofar as the faculty are concerned since the faculty themselves aid in the development of policy and in certain instances may actually set policy. As Judge Cardozo has stated:

The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters and not servants. . . . They have the independence appropriate to a company of scholars.

It follows, therefore, that the managerial exclusion in the instant case must be confined within narrow boundaries. For this reason, and on the basis of the record as a whole, I decline to exclude additional members of the professional service as management."

In view of the uniqueness of the university setting and given the faculty's role in faculty governance, the New York Public Employment Relations Board declined to exclude additional members as management, such as Assistant and Associate Deans.

The above decision was reviewed by the New York Supreme Court, Wakshull v. Helsby (N.Y. 1970), S. Ct., App. Div., 315 NYS (2d) 371, 75 LRPB 2657. The New York Supreme Court stated:

"Similarly we find no merit in petitioners' contention that the inclusion of associate and assistant deans in the unit is without basis in the record. . . . The fact that there may be some conflict of interest between the dean and the faculty, . . . does not compel their exclusion from the negotiating unit."

Apparently, in confirming the decision of the New York Public Employment Relations Board, the Court must have been of the opinion that any conflict of interest that might exist, due to the inclusion of Assistant and Associate Deans, was outweighed by the similarities of interest and responsibility of the faculty, due to the specialized nature of their work in a university setting.

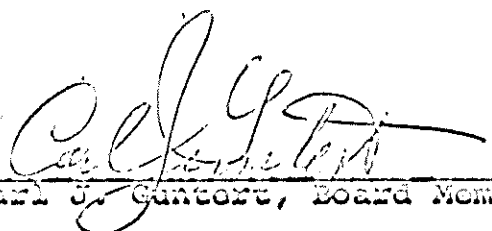
I note that in our policemen's decision, we recognized that while some conflict of interest may result with respect to the inclusion of some personnel with managerial duties, such conflict of interest was of minor significance in comparison to the similarities of interest due to the specialized nature of work of policemen. We determined that inasmuch as no real conflict of interest was apparent, and in view of legislative policy, the facts of that case mandated common representation. We adopted the following rationale of the National Labor Relations Board in Textron, Inc., supra:

"If we find, upon the facts of any case, that the probabilities of such conflict are sufficiently minimal, then in the absence of congressional mandate we see no commonsense reason to deny such persons the opportunity to freely engage in concerted activity and the right to decide for themselves whether or not they wish to be represented in their dealings with their employer by a labor organization."

Similarly, in the instant case, I "see no commonsense reason to deny" Associate and Assistant Deans "the opportunity to freely engage in concerted activity and the right to decide for themselves whether or not they wish to be represented in their dealings with their employer by a labor organization."

Any conflict of interest here present would be minimal in view of the "collegiality" of the decision-making process of the University, since the Associate and Assistant Deans' participation in policy determination and decision-making is limited to consultation. Moreover, Associate and Assistant Deans are primarily concerned with matters relative to their respective colleges, not matters of general concern to the University of Hawaii, Manoa Campus, nor the statewide University System. Additionally, insofar as it is obvious that the Legislature intended that the exclusionary language of Section 89-6(c), supra, should be narrowly construed, I find that Associate and Assistant Deans, who comprise the second lowest administrative level, are not administrative officers, directors, or chiefs of a state or county department or agency, or any major division thereof, or their deputies or first assistants, nor are they top-level managerial or administrative personnel.

While I concur with my colleagues on the exclusion of graduate assistants and the inclusion of department chairmen in Unit 7, Faculty of the University of Hawaii and the Community College System, I dissent from their determination that Associate and Assistant Deans should be excluded from the bargaining unit. Based on the aforementioned considerations, I find that Associate and Assistant Deans should be included in the bargaining unit, along with the rest of the faculty and department chairmen, as they do not fall within the exclusionary language of Section 89-6(c), Hawaii Revised Statutes.

By   
Carl J. Cantore, Board Member

Dated: September 15, 1972

Honolulu, Hawaii

## DIRECTION OF ELECTION

IT IS HEREBY ORDERED that an election, by secret ballot, shall be conducted among the Faculty of the University of Hawaii and the Community College System. (See Appendix.)

Eligible to vote are those employees who were employed during the payroll period ending September 30, 1972, including employees who did not work during the designated payroll period because they were temporarily laid off, ill or on vacation, maternity leave or other authorized leave, and also including employees serving in the military service of the United States or on leave for service in National Guard units and who appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election.

IT IS FURTHER ORDERED that the Public Employer shall prepare an eligibility list in alphabetical order, containing eligible voters' names in accordance with the above description and voting places, and submit copies of such list forthwith to the Public Employment Relations Board.

IT IS FURTHER ORDERED that at least seven calendar days prior to said election the Public Employer shall cause to be posted at locations in or about the establishment ordinarily used by the Public Employer for written communications to the above-mentioned employees, Notices of Election and sample ballots, which shall be furnished by the Board.

IT IS FURTHER ORDERED that the election shall be conducted at such time and place as listed below:

Manoa Campus	8:00 a.m. - 12:00 noon 1:00 p.m. - 4:00 p.m.
Leeward Community College	9:00 a.m. - 10:30 a.m.
Honolulu Community College	9:00 a.m. - 10:30 a.m.
Kapiolani Community College	9:00 a.m. - 10:30 a.m.

Windward Community College	9:00 a.m. - 10:00 a.m.
Maui Community College	9:30 a.m. - 11:30 a.m.
Kauai Community College	9:30 a.m. - 11:30 a.m.
University of Hawaii at Hilo	9:30 a.m. - 11:30 a.m.

Eligible employees at Leahi Hospital, Waimanalo and Coconut Island shall vote at the time and place specified for the Manoa Campus.


IT IS FURTHER ORDERED that eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by the College & University Professional Association (HFA-NEA), the Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers (AFL-CIO), the AAUP-UHFA Alliance or the Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, or No Representation as follows:

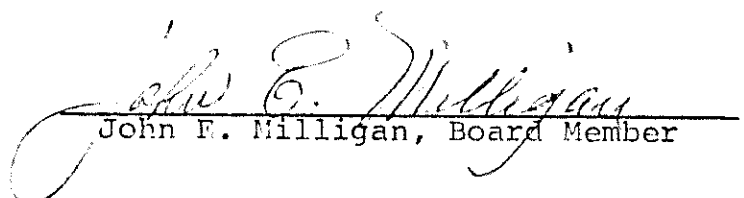
October 18 -- Manoa Campus, Leeward Community College, Honolulu Community College, Kapiolani Community College and Windward Community College

October 19 -- University of Hawaii at Hilo, Maui Community College and Kauai Community College

IT IS FURTHER ORDERED that eligible employees at Mauna Kea and Kona, Hawaii, at Haleakala, Maui, and on Molokai and eligible employees working outside the State shall vote for collective bargaining representation by mail ballot.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
John E. Milligan, Board Member

Dated: September 15, 1972

Honolulu, Hawaii

## APPENDIX

The appropriate bargaining unit of Faculty of the University of Hawaii and the Community College System, Unit 7, is as follows:

INCLUDED Personnel in the following classifications and positions are included in Unit 7.

### A. UNIVERSITY OF HAWAII (General)

#### Instruction<sup>1</sup>

- Instructor
- Assistant Professor
- Associate Professor
- Professor
- Senior Professor<sup>2</sup>

#### Research

- Junior Researcher
- Assistant Researcher
- Associate Researcher
- Researcher
- Senior Researcher<sup>3</sup>

#### Specialist

- Junior Specialist
- Assistant Specialist
- Associate Specialist
- Specialist

#### County Extension Agent and Home Economist

- Assistant in Extension
- Assistant County Extension Agent
- Assistant County Home Economist
- Associate County Extension Agent
- Associate County Home Economist
- County Extension Agent
- County Home Economist

#### Assistants to the Deans of Social Work for

- Admissions
- International Programs
- Registration

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<sup>1</sup>Includes visiting Assistant Professor, Associate Professor and Professor.

<sup>2</sup>Appointments to this rank were made in the past by special action of the Board of Regents on recommendation by the President. New appointments to this rank are no longer made.

<sup>3</sup>supra

(INCLUDED positions continued)

Directors of

- Admissions and Records
- Asian Studies Program
- Campus Center, Manoa Campus
- Center for Governmental Development
- Center for Labor Management Education
- Center for Research and Early Childhood Education
- Counseling and Testing Center
- Courses and Curricula (College of Cont. Educ. & Comm Serv.)
- Clinical Training Program (Psych. Dept.)
- Economic Research Center
- Division of Field Services (College of Educ.)
- Education Research and Development Center
- Environmental Center
- Ethnic Studies
- Foreign Contracts Office
- Instructional Resources Services Center
- Land Study Bureau
- Look Laboratory
- New College
- Overseas Career Program
- Pacific and Asian Linguistics Institute
- Pacific Urban Studies and Planning Program
- Population Genetics Laboratory
- Sea Grant Program
- Sensory Science Laboratory
- Sinclair Library
- Student Health Service
- Student Services (College of Cont. Educ. & Comm. Serv.)
- Survey Research Office
- Water Resources Research Center

Executive Secretary, International Advisory Council

Associate Director of Overseas Career Program

Assistant Director of Center for Governmental Development

Superintendent, Agricultural Experiment Station

Program Director of Community Services (College of Cont. Educ. & Comm. Serv.)

County Extension Chairmen

Division Chairmen (Community Colleges and Hilo College)

Department Chairmen

Lecturers teaching 7 or more credit hours per semester at the University of Hawaii, including Hilo College, and Lecturers teaching 8 or more credit hours per semester in the Community College System

B. UNIVERSITY OF HAWAII AT HILO

Directors of

General Education (Hilo College)  
Development (Hilo College)  
Continuing Education and Community Service (Hilo College)  
Continuing Education and Community Service (Hawaii CC)  
Student Services (Hawaii CC)

Head Librarian, Academic Support (Hawaii CC)

C. COMMUNITY COLLEGE SYSTEM

Assistant to Provost (Leeward CC)

Director of Continuing Education and Summer Session  
(Kapiolani CC)

EXCLUDED Personnel in the following classifications and positions are excluded from Unit 7.

A. UNIVERSITY OF HAWAII (General)

President

Vice Presidents

Secretary of the University

Secretary of the Board of Regents

Assistant Secretary of the Board of Regents

Chancellors

Office of the Chancellor<sup>4</sup>

Deputy Chancellor, East-West Center

Assistant Chancellor, Hilo

Deans

Associate Deans

Assistant Deans

Assistants to the Deans of Social Work for  
Administrative and Community Affairs  
Fiscal Affairs  
Practicum

Provosts

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<sup>4</sup>Newly-created positions in the Office of the Chancellor, Manoa Campus.



(EXCLUDED positions continued)

Assistant Vice Presidents for  
Academic Affairs  
Business Affairs

Special Assistants to the President

Special Assistant to the Vice President for Business  
Affairs

University Librarian

Associate University Librarian

Assistant University Librarian

Executive Director, Leahi Hospital

Directors of  
Center for Engineering Research  
Curriculum Research and Development Group (College of  
Educ.)  
Hawaii Institute of Geophysics  
Hawaii Institute of Marine Biology  
Industrial Relations Center  
Institute of Astronomy  
Pacific Biomedical Research Center  
Student Housing

Director and Manager of Educational Television

Associate Directors of  
Cooperative Extension Service  
Hawaii Agricultural Experiment Station  
Hawaii Institute of Geophysics  
Hawaii Institute of Marine Biology  
Pacific Biomedical Research Center

Assistant Directors of  
Cooperative Extension Service  
Hawaii Agricultural Experiment Station

Staff of Industrial Relations Center

Ombudsman

Graduate Assistants

Resident Assistants

Lecturers teaching less than 7 credit hours per semester  
at the University of Hawaii, including Hilo College,  
and Lecturers teaching less than 8 credit hours per  
semester in the Community College System

(EXCLUDED positions continued)

B. UNIVERSITY OF HAWAII AT HILO

Directors of

Business and Management Affairs  
Continuing Education and Community Service  
Center for Cross-Cultural Training and Research  
Student Services (Hilo College)

Deputy Director of Center for Cross-Cultural Training  
and Research

Administrative Officers of

Center for Cross-Cultural Training and Research  
Hawaii Community College  
Hilo College

Head Librarian, Academic Support (Hilo College)

C. COMMUNITY COLLEGE SYSTEM

Directors of

Administrative Services (Kapiolani CC)  
Administrative Services (Leeward CC)  
Business Affairs (Honolulu CC)  
Business and Fiscal Affairs (Kauai CC)  
Community College Services (Central Office)  
Facilities and Maintenance (Honolulu CC)  
Facilities and Management Planning (Maui CC)  
Fiscal and Business Affairs (Central Office)  
Fiscal Planning and Management (Maui CC)

State Director for Vocational Education (Central Office)

Administrative Assistant (Kapiolani CC)

Personnel Officer (Honolulu CC)

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
HAWAII FEDERATION OF COLLEGE TEACHERS,	)	
Local 2003, American Federation	)	
of Teachers, (AFL-CIO),	)	
	)	
Petitioner,	)	
	)	Case No. <u>R-07-12</u>
and	)	
	)	
HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION,	)	
Local 152, HGEA/AFSCME,	)	
	)	
AAUP-UHFA ALLIANCE and	)	
	)	
COLLEGE & UNIVERSITY PROFESSIONAL	)	
ASSOCIATION (HEA-NEA),	)	
	)	
Intervenors,	)	
	)	
and	)	
	)	
STATE OF HAWAII and	)	
BOARD OF REGENTS,	)	
UNIVERSITY OF HAWAII,	)	
	)	
Employers.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDATIONS

The Hawaii Federation of College Teachers having filed on July 13, 1971, a petition for certification as the exclusive bargaining representative with the Hawaii Public Employment Relations Board supported by the required showing of interest and the Hawaii Government Employees' Association, the AAUP-UHFA Alliance, and the College & University Professional Association having filed petitions supported by necessary showing of interest to intervene, a hearing was held to determine the composition of Unit 7, Faculty of the University of Hawaii and Community College System.

Article IX of the Constitution of the State of Hawaii provides for the establishment of a State University and other such educational institutions as may be desirable. In accordance with this mandate, there is established a system of higher education consisting of the

University of Hawaii and the various Community Colleges. Dedicated to education, research and public service, this system operates facilities at more than 50 locations throughout the State.

The affairs of the University and the various Community Colleges are controlled by the Board of Regents, appointed by the Governor. To conduct the operations of the University system, which hereinafter also refers to the various Community Colleges, the Board of Regents is vested with the power to appoint a president and other such officers, faculty and employees as may be required to carry out the purpose of the University (Section 304-11, Hawaii Revised Statutes).

The President of the University, as Chief Executive Officer, is directly responsible to the Board of Regents for the operation of the University. All operating components of the University System are accountable to the Office of the President which is comprised of the President and two Senior Vice Presidents, the Vice President of Planning and Academic Affairs and the Vice President of Finance and Administration, the Secretary of the University and two special assistants. Lines of authority from the Chancellors of the University of Hawaii, Manoa Campus, the University of Hawaii at Hilo and the East-West Center, and the Vice President for Community Colleges go directly to the President.

The largest component of the University System is the University of Hawaii, Manoa Campus, which is headed by a Chancellor and which consists of 7 academic colleges and various research and academic support programs. The Manoa Campus has an enrollment of approximately 22,000 students and employs about 2,600 Board of Regents appointees, about 1,500 civil servants and approximately 730 graduate assistants.

The East-West Center, headed by a Chancellor, consists of a problem oriented institute and an open grants division. There are approximately 90 Board of Regents appointees and 52 civil servants at the East-West Center.

The various Community Colleges, with the exception of Hawaii Community College, are each headed by a Provost who is responsible to the Vice President for Community Colleges. These campuses have an enrollment of approximately 11,550 students with approximately 500 Board of Regents employees and 152 civil servants.

The University of Hawaii at Hilo is headed by a Chancellor who supervises the operations of the University on the Island of Hawaii. The University of Hawaii at Hilo is made up of the Hilo College, the Hawaii Community College and the Continuing Education Program. The Hawaii Community College is headed by a Provost who is responsible to the Chancellor at Hilo. There are approximately 2,300 students, 165 Board of Regents appointees and 25 civil servants at the University of Hawaii at Hilo.

The University structure is rounded out by several special programs and proposed new campuses.

The academic programs of instruction at the University of Hawaii, Manoa Campus, are divided among the several academic colleges. Each college is headed by a Dean who acts as the chief administrative officer of the college. As chief administrative officer, the Dean is primarily concerned with areas of faculty personnel, curricular offering and academic programs of the department or school. He is responsible for the recruitment and retention of faculty, budgets and the administration of University rules which are applicable to his college. In addition to the Deans who head academic colleges, there are other Deans who are responsible for the administration of programs of the University System -- Graduate School of Library Science, Summer Session, Continuing Education and Community Service, marine programs, Graduate School and the Community College System. Each Dean is responsible for the functioning of his college or program and reports to his respective Chancellor or Provost.

To aid the Deans in the administration of their colleges or programs, various Associate and Assistant Deans have been appointed. The

The Associate and Assistant Deans act as deputies to the Dean and perform functions, which are the responsibility of the Deans and which have been delegated to them. Associate or Assistant Deans need not be members of the academic faculty of the University. Those who are not members of the faculty are Administrative, Professional and Technical (APT) appointments of the Board of Regents.

Though there are no standard duties assigned to Associate or Assistant Deans, they are generally charged with assisting the Dean with matters relating to faculty personnel, curriculum, fiscal affairs and student services. Each Dean determines the method in which he shall utilize his deputies and the rank each is to hold. There are no significant differences between an Associate and Assistant Dean, each of whom serves as a deputy to his respective Dean. No hierarchy of authority exists among the Associate and Assistant Deans within a respective college or in other administrative positions. Each Associate or Assistant Dean reports directly to his respective Dean, and not through another Assistant or Associate Dean.

In the absence of the Dean, one of the Associate or Assistant Deans acts as head of the college. There is no fixed order of succession. Each Dean may designate any one of his Associate or Assistant Deans to act for him while he is away from his post.

Many of the Associate and Assistant Deans are members of the academic faculty. As such, some of them maintain their teaching proficiency by carrying a limited teaching load in addition to their administrative duties. Teaching, though it may be considered desirable, is not mandatory for Associate and Assistant Deans.

The Associate and Assistant Deans are normally located in the same office complex with the Dean. There is a common clerical staff for the Dean's Office, which maintains files to which the Associate and Assistant Deans have general access.

The University of Hawaii Bulletin containing general information for the Manoa Campus and the Graduate Division Bulletin lists the <sup>deans</sup> and

their assistants under a separate section devoted to administrative offices. Under this section the Deans and their assistants are listed by name and administrative position without regard to academic rank. This segregation of the administrative roles of the Deans and their assistants is also followed in the Directory of Faculty and Staff for the Univeristy of Hawaii.

The salaries of the Deans, Associate Deans, and Assistant Deans are set by the Board of Regents on recommendations of the President. This method of setting the level of compensation is followed when the individual's duties are primarily administrative in nature. The contracts for these people are generally for 11 months. Where a member of the faculty on a 9-month contract is appointed as an Associate or Assistant Dean, his contract is renegotiable to 11 months.

The next administrative unit below the college in the breakdown of the University structure is the department. There are approximately 87 departments on the Manoa Campus of the University of Hawaii. The departments vary in size from 1 to 117 faculty members. From the standpoint of student enrollment, departments range from two to 6,494. Each department undertakes the instructional program of a given discipline.

At the University of Hawaii at Hilo and in the Community Colleges, the division replaces the department as the lowest administration unit in the hierarchy. The functions of the divisions, although slightly broader than those of the departments, are substantially the same.

Each department and division is headed by a chairman. The chairman, a member of the instruction department, is appointed by the President upon recommendation of the Dean. In making his recommendation, the Dean consults with the faculty members of the department. The views of the faculty are forwarded to the President for consideration in making the appointment of a department chairman.

Only faculty members of the rank of Associate Professor or Professor are normally considered for the position of department chairman. When appointed, the department chairman normally serves a 3-year term. To provide maximum continuity and to assure the presence of the chairman on campus when matters such as the budget are under consideration, chairmen have their appointments extended to 11 months.

In the absence of the chairman, another member of the faculty designated by the chairman assumes the administrative duties.

Although the department chairman is the administrative officer of the department, he is more of a leader, innovator, moderator and executor than an autocrat with large vested authority. He is the first among equals. He is expected to consult with the faculty of the department before making decisions since all are equally entitled to participate in the formulation of departmental policy.

The chairman, as part of the administrative line of communications of the University, relays recommendations and policy decisions between the Dean and the faculty. It is the duty of the chairman to serve as the communication link between the faculty and the administration.

The department chairman, as the administrative officer of the department, is responsible to the Dean for the functioning of his department. The chairman prepares the departmental budget after consultation with the other members of the faculty. He makes recommendations for appointments and reappointments to faculty positions, evaluates the faculty and makes recommendations for promotion and tenure. The department chairman is also charged with the responsibility of supervising the instruction presented, making course assignments and assuring a proper departmental balance of the teaching load.

During his tenure, the department chairman maintains some of his academic responsibilities by teaching a few classes each semester. The teaching load carried by the department chairman is somewhat lighter



than that of other faculty members, since he has additional administrative responsibilities. The working conditions of the chairman are substantially the same as those of the other faculty.

While serving as chairman, a person draws his normal salary. In addition, a chairman may receive a stipend of up to \$100 per month to compensate him for the additional administrative responsibilities. The stipend varies with the size and complexity of the department concerned. Some department chairmen receive no additional remuneration.

After the expiration of his term, the chairman relinquishes his administrative duties and resumes his full time teaching position as a faculty member of the department.

To assist the faculty with instruction and research, graduate students are retained on a part-time basis as graduate assistants. To qualify for the position of graduate assistant, a person must be admitted to the University as a potential degree candidate. Assistantships are available on an annual basis for a total appointment which may not exceed four years. The work of each graduate assistant is reviewed annually to determine whether he will be reappointed.

The Deans of the respective colleges make the appointment of graduate assistantship upon recommendations of the department chairman. The appointment of all graduate assistantships must have the approval of the Dean of the Graduate Division. Formal appointments for the graduate assistant positions are made by the Board of Regents.

In prior years, graduate assistants were classified as CI-1 or R-1 in the Board of Regents classification system. Since 1969, appointments at the I-1 (formerly CI-1), I-FT, R-1, and S-1 as defined in the Board of Regents Faculty Classifications System are not considered faculty members. Certain policies and procedures which apply to the faculty in general exclude graduate assistants or make special provisions for them. The Business Affairs Circular No. 301 promulgated by the University of Hawaii established a separate compensation plan, Schedule A,

Group IV, for graduate assistants. This new schedule provides for payments to be spread over a 12-month period. The new plan applies only to graduate students admitted into a degree program and in active pursuit of a graduate degree.

Graduate assistants are classified into two groups based on academic qualifications and experience. Those who possess a bachelor's degree from a recognized institution are placed in the G-1 level. Graduate students with a master's degree or its academic equivalent or 30 credit hours in pursuit of an advanced degree are placed at the G-2 level. Advancement from step to step or from level G-1 to G-2 on the salary scale is on the basis of the recommendations of the department, with the approval of the Dean.

Graduate assistants work under special supervision with limited latitude for independent action. A graduate assistant may assist a professor by conducting a laboratory section, in which the work to be performed is fully defined by the professor in charge of the course. Or, the graduate assistant may teach a lecture section, in which the material has been defined by the professor in charge of the section. Some graduate assistants perform as readers of examinations.

Graduate assistants are eligible to become members of various committees within each department. Generally the graduate assistants do not have a full voice and only exercise limited voting power. The exception to this is in the political science department where all students are given equal voice with the faculty in all matters, including tenure and promotion. Departmental committees are composed of undergraduates, graduate students and faculty.

Graduate assistants are not eligible for tenure nor may their time spent as graduate assistants be used to fulfill any time requirements for tenure, if they should later obtain positions in which they would be eligible for tenure.

Aside from the health plan, graduate assistants do not have other fringe benefits offered by the State. They do not participate

in the State retirement system. Nor do they have social security deducted from their compensation. In the past, graduate assistants who filed a certificate verifying that teaching or other work is required in the pursuit of an advanced degree had their salaries exempt from federal income tax.

Graduate assistants may avail themselves of the student health service which is not generally available to faculty members.

Graduate assistants normally teach or do research within the same department in which they are working on their degrees. Faculty members may not be awarded an advanced degree in their own department.

Since graduate assistants are not eligible for promotion to a level higher than graduate assistant, they do not go through the promotion procedures and reviews which the regular faculty undergoes. Appointments for assistantships are renewed on a year-to-year basis. The renewal is dependent upon the assistant's maintaining his student status and making significant progress toward his degree.

Graduate assistants are not eligible to become members of the faculty senate nor are they eligible to vote for the selection of members to the faculty senate.

Both the University of Hawaii Bulletin for the Manoa Campus and the Graduate Division Bulletin do not list graduate assistants with the faculty of the various departments.

Upon completion of his work and the awarding of his degree, a graduate assistant must terminate his position. As a general practice, the graduate assistant is not retained in a higher position. A person being awarded an advanced degree in a department is not hired by that department as a member of the regular instructional staff. There have been occasions, where a student has been hired after the completion of his work, but only to fill a temporary position. The appointment of a graduate assistant is always temporary and terminal. He has no employment possibility with his department upon termination of his student status or his being awarded an advanced degree.

A question was raised at the hearing regarding the status of the staff of the Legislative Reference Bureau. The Legislature, however, in passing Act 171, Session Laws 1972, which transfers the Legislative Reference Bureau from the University to the Legislature, has rendered this question moot. The Act was signed into law on June 1, 1972, with an effective date of July 1, 1972.

An individual exclusion was sought in the case of Paul P. Tinning. Mr. Tinning is an associate specialist with the Center for Labor-Management Education. He is a tenured member of the faculty, having been with the Labor-Management Center since September 1963. Before coming to the University of Hawaii, Mr. Tinning served as the Director of the Oregon State Conciliation Service. Prior to going to Oregon, he was a mediator for the New Jersey State Board of Mediators. At the Center Mr. Tinning is engaged in teaching, research, writing, speaking engagements and other related activities. The courses he has taught include grievance handling, arbitration and improved supervision.

Mr. Tinning has been directly involved in the implementation of Chapter 89, Hawaii Revised Statutes, having served as a fact-finder for the Hawaii Public Employment Relations Board. In addition, Mr. Tinning has been named as one of the arbitrators, who may be called on to settle disputes arising out of the contract between the teachers and the Department of Education.

Mr. Tinning has counseled the President of the University on collective bargaining matters. He also participated as a member of a task force in preparing a memo on collective bargaining. Other members of the task force were the Deans, Provosts and other administrative officers of the University. Discussions by the task force encompassed the inclusions and exclusions of Unit 7.

Pursuant to stipulations made during the hearing, it was agreed by, and between, the parties that resident assistants, lecturers who teach less than 7 credit hours per semester at the University or less than 8

credit hours per semester at the Community College, and the Ombudsman shall be excluded from Unit 7.

#### CONCLUSIONS OF LAW

The Hawaii Public Employment Relations Act, Chapter 89, Hawaii Revised Statutes, establishes a scheme for Collective Bargaining in Public Employment. Under this law the Faculty of the University of Hawaii and the Community College system shall constitute an appropriate bargaining unit. The appointment and classification of faculty pursuant to Sections 304-11 and 304-13, Hawaii Revised Statutes, is the bases for differentiating faculty from non-faculty in making the determination as to who shall be included in the appropriate unit. Excluded from the bargaining unit are representatives of the Public Employer who are administrative officers or chiefs of a major division or an agency. Excluded along with the administrative officer or chief, are his deputy, first assistant and any other top-level managerial and administrative personnel. Also excluded from coverage are part-time employees working less than twenty hours per week.

Pursuant to Agreements by the parties, disagreement as to inclusions and exclusions from the bargaining unit are limited to those involving the Assistant and Associate Deans, the department chairmen, the staff of the Legislative Reference Bureau, Labor-Management Education Specialist Paul Tinning and the graduate assistants.

It was previously mentioned that Act 171, Session Laws of Hawaii 1972, transferred the Legislative Reference Bureau out from the control of the University. As of July 1, 1972, the Legislative Reference Bureau is under the control of the Legislature. Thus, the question as to whether the staff should be included in Unit 7, Faculty of the University and Community College, is now moot and no determination is made regarding their former status as part of the University.

The major purposes of the University are education, research and public service. The education function is performed in the academic colleges which administer programs of related academic disciplines. As such, the colleges can only be considered as major divisions of the University. There is no testimony to dispute the fact that the colleges are among the larger, or more important, administrative segments of the University.

The Dean, as the chief or administrative officer of a major division of the University, is excluded from the bargaining unit provided for under Section 89-6(c), Hawaii Revised Statutes. There is no dispute among the parties with respect to the exclusion of Deans as the heads of major divisions of the University. The law also provides that the deputy, first assistant and any other top-level managerial and administrative personnel are also to be excluded along with the heads of the major divisions.

The term "deputy" is defined as "one, who by appointment exercises an office in another's right, having no interest therein but doing all things in his principal's name and for whose misconduct the principal is answerable," in Ahai v. Cain, 27 H. 770, at 773 (1924). The Associate and Assistant Deans assist the Dean with his responsibilities relating to faculty personnel, curriculum, fiscal affairs and student services.

Testimony showed that the Associate Dean of the Graduate Division reviews the designation of personnel as members of the graduate faculty. The Assistant Dean for Academic Development reviews appointments to the faculty of the University and may exercise a degree of discretion in personnel decisions. These are personnel functions which are the responsibility of the Deans, who have delegated the respective Assistant and Associate Deans to exercise such authority.

In the area of curriculum, the Associate Dean of the Graduate Division reviews curriculum proposals in many fields of graduate study

to determine whether they will be offered by the Graduate Division. Similarly in the College of Arts and Sciences, the Associate Dean for Curriculum reviews curriculum proposals for the various departments and programs. The formulation of curriculum offerings is basic to the establishment of academic policy and, as such, is the responsibility of the Dean.

The various Assistant or Associate Deans for Fiscal Affairs oversee the budgets of their respective colleges. They may also administer the management of research contracts and extramural funds. In the exercise of their fiscal responsibility, they may veto requests for funds. The overall responsibility for the budget lies with the Dean and it is his responsibility to compile each budget proposal and present it to the University administration.

In the absence of the Dean, one of the Associate or Assistant Deans acts as the head of the college in place of the Dean. There is no formal hierarchical order of succession. The appointment of an Acting Dean may go to any one of the Associate or Assistant Deans at the pleasure of the Dean.

There can be little doubt that the Associate and Assistant Deans are deputies of the Dean and that they exercise powers which are delegated by the Dean. The Associate and Assistant Deans comprise an integral segment in a Dean's Office. They are part of a management team, on which the Dean relies to assist him in the effective administration of the complex organization he heads.

While exercising the authority delegated to them, the Associate and Assistant Deans assist in formulating and effectuating the policies under which their college is to be run. Their recommendations to the Deans, regarding appointment of personnel, curriculum proposals and changes, fiscal affairs and student services, serve as the basis for administering the respective divisions and are indicia that Associate and Assistant Deans are part of management. Ferro Mfg. Corp.,

Lexington Metal Products Co. Div., 65 LRRM 1696; LTV Elctro-systems, Inc., 67 LRRM 1351; American Federation of Labor, 42 LRRM 1075.

As the University contends, the term "deputy" as used in Chapter 89, supra, does not limit the statutory exclusion to one person. The number of deputies to be excluded must be governed by the functions they perform within a reasonable organizational structure set up in light of the complexities of the agency or department concerned. It is not foreign in the government structure to have more than one person designated as deputy where situations warrant.

In consideration of the duties performed by the Associate and Assistant Deans and the fact that both are co-equal in status and that both are directly responsible to the Dean without a hierarchy of authority of one over the other, it must be concluded that the Associate and Assistant Deans are deputies of the administrative officer or chief of a major division of the University and must, therefore, be excluded.

Even if the Associate and Assistant Deans were found not to be deputies, the functions performed by them in the administration of their divisions would require their exclusion as managerial employees.

The basic educational unit at the University is the department within the college. The department undertakes the instruction of a given academic discipline within the college. Each department is headed by a chairman, appointed from the members of the department, who serves a three-year term. To be excluded from the bargaining unit, it must be shown that the department chairman is either the head of a major division, a top-level managerial employee, or an employee concerned with confidential matters affecting employee-employer relations.

As defined by Webster's Third International Dictionary, Unabridged, the term "major" indicates:

"One of the larger or more important members or units of a kind or group."

Though it is devoted to the basic purposes of the University, the scope of the department's activities in comparison to that carried out by the



the college or the University as a whole are minute. While both the department and the college serve the same purposes, it would be erroneous to conclude on such basis that the department is a major division of the University as the college is. Otherwise, every faculty member of the University would also be regarded as a major division since they serve the same purposes. In order to identify a major division, one must look to the reasonableness of the organizational structure and the complexities of the operation. In this situation, the department is limited to a single discipline.

The organizational chart of the University of Hawaii's statewide administration does not show the departments as major divisions of the University. The department, as the basic operating unit of the University, has not been regarded by the administration of the University as a major division. Consequently, it must follow that administratively the department within the college does not constitute a major division.

To be excluded on the basis of confidentiality, the department chairman must have access to confidential information regarding employee-employer relations. The testimony indicated that the department chairmen are not regularly consulted by the President nor do they regularly attend meetings of the Council of Academic Deans. Department chairmen were not included on the University Task Force to study the impact of collective bargaining. The only information possessed by the department chairmen which might be classified as confidential are faculty personnel dossiers, which are put together when appointments, promotions or tenure are being considered.

Considering the "collegiality" of the decision-making process in matters concerning appointment, promotion and tenure, the information contained in personnel dossiers is available to a number of people in addition to the department chairmen. When considering faculty personnel matters, the departmental personnel committee has full access to information on faculty members being considered. In some departments the policy

of open access has been followed whereby all personnel in the department from students to faculty is allowed access to personnel files.

The facts presented indicates that any confidential information which the department chairmen may possess regarding employee-employer relations is, for the most part, available to other members of the department, including some who are part of the bargaining unit. Any information which the department chairmen may have, if any, which is not generally available to other members of the faculty appears to be very limited. Considering the proclaimed nature of the decision-making process at the University with its great reliance on the consult or confer process at the department level, with the department chairmen being but one among equals, it appears unlikely that department chairmen would possess confidential information regarding employee-employer relations which is not available to other members of the department.

The exclusion of department chairmen on the basis of confidentiality would be contrary to the facts presented. There are no grounds to warrant the exclusion of department chairmen from the bargaining unit as individuals concerned with confidential matters regarding employee-employer relations.

The sole ground remaining is whether the department chairman is a top-level managerial or administrative personnel and, therefore, his exclusion from the bargaining unit would be justified.

The department chairman is considered to be the "first among equals." In making decisions concerning the department he is expected to consult with other members of the department to insure that departmental decisions reflect collective thinking. All members of the department are equally entitled to share in the making of decisions which affect them. The role of the chairman here is to coordinate the views of the members of his department.

The department chairman is charged with the supervision of his department and he does have some responsibilities in personnel matters.

Though he is formally charged with maintaining the quality of the department, the testimony indicated that no real supervision was exercised by the department chairman. No visits were made to determine the quality of classroom instruction, no hours of work were specified nor was there specified the manner in which research was to be conducted.

In personnel matters, the department chairman may make a separate recommendation apart from that of the department personnel committee. This recommendation is considered by the Dean, along with the recommendation of the personnel committee, but does not supercede the committee's recommendations. The chairman's authority to make recommendations regarding most personnel matters is shared with the members of the faculty and, in one case, is shared even with students.

The department chairman does have the responsibility for submitting the departmental budget. This again, however, is the result of the consult and confer process with the rest of the faculty.

In considering case law, it is interesting to note that the cases are almost equally divided between including and excluding department chairmen.

In C. W. Post Center of Long Island University, 77 LRRM 1001, the Petitioner sought to have division and department chairmen excluded as supervisors, while the employer contended that they were not supervisors and should be included in the unit. Each department had its own chairman who was usually selected by the Dean in consultation with the faculty. The chairman conducted interviews and discussed terms of employment with prospective new candidates for the faculty. He recommended change of status of employees to the Dean and the Board of Trustees. The NLRB found that the chairmen did exercise the power to make effective recommendations as to hiring and change of status of employees and should, therefore, be excluded as supervisors under Section 2(11) of the LMRA. See also Long Island University (Brooklyn Center), 77 LRRM 1006; Adelphi University, 79 LRRM 1545; City University of New York, 2 PERB 3467, 3056;

State University of New York, 2 PERB 4183; University of Rhode Island, GERR No. 428, p. B-1 (Oct. 19, 1971).

Those cases rely on the supervisory status of the department chairman in excluding him from the bargaining unit. Under Chapter 89, Hawaii Revised Statutes, there are no specific exclusions for supervisors. On the contrary, the Legislature established separate units for supervisors and, in four instances, authorized that supervisors may be in the same unit as the rank and file if it was mutually agreed upon. There can be no doubt that supervisors were intended to have the right to bargain collectively under the Hawaii Public Employment Relations Act. None of the above decisions hold that department chairmen are top-level managerial employees, which would be acceptable grounds for excluding the department chairmen under Section 89-6(c), supra.

In Fordham University, 78 LRRM 1177, which facts closely resemble the present situation, the Board found that department chairmen should be included in the bargaining unit. In this case, new faculty appointments were made on recommendation of the departmental faculty acting as a group. In considering promotion and tenure, departmental committees made recommendations with which the chairman could disagree, but his dissenting recommendation did not supercede that of the committee and did not always prevail. The chairman prepared his budget with the advice and consent of the departmental faculty. The chairman made the course schedule with the advice and consent of the faculty.

The teaching load of the department chairman was reduced and the chairman received a stipend to compensate him for his administrative duties. The chairman served on the faculty senate and faculty grievance committee. The facts cited above from Fordham University, supra, are parallel to those at bar and a similar holding is justified. See similar decisions: University of Detroit, 78 LRRM 1273; University of Rhode Island, GERR No. 428, p. B-1.

It is apparent from the facts and supporting case law that the department chairmen are not top-level managerial or administrative

personnel, which would justify their exclusion from the bargaining unit. Though they may have some indicia of supervisory authority, the nature of their supervisory duties are not sufficient to exclude them under Section 89-6(c), supra.

Department chairmen are neither heads of major divisions, confidential employees, or top-level managerial or administrative personnel and must, therefore, be included in the bargaining unit.

In setting the statutory scheme of bargaining units, the Legislature designated units which were occupational categories based on existing compensation plans, the nature of work involved and the essentiality of services provided to the public (Senate Standing Committee Report No. 745-70, April 14, 1970). All employees throughout the State who fall in any of the designated units shall constitute an appropriate bargaining unit (Section 89-6, supra). The question presented here is whether graduate assistants are public employees who would be entitled to coverage under Chapter 89, supra, and, if so, do they constitute part of the faculty of the University and the Community College System.

A public employee is defined as "any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in Section 89-6(c)" (Section 89-2(7), supra). This definition is comparable to that provided in Section 2(3) of the Labor-Management Relations Act. The broad term of Section 89-2(7), supra, is limited by the provisions of Section 89-6(c), supra, which provide for the exclusions of part-time employees who work less than 20 hours per week.

A graduate assistant must be a graduate student, who has been accepted as a potential degree candidate. Selected graduate students serve as part-time teaching or technical assistants but, in no case, are they allowed more than one-half time appointment.

The testimony of several graduate assistants regarding to the number of hours they worked conflict, with one stating he worked about 15 hours a week and another claiming well over 20 hours a week.

The University's witness, the Associate Dean of the Graduate Division, indicated that general surveys conducted in 1966, 1968 and 1970 included questions regarding the number of hours worked by the graduate students. A survey of graduate assistants in the spring of 1971 asked the graduate assistants to estimate the hours they worked by selecting one of the given set of groupings. No documents were submitted and the testimony concerning the results of these surveys is not clear and does not resolve the conflicting testimony of the two graduate assistants. Since no determination can be made as to the hours worked, we will assume, subject to further proof, that the one-half time appointments result in at least 20 hours of work per week.

Unit 7 establishes a bargaining unit for the faculty of the University and Community College System. Public employees who are classified as faculty, pursuant to the Board of Regents classification and appointment system, and who are in the same occupational category based on existing compensation plans will be eligible for this unit. In addition to the above requirements, the nature of work performed will be determinative of an employee's status as a member of the appropriate bargaining unit.

Part 3 of the Faculty Handbook sets forth the classification and compensation plan of faculty members. The introductory paragraphs of Part 3 outline broad general categories of employees covered by the classification and compensation plan, which include people in the first step of each category, Instruction, Research-Specialist, County Agent, or Home Economist. The third paragraph of page 3-2, however, specifically limits the preceding language, stating:

"Appointments at the level of I-1, I-FT, R-K, and S-1 are defined in the BOR Faculty Classification system, but persons holding these positions are not considered as faculty members and certain policies and procedures in this Handbook exclude them or make special provisions for them."

The faculty of the University is again defined at page 1-6 of the Handbook, wherein it states:

"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."

The Board of Regents on June 10, 1970, approved new salary schedules for the University of Hawaii. Under the new structure, graduate assistants are no longer in the first step but are now paid on a separate schedule. It appears from the Handbook and the reclassification action by the Board of Regents of June 10, 1970, that graduate assistants are not classified as faculty.

The distinction between the faculty and the graduate assistants is further enunciated when the appointment, promotion and tenure potential, duties, and benefits are considered. The decision of the NLRB in Adelphi University, supra, under a factual situation similar to that presented at the hearing, clearly shows the true status of the graduate assistants. In Adelphi the NLRB found:

"The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such. They do not have faculty rank, are not listed in the University's catalogues as faculty members, have no vote at faculty meetings, are not eligible for promotion, or tenure, are not covered by the University personnel plan, have no standing before the University's grievance committee, and, except for health insurance, do not participate in any of the fringe benefits available to faculty members. Graduate assistants may be elected by the students as their representatives on student-faculty committees. Unlike faculty members, graduate assistants are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.

"In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit." 195 NLRB No. 107, p. 7.

In Fordham University, supra, the NLRB found that the relationship between faculty members and graduate assistants was one of teacher-student, not supervisor and employee. In this case, the graduate assistants assisted faculty members. The assistants were full-time students

whose positions terminated with the cessation of their academic work. The assistantships were awarded by the departments to its most promising students. See also C. W. Post Center of Long Island University, supra, and Long Island University (Brooklyn Center), supra.

A review of the facts in the present case indicate that, as in the cases cited above, the graduate assistants are appointed in a different manner. The term of the appointment is from year to year for a maximum of four years. Fringe benefits and leave available to faculty members are not offered to graduate assistants. The duties they perform are greatly limited in scope and they are closely supervised by members of the faculty. In light of these facts it must be found that the nature of work performed and the positions held by the graduate assistants differ substantially from that of the faculty.

In Regents v. Michigan Commission, 79 LRRM 3100 (1972), the Michigan Court of Appeals found that medical interns, residents and past doctoral fellows working at the University of Michigan Medical Center were not "public employees" covered by the Michigan Collective Bargaining Law. The Michigan Court considered the interns to be primarily students in pursuit of advance degrees.

An interesting point raised by the Michigan decision was the threat to the Regents exclusive control of all matters dealing with the education of the student. The Court found that the educational and employment aspects of the relationship between the students and the University was inextricably mixed and to hold that the interns were employees would impinge, to some degree, upon the constitutional authority of the Regents to control the educational affairs of the student.

The situation faced by the Michigan Court is not unlike that faced here. Should the conditions of employment and conditions of continued enrollment as awarding of degrees be subject to collective bargaining, the constitutional authority of the Board of Regents would be impinged upon. Like the Michigan Court, absent clear expression by the Legislature, we are hesitant to bring this situation to fruition.



Upon finding that the graduate assistants are classified on a different compensation schedule, that the nature of their appointments differs substantially from that of the faculty and that the nature of the work performed by the graduate assistants differs from that performed by the faculty, it must follow that the graduate assistants should be excluded from Unit 7, Faculty of the University and Community College System. Such exclusion also entails due regard to the possible infringement upon the constitutional authority of the Board of Regents.

The University of Hawaii seeks an individual exclusion for Paul P. Tinning, Labor-Management Education Specialist. The University alleges that Mr. Tinning is an individual concerned with confidential matters affecting employee-employer relations. A review of the facts indicates that Mr. Tinning was asked by the University to be a member of task force which made recommendations regarding the impact of the collective bargaining law on the University. There is no testimony, however, as to the permanence of Mr. Tinning's involvement in matters affecting employee-employer relations and, it may be conjectured that once units are delineated and the exclusive representatives selected, the administration may have less use for his services. A review of the facts indicate that no exclusion has been proved which meets the requirements of 89-6(c), Hawaii Revised Statutes. On this basis, it must be found that Mr. Tinning, Labor-Management Education Specialist, should be included as part of Unit 7.

#### RECOMMENDATIONS

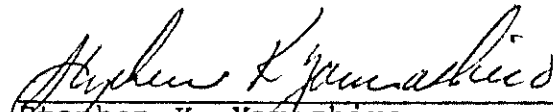
Based on the above findings of fact and conclusion of law, it is recommended that the following be excluded from Unit 7, Faculty of the University and Community College System:

1. Assistant and Associate Deans
2. Graduate Assistants

It is further recommended that the following be included in Unit 7, Faculty of the University and Community College System:

1. Department Chairmen
2. Mr. Paul Tinning, Labor-Management Education Specialist

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
\_\_\_\_\_  
Stephen K. Yamashiro  
Hearings Officer

Dated: July 17, 1972

Honolulu, Hawaii