

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. RA-07-82
)	
BOARD OF REGENTS, University)	DECISION NO. 240
of Hawaii,)	
)	FINDINGS OF FACT, CONCLU-
Petitioner,)	SIONS OF LAW AND ORDER
)	
and)	
)	
UNIVERSITY OF HAWAII)	
PROFESSIONAL ASSEMBLY,)	
)	
Intervenor.)	
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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 4, 1984, Petitioner BOARD OF REGENTS, University of Hawaii [hereinafter referred to as Petitioner or BOR] filed a Petition for Clarification or Amendment of Appropriate Bargaining Unit with the Hawaii Public Employment Relations Board [hereinafter referred to as Board].* Petitioner seeks to have Position No. 83287, Professor I5-R, chief administrator of the University Laboratory School, excluded from collective bargaining under the provisions of Subsection.89-6(c), Hawaii Revised Statutes [hereinafter referred to as HRS] as a "top-level managerial and administrative" employee.

The UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY [hereinafter referred to as UHPA], exclusive representative of bargaining unit 7, objects to the proposed exclusion. In Order No. 521,

*The Hawaii Public Employment Relations Board was designated as the Hawaii Labor Relations Board by Act 251, Session Laws of Hawaii, 1985, effective January 1, 1986.

the Board granted UHPA's Petition for Intervention. Board Exhibit 4.

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

FINDINGS OF FACT

Petitioner is the public employer, as defined in Subsection 89-2(a), HRS, of employees in Unit 7, as defined in Subsection 89-6(a), HRS.

UHPA is the exclusive representative, as defined in Section 89-2(12), HRS, of employees in bargaining unit 7, faculty of the University of Hawaii and the community college system.

The subject position, administrator for the University Laboratory School [hereinafter referred to as Lab School], falls under the supervision of Dr. Arthur King, Director of the Curriculum Research and Development Group [hereinafter referred to as CRDG]. The CRDG is a branch of the College of Education. Transcript [hereinafter referred to as Tr.] I, pp. 10-11. King testified that the College of Education's functions can be divided into its teaching (i.e. the instruction of education students) function, its curriculum research function, and student services. Petitioner's Exhibit [hereinafter referred to as Pet. Ex.] 3-I. The CRDG falls within the scope of the College's research function. The CRDG's two major functions are (1) research into curriculum ideas, the design of curriculum

materials and program implementation in public schools (Tr. I, p. 13) and (2) operation of the Lab School. Tr. I, pp. 30-31; Pet. Ex. 3-XIII. The primary function of the Lab School is to serve as a trial area for programs developed by the CRDG, preparatory to implementation in the public schools. The Lab School's other function is to provide an education to its student population. Tr. v. I, pp. 14, 25-26, 152-54; Pet. Exs. 1, 2. The Lab School consists of fourteen grade levels: preschool, kindergarten, and grades one through twelve. Tr. I, p. 174. Preschool, kindergarten and grades one through five comprise the Early Childhood Section which is supervised by a section chief reporting to the Lab School Administrator. Tr. I, pp. 174-75. The Lab School curricula is divided into departments of English, math, science, social studies, art, music and physical education. Each curriculum has a "department chair" equivalent who coordinates the program. The majority of such section heads serve part-time in research. Tr. I, p. 177; II, pp. 23, 123-24.

King, as Director has authority over policy, direction and management of the CRDG, including budget formulation, evaluation of unit activities, and personnel actions. He also takes an active role in some curriculum projects. Tr. I, p. 32. King is an excluded employee as are the Dean of the College of Education and the Director of Student Services. Tr. I, pp. 33, 148.

The total staffing at the Lab School is comprised of 21.1 Full Time Equivalent (FTE) instructional and administrative, professional and technical positions which is performed by fifty-five individuals. Tr. I, pp. 31-32; Pet. Ex. 4. With the

inclusion of civil service, non-faculty lecturer, casual (including athletic coaches), and student help employees, the Lab School Administrator supervises eighty-nine persons engaged in predominantly part-time work. Tr. II, pp. 21, 108-16; Pet. Ex. 7, p. 6. The complement of 21.1 includes 6.2 FTE for part-time lecturers employed at the Lab School. Tr. I, pp. 124-25; Pet. Ex. 4. The actual FTE positions is thus 14.9. UHPA noted a conflict in the Lab School position organizational chart which shows 17.65 FTE for fiscal year 1983, including 4.40 FTE instructional positions shared by nine individuals and 13.25 APT positions shared by twenty-seven individuals, while the Summary Personnel and Fiscal Data for fiscal year 1983 shows actual FTE positions, exclusive of part-time positions, of 16.5 FTE. Tr. I, pp. 126-27; Pet. Ex. 3, Chart XIII A; Pet. Ex. 4. King was unable to reconcile the discrepancy.

Lab School personnel generally divide their time between the Lab School and other research and development positions in the CRDG. Tr. I, pp. 127-33, 183-84; II, p. 106; Pet. Ex. 3, Chart XIII A, Chart XIII B. Other personnel are full-time in either the Lab School or CRDG research and development. Tr. I, p. 136; Pet. Ex. 3, Chart XIII A, Chart XIII B. When the split-time personnel are engaged in research and development, they function under the supervision of the project head and King rather than the Lab School Administrator. Tr. I, pp. 130-31, 138, 147. The organizational chart, in fact, indicates that the position in question spends .40 of its time in instruction and .35 of its time in research and development, exclusive of the

"Principal" designation. King indicated that this time was spent by incumbent Loretta Krause in the Speech Department. She has since dropped this appointment. Tr. I, pp. 131-35; Pet. Ex. 3, Chart XIII A, Chart XIII B. Krause testified that the figure .40 indicated a "functional role" "additional" to the role of school administrator. Tr. II, pp. 13-14.

Report 1279, Employee Data by Bargaining Unit and Occupational Group, 12/31/84, identifies Krause as an Instructor 5--Research (i.e., "I5-R"). Tr. II, p. 96; Intervenor's [hereinafter referred to as Int.] Ex. 1. Her occupational group code places her in the professor category separate and apart from the "executive-managerial" and "administrative" categories. Tr. II, pp. 98-102; Int. Ex. 2.

Recruitment of research personnel at the Lab School is primarily done by King, with a "screening" function resting with the Lab School Administrator. Tr. I, pp. 43-44, 46.

The Lab School Administrator's authority to direct employees includes the capacity to assign them to classes and duties, recommend dismissal, suspend, examine and correct program distress, set work schedules, insure professional behavior, shift classroom space and other physical conditions of work and control the daily schedule of classes. Tr. I, p. 53; II, pp. 32-33, 86-87.

The Lab School Administrator's authority to determine the means to carry out operations includes the capacity to schedule and design curriculum, to determine the objectives of classes, to monitor achievement of research objectives and to

determine the number of classes, hours of classes, the school year, admission procedures, attendance procedures, and graduation requirements. Tr. I, p. 54; II, pp. 34-35. The Lab School Administrator also is engaged in some research activities as a secondary function. Tr. I, pp. 180-81. The Administrative/Managerial position description prepared by King in August 1984, reads in part:

The work performed is broken into five categories:

- A. Laboratory School Administration tasks (70% of effort)
- B. Research and Development tasks (10% of effort)
- C. Professional Service tasks (10% of effort)
- D. University Service tasks (5% of effort)
- E. Community Service tasks (5% of effort)

- A. Laboratory School Administration (70% of effort)

1. The Administrator/Principal has operational responsibility for the University Laboratory School. She sets educational policies and programs, reviews program effectiveness, and insures that the school fulfills its essential role in the R&D process. Additionally, she is responsible for student health and safety.

Functions in this category are the continuous attention to:

- Policy setting and communication
- School planning and budgeting, including negotiation with general and fiscal administration
- School expenditure plan development and execution
- Staff evaluation, including recommending of tenure, promotion, and layoffs of school staff
- Development of internal school management systems for the conduct of the various Laboratory School programs

- Liaison with other agencies and departments
 - Student safety including institutional hazards; protecting students against unauthorized school "visitors" and hazards at bus stops and related spaces
 - Student conduct including handling of student discipline and emotional crisis cases with referrals to the Department of Social Services and Housing as appropriate
 - Developing procedures to handle student and other school emergencies
2. Staff development--The Administrator/Principal works closely with teachers to lead in the development of their expectations and personal philosophies of instruction. She is responsible for engaging and retraining teachers and developers who must be capable of dealing with a wide range of student abilities without sacrificing the quality of the disciplines they teach.

B. Research and Development (10% of effort)

1. The Administrator/Principal applies a theoretic perspective to educational research, drawing upon knowledge of research and other critical literature; she does professional writing, speaking and lecturing, and extensive planning, conferencing, and decision making. She studies national and international trends and theories for educational improvement.
2. The Administrator/Principal develops and maintains relationships with the scholarly community and the educational community especially with private and public schools as a liaison in Hawaii and with Laboratory Schools nationally.
3. The Administrator/Principal engages in continuous dialogue with members of the CRDG staff and reference groups in the design of Laboratory

School programs and activities; she analyzes Laboratory school activities and works continuously at the refinement of principles and procedures for conduct of these educational activities.

4. The Administrator/Principal serves as principal investigator of several R&D projects and serves as a staff member on others.

C. Professional Service (10% of effort)

The Administrator/Principal participates in numerous local and national professional activities. Recent and future activities include:

- Associate editor of the Laboratory Schools Journal, refereeing over 100 manuscripts annually
- President, National Association of Laboratory Schools
- Board Member, National Association of Laboratory Schools
- State Coordinator and Board Member, Hawaii Association of Secondary School Principals
- Board Member and Regional VII Director (9 western states), National Association of Secondary School Principals
- Vice President, Interscholastic League of Honolulu (ILH)

D. University Services (5% of effort)

The Administrator/Principal participates in College of Education, UH Manoa, and UH committees, councils, and task groups. Examples of present and recent activities include the Joint UH-DOE Task Force "Hawaii Towards Excellence in Education," Manoa Campus Teacher Education Committee on Language Arts; College of Education Senate; Personnel Committees; etc. The Administrator/Principal lectures to University classes upon invitation and consults with individual students, other schools, and universities regarding the UH Laboratory School program.

E. Community Service (5% of effort)

The Administrator/Principal participates in community service activities not directly related to her Laboratory School functions. Sample past and present activities include State Selection Committee Member, Nissan Hawaii High School Hall of Honor; State Chair, U.S. Senate-Japan Student Exchange Project; State Chair, Congress-Bundestag Program; preparation and production of an ethnic dance performance as a final activity for Japanese students in a Special Program in English (Summer Session, Manoa Campus); and conducting a five-day workshop on Effective Communication for the City Prosecutor's Office, City and County of Honolulu.

Pet. Ex. 7, pp. 2-4.

Krause testified that the position description accurately describes the duties she performs. Tr. II, p. 12.

Subordinate to the Lab School Administrator is an assistant administrator/teacher who assumes the Lab School Administrator's duties in her absence. Tr. II, pp. 18-19.

In the case of subordinate positions engaged in teaching to the exclusion of research, the Lab School Administrator is "generally" responsible for personnel actions, including the writing of job descriptions, recruiting, screening and recommendations. Krause stated this to be explicitly the case for positions in orchestra, band, foreign language, physical education, and "some English." King, however, would "sign off" on such actions. Tr. I, p. 59; II, pp. 74, 118. If the positions involved mixed duties of teaching and research, personnel action and resource allocation are "negotiated among the Lab School Administrator, the project sponsor and King. Tr. I, pp. 63-64;

II, pp. 119, 124-30. King retains authority as the senior administrator, with ultimate authority in the BOR. Tr. I, p. 77; II, pp. 121-22. In the case of filling research positions, Krause stated she is not always involved. Tr. II, p. 119.

King also averred that the Lab School Administrator is responsible for formulating policies and program goals and objectives for the Lab School (Tr. I, pp. 55, 73-76), though he conceded that he has ultimate authority in the area of policy adoption. Tr. I, pp. 58, 75-76. The Lab School Administrator also was responsible for developing the administrative rules and regulations, the parent-student handbook, and general information for public dissemination. Tr. I, p. 66; II, pp. 53, 57; Pet. Exs. 11, 12. Examples of program development cited by King in which the Lab School Administrator had major input is curriculum innovation, admissions, guidelines and graduation requirements. Tr. I, pp. 74-76.

Krause summed up her duties as including the setting of written policies for the Lab School on everything including admission, attendance, class requirements, curriculum, "school planning" and budgeting, including negotiations with general and fiscal administration; school expenditure plans, development and execution; staff evaluation, including tenure and lay-off recommendations; development of internal program management systems; and student safety and conduct. Tr. II, pp. 15-17, 36-37.

An example Krause cited as an exercise of authority in a policy change was the decision to disallow the taking of many

elective courses in favor of offering a comprehensive school curriculum, in order to give students a sense of structure and to lead them in the direction of college preparatory curriculum. This was a joint decision of King and Krause. Tr. II, pp. 39-41, 61.

Another example of her participation in policy change involving staff, budget and curriculum was a decision to shift from a twelve month to a three-year Japanese language requirement and to reallocate resources among English, math and science curricula. Tr. II, pp. 42-43.

An example cited by Krause of her authority to adjust class teaching loads was the instance where changes in research grant resources necessitate the shifting of personnel between teaching and research. Tr. II, pp. 81-82.

Regarding personnel allocation, Krause noted that since being appointed in September of 1971, the total FTE positions has dropped from 33.7 to 21 in 1984, due to her work in reallocation and redistribution of positions. Tr. II, pp. 44-45.

Krause also cited three grant programs she was instrumental in having implemented at the Lab School, i.e., the Carnegie Grants Program for High School Improvements, the Cultural Foundation on Promoting the Traditional Costume of Japan in Hawaii, and a cultural exchange program involving the Rainbow Gakuen of Japan. Tr. II, pp. 29-52, 145, 156-61; Pet. Exs. 8, 9, 10.

King testified that the Lab School Administrator is officially subordinate to him as CRDG director, but in fact operates semi-autonomously, with considerable independence,

initiative and policy formulation and recommendation capacity.
Tr. I, pp. 36-37.

The Lab School Administrator is a member of the local management team which shares in all reviews, determinations, judgments of actions and work of the entire CRDG unit. Tr. I, p. 37; II, p. 18. King receives periodic reports and reviews from the Lab School Administrator but is not a part of the day-by-day operations. Tr. I, p. 54.

In relation to the Lab School faculty, King characterized the Lab School Administrator as being more an administrator than a traditional collegial peer. Tr. I, p. 80.

Krause concurred with King's characterization of the relationships between the CRDG and the Lab School and between King as CRDG director and herself as Lab School Administrator. She averred that joint policy discussion occurs, that they work closely together and in cooperation in looking at the assignments for research and the school, and that she "wins a few and loses a few" in this "semi-autonomous" relationship. Tr. II, pp. 33, 46, 56.

The Lab School Administrator's responsibility for program development, policies, procedures and reallocation of resources is clearly subject to King's approval. Any idea initiated in such areas which are channeled to the Lab School for development are presented to the Lab School Administrator, who in turn meets with King and the project initiator to determine how to proceed on the project. While this decision is often jointly arrived at, King has the ultimate authority to "validate" it.

Tr. I, pp. 39-43, 51, 111. Thus, in the basic scheme, the Lab School, as well as CRDG research and development, is subject to King's supervision, with the Lab School Administrator "managing" the Lab School. Tr. I, pp. 147, 157.

Decisions made within the Lab School itself are not made collegially but are made by Krause and do not necessarily reflect the consensus opinion of the faculty. Tr. II, pp. 41-42.

King testified that he felt that the BOR's request to have the Lab School Administrator excluded from Unit 7 was important because of the position's importance in formulating plans in case of a strike by public employees at the Lab School. He averred that the Lab School Administrator was essential to the formulation of strike plans and the operation of the school under strike conditions (Tr. I, p. 51), and that unit inclusion created a conflict of interest in that the Lab School Administrator could not participate in both management's strike contingency planning and a strike. Tr. I, pp. 81-82. Krause herself affirmed the perception of a conflict of interest and asserted that she felt formulation of strike plans was inherent in the position and that without such plan chaos could develop. Tr. II, pp. 76-77, 79. Krause conceded, however, that King was qualified and capable of formulating a strike plan for the Lab School. Tr. II, pp. 77-79.

King, citing a 1966 report to the Legislature (Styles report) in which the Lab School was said to be moving in a direction to carry the educational research load for the State, characterized the Lab School as a major program affecting the total state. Tr. I, pp. 72-73; Pet. Ex. 5.

For fiscal year 1984, the Lab School budget was \$498,800 with the total CRDG budget being \$1,582,700. Tr. I, pp. 158; Pet. Ex. 4. King testified that assets would be distributed between CRDG's research and Lab School activities in roughly the same proportions as the budgetary breakdown, i.e., about one-third to the Lab School and two-thirds to research. Tr. I, pp. 159-60. King allocates the CRDG budget between research projects and the Lab School. Tr. I, pp. 168-69. Krause asserted that she has "total authority" to carry out the Lab School budget process, unless overridden by King. Tr. II, p. 83.

King stated that public high school principals work in the context of State, district and Board of Education policies, while the Lab School Administrator works within no comparable context and, in fact, embodies all those functions. For that reason, King averred, the two positions are not comparable. Tr. I, pp. 100-01.

Neither does the Lab School utilize extensive rules and regulations such as exist in the Department of Education (DOE). Tr. I, pp. 109-10; Pet. Ex. 6A, 6B, 6C, 6D. Krause agreed with this position. Tr. II, pp. 57, 63.

In cross-examination of King, however, UHPA noted the DOE School Code provisions seem to give substantial authority to principals, including authority over planning, organizing, staffing, directing and controlling of educational programs, finances, personnel and facilities. Tr. I, p. 162; Pet. Ex. 6A. UHPA further elicited from King the admission that one district superintendent supervises many principals whereas he has a

one-to-one supervisory relationship with Krause. King, however, averred that the Code allows more latitude than principals actually have, and that the Lab School Administrator "embodies" superintending functions. Tr. I, pp. 163-65. Krause echoed this view, stating that she sees her position as having more latitude for innovation and design than high school principals who are more restricted by rules and regulations. Tr. II, pp. 84-85. Krause asserted that in contrast to department chair leadership, her decisions do not reflect a consensus but are made in light of the goal of teaching students and furthering research, with King then reviewing on her decisions. Tr. II, pp. 91-92.

UHPA's witness, Robert Potter, Chairperson of the Department of Educational Foundations, College of Education, noted that the Lab School has a third or a quarter of the enrollment of a comparable-level public school. Tr. III, p. 25. Public schools tend to employ proportionately more full-time equivalent teachers, Potter asserted. Tr. III, pp. 29-30. Potter sketched principal duties as including scheduling, staffing, recruitment and supervision of teachers, fiscal problems, discipline and safety. Tr. III, p. 24. Scanning the Lab School Administrator's job description under "A. Laboratory School Administration", Potter asserted that the duties of reviewing program effectiveness; student health and safety, policy setting and communication; school planning; budgeting and expenditure; staff evaluation; development of an internal management system; student conduct; liaison; development of procedures to handle student and other school emergencies; and staff development are

duties similar to those handled by high school principals. Tr. III, pp. 31-34; Pet. Ex. 7, p. 2-3.

King contrasted the subject position to that of academic department chairs. Academic chairs are nominated by peers, with subsequent appointment by the department dean. Chairmanship is often a rotating position. The chair presides and presents items of business, policy, or action but decisions are made by vote. Tr. I, pp. 114-15. The Lab School Administrator position in contrast is filled by selection by King from instructional positions with subsequent appointment by the President and BOR. The Lab School Administrator, furthermore, does not preside over a collegial decision-making process but acts more as a manager. Tr. I, pp. 116-17, 171, 179. Neither is budget formulation accomplished collegially, as in academic departments, but in a process involving initial formulation by the Lab School Administrator, with subsequent review and approval by King. Tr. I, pp. 119-20.

Lab School faculty promotion, however, operates under a collegial process in which an administrative committee comprised of all staff Instructors and Researchers made recommendations to Krause and King. Tr. II, pp. 131-33.

Krause's own promotion from associate to full professor in 1984 was effected through the standard faculty peer review process. Tr. II, pp. 133-34; III, pp. 44-45.

Academic Department chairs are included in bargaining units. Tr. I, 170; III, pp. 9, 21. The normal term for

such chairs is about three years, according to Potter. Tr. III, pp. 5-6. Potter also affirmed that departments act collegially. Tr. III, pp. 46-47.

UHPA submitted into evidence an excerpt from the Faculty Handbook dealing with the duties and functions of Department Chairs. Such duties involve course scheduling, assignment of courses, course development, budgeting and expenditure, recommendation and evaluation on personnel action and recruitment, and instructor supervision. The department chair makes the decision on the hiring of lecturers. Tr. III, pp. 13-17.

Scanning the Lab School Administrator's job description, under "A. Laboratory School Administration", Potter asserted that the duties of setting educational policies; review of program effectiveness; school planning, budgeting and expenditure; staff evaluation; liaison; development of procedures to handle student and other school emergencies; and staff development (i.e., retraining) are duties comparable to those handled by department chairs. The duty of insuring that the school fulfills its essential role in the research and development process has no parallel in department chair functions, Potter stated. Tr. III, pp. 31-35; Pet. Ex. 7, p. 2-3.

CONCLUSIONS OF LAW

The BOR has requested the exclusion of Position No. 83287 from Unit 7 on the basis that the position's duties and responsibilities make it a "top-level managerial and administrative" employee within the meaning of Subsection 89-6(c), HRS.

Subsection 89-6(c) reads:

Sec. 89-6(c). 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 first 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, employee of the executive office of the governor, household employee at Washington Place, employee of the executive office of the mayor, staff of the legislative branch of the State, employee of the executive officer of the lieutenant governor, inmate, kokua, patient, ward or student of a state institution, student help, any commissioned and enlisted personnel of the Hawaii national guard, or staff of the legislative branch of the city and county of Honolulu and counties of Hawaii, Maui and Kauai except employees of the clerks' offices of said city and county and counties, shall be included in any appropriate bargaining unit or entitled to coverage under this chapter. [Emphasis added.]

The criteria for determining top-level managerial or administrative exclusions were set forth in prior Board cases. In Decision 75, Hawaii Nurses Association, 1 HPERB 660 (1977), the Board made its initial formulation to determine whether an individual occupies a top-level managerial or administrative position:

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

1. The level at and extent to which the individual exercises authority and judgment to direct employees and

determine the methods, means and personnel by which the employer's operations are to be carried out; or

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

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

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

Whether a particular position satisfies these criteria is a question of fact to be determined on a case by case basis by this Board. (Footnotes omitted.) Id. at 666.

In Decision 95, Hawaii Government Employees Association, 2 HPERB 105 (1978), the Board elaborated the criteria as follows:

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

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

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

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

As stated in Decision 75, exclusion based on managerial attributes are not restricted to positions which work in the field of labor relations. Id. at 143.

The BOR's case-in-chief amounted to a descriptive enumeration of the position's duties and responsibilities. These enumerations, taken in toto, describe a position with managerial responsibilities, as that term is elaborated in Decisions 75 and 95. The BOR enumerations are summarized as follows:

-The Laboratory School Administrator position is responsible for the exercise of authority and judgment in the direction of employees and the determination of methods, means and personnel necessary for the management of the Laboratory School. The primary management responsibility is the management of the Laboratory School. The Laboratory School Administrator is viewed as a peer member of the management team. The Laboratory School Administrator is vested with authority to make decisions that determine the program. The Laboratory School Administrator has the authority to reallocate resources in order to attain program goals and objectives.

-The Laboratory School Administrator determines, formulates and effectuates the employer's policies as defined by HPERB Decision 95.

-There exists a conflict of interest between the duties and responsibilities of the Laboratory School Administrator

position and the position's role as a member of the bargaining unit.

-The University Laboratory School Administrator position is the top administrative position of an on-going major program for which the administrator formulates policy.

-The Laboratory School Administrator position is significantly different from that of a public school principal.

-The Laboratory School Administrator's responsibilities exceed those typically assigned to a supervisory position.

-The Laboratory School Administrator represents management as opposed to being "an equal among equals" as in the case of department chairmen.

UHPA's arguments can be stated as follows:

-The responsibility and authority of the position is basically similar to that of department chairs at the University. The position itself is a faculty position as evidenced by the fact that the present incumbent is a full professor and has been tenured and promoted in the same manner as other faculty and takes part in research and community service like other faculty members.

-The position has many of the same responsibilities and functions as that of a public school principal but fewer students and teachers to manage.

-The University in its own records treats the position and the incumbent as a member of the faculty and not as a managerial or other excluded category of employees.

-HPERB Decisions 75 and 95 are not directly applicable because of the dissimilarity of positions involved.

The Board, after consideration of the opposing arguments, concludes that the Lab School Administrator more clearly fits the criteria of a top-level managerial position and thereby should be excluded from bargaining unit 7. The Board arrives at this conclusion despite the fact that much of the BOR's testimony is conclusory, self-serving, and tailored to conform to the definitions in Decisions 75 and 95. Thus, it is more a consideration of the nature of the position's specific duties and responsibilities, the program administered, and the position's placement in the University organizational structure, which warrants this conclusion.

The major consideration for the Board in arriving at its decision is the fact that an employee, to be considered "top-level managerial", need not be responsible for management or policy-setting, as such, but rather may be considered managerial merely because of meaningful participation in the policy-setting process. Testimony clearly indicates that the position in question has sufficient policy input to raise it from the supervisory to the managerial level.

The Board stated the following guidelines in Decision 95, in discussing exclusion of policy-formulating positions:

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

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

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

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

* * *

. . . "It is not whether a person definitely establishes policy but rather the individual's regular participation in the policy-making process which determines managerial status. Absolute discretion or authority to act is not a prerequisite to finding that an individual formulates policy. What matters is the fact of participation at a fundamental level in the decision making

process, not the participant's batting average in having his views prevail."
(Citation omitted.) 2 HPERB at 144-145.
(Emphasis added.)

While the Lab School Administrator position is not solely responsible for policy at the Lab School, it is apparent from testimony that it participates at a meaningful level in the policy decisions ultimately set by King as CRDG director. Evidence indicates that he gives meaningful consideration to the Lab School Administrator's opinions and desires in arriving at his decisions. This consideration is meaningful in the sense that, without it, the CRDG director would have no reliable method of making decisions in operating the Lab School. The Board rules that the Lab School Administrator has sufficient authority in the policy setting process at the Lab School to be considered as a part of the management process, as opposed to a supervisor merely implementing the orders and policies of superiors. Hawaii Nurses' Association and State of Hawaii, 1 HPERB at 665 (1977).

UHPA drew significant parallels in the duties and responsibilities of the Lab School Administrator and the duties and responsibilities of department chairs. Many of the specific functions of the two positions were demonstrated by UHPA to be similar, i.e., the function in the budgetary process, personnel management and other administrative matters. However, the significant difference between the function of the Laboratory School Administrator and that of the department chairs is that the Laboratory School Administrator has charge of a discrete, self-contained school operation with a campus of its own, and

a self-contained infrastructure, including an independent physical plant, food service, security, maintenance, and extracurricular programs. The Lab School describes an entity unto itself, unlike academic departments within the organization of the University or schools within the DOE system. The Lab School, relative to academic departments or DOE schools, is a self-contained major program with a significant degree of autonomy. The Lab School was labeled a "major program" affecting the State, Micronesia, the public school system, the University and the College of Education in the Stiles Report. Tr. I, pp. 13, 17 and 73; BOR brief p. 21. The Lab School Administrator, furthermore, supervises a wide spectrum of personnel, not limited to instructors. For these reasons, the Lab School Administrator is faced with a task qualitatively different from that of department chairs, who, like high school principals in the DOE system, serve a function more properly described as bureaucratic as opposed to managerial. The Laboratory School Administrator position by comparison involves more independent decision-making relative to department chairs and high school principals. The Board concludes that, by a preponderance of the evidence, this relative difference amounts to a qualitative difference between managerial and non-managerial positions.

The fact that many employees supervised by the Laboratory School Administrator work part-time and that many researchers who are supervised by King work in the Lab School does not affect the Board's decision that managerial exclusion is warranted here. The Laboratory School Administrator is the top

managerial position at the Lab School and the Lab School itself is properly considered enough of a discrete and major on-going program such as to constitute a program with "life of its own". This conclusion is not altered by the fact that, as UHPA points out, the number of students and faculty at the Lab School is not large.

UHPA points out that many of the instructional personnel at the Lab School operate under the collegial model obtaining at the University proper. UHPA also points out that Krause, the present incumbent, was promoted through standard faculty procedures. In the same sense, UHPA argues, that the Lab School Administrator's power to hire, fire and promote is not basically different from those of the department chairs. While this may be true, the other conclusions set forth, supra, as to the significant differences between the functions of department chairs and the Laboratory School Administrator dictate that a difference be recognized between the functions of the Laboratory School Administrator and department chairs. While there are many similarities between the functions of the two positions, the differences necessitate that a bargaining unit differentiation be recognized.

UHPA also points out that deans and assistant deans are excluded from unit 7 as per Hawaii Federation of College Teachers and HGEA, 1 HPERB 289 (1972) and also that department chairs are not. UHPA further points out that King is excluded from the unit even though he is on the same operational level as the department chairs. UHPA then points out that the Lab School

Administrator is organizationally under Dr. King, or one step further removed from the excluded dean's level, and that it would be inconsistent to have the Lab School Administrator excluded also from the unit. The Board, however, reiterates that the Lab School is an entity unto itself in terms of functions within the University and placement in the University organization and as such merits consideration outside of the context of the organizational structure of departments at large.

The Board differentiates the Lab School Administrator position from high school principals in the DOE by the fact of its being the top administrative head of a program which is independent unto itself in the University of Hawaii organization, as opposed to high schools in the DOE system which are part of a much more homogeneous system administered pursuant to systematic rules, regulations and policies brought down the chain of command from district superintendents and the Board of Education. Because of the Lab School's uniqueness, the UHPA's argument that the small enrollment at the Lab School indicates a lack of real responsibility on the Lab School Administrator's part is not persuasive.

UHPA argues that since University computer printouts show the Lab School Administrator's title, position number and occupational group as faculty, the position should be so regarded faculty as opposed to executive or managerial. The Board, however, must in making unit determinations look beyond titles and structural placement to the actual duties, responsibilities and systemic function. In so doing, the Board concludes that the Lab

School Administrator's title within University computer printouts does not indicate the full range and nature of the Lab School Administrator functions.

UHPA further argues that Decisions 75 and 95 are not fully applicable to the situation at hand. UHPA argues that there are not particularly applicable because the collegial and administrative relationships involved here were not at issue in those decisions. While UHPA is correct in that Decisions 75 and 95 may not be considered fully applicable to the University collegial setting and in fact concern positions which were more strictly hierarchical, those decisions did quite centrally address issues concerning placement of policy-makers in the bargaining unit structure. That being the case, those decisions are directly applicable to the question of placement of the Laboratory School Administrator who, the Board concludes, has a significant voice in policy-setting for the Lab School.

While the Board adopts the BOR's position as to exclusion, it does not do so on the basis that a conflict of interest is created in this situation where the Lab School Administrator is included within unit 7 at the time the position is required by the CRDG to participate in strike contingency plans. This conflict is created by the CRDG directives assignment to the Lab School Administrator of the duty of the strike planning and is not a conflict created by the position's duties and functions as such.

The Board's decision that the Lab School Administrator participates at a level in policy-making significant enough to

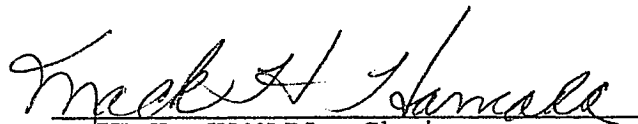
warrant exclusion rests on the fact that that position is the CRDG director's link to the operation of the Lab School. Without the input of the Lab School Administrator in the decision making process, the director could not make meaningful decisions pertaining to its functions and realization of its goals. The fact that the Lab School Administrator is a peer member of the management team of the CRDG is evidence of this. Evidence indicates that the Lab School is complex and large enough to be considered semi-autonomous from the CRDG.

ORDER

Position No. 83287, Professor I5-R, chief administrator of the University Laboratory School, shall be excluded under Subsection 89-6(c), HRS, from bargaining unit 7.

DATED: Honolulu, Hawaii, February 2, 1987.

HAWAII LABOR RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES R. CARRAS, Board Member

DISSENTING OPINION

The position in question, as asserted by UHPA, is a faculty position with responsibility and authority similar to

that of an academic department chairman. The research and community service functions are of the same nature as those of any faculty position. The BOR failed to demonstrate how the position differed in any conclusively different manner such as to distinguish it from the faculty grouping. The position therefore should not be differentiated from faculty on the basis that it is a managerial position.

To the extent that the position departs from faculty criteria, the position is similar in function and authority to the position of a public school principal, who are not as a class excluded from bargaining unit participation. Any "managerial" powers that the Lab School Administrator holds are akin to such powers held by high school principals and were not demonstrated by the BOR to be qualitatively different from such functions held by high school principals. Such managerial functions were not demonstrated by the BOR to be of such a level as to warrant classification as a managerial employee.

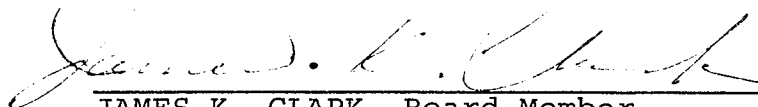
In the University hierarchy, the various instructional departments come directly under the Dean of the college. Testimony indicated that deans and assistant deans are excluded from bargaining unit participation. Department chairs are not. Testimony further indicated that the Director of the CRDG is directly under the Dean of the College of Education at the same operational level as department chairs. The director is excluded from the bargaining unit. Thus, the exclusion of the Lab School Administrator adds another layer of excluded "management" to the CRDG--which can, for these purposes, be considered a department

in the college of education--even though, in other cases department chairs are not excluded.

Decisions 75 and 95 are poor authority on which to base the exclusion of the position in question. It is clear that the Lab School Administrator as a faculty member operates in a collegial framework typical to university settings. The application of the managerial/supervisory/non-supervisory model is problematic in this collegial setting. In such a case, the Board should be wary of excluding an employee from bargaining unit status on the basis of any managerial function being read into the situation, particularly in such a case as the present, where the position's immediate superior is already excluded from bargaining unit participation.

Finally, the position, as evidenced in testimony, has no negotiations function. Also, the alleged conflict of interest created by having the Lab School Administrator help prepare strike plans is, as UHPA pointed out, a conflict for the Lab School Administrator and the director imposed on themselves. The conflict could be readily avoided merely by having Dr. King himself formulate any necessary strike plan. Testimony indicated that he is sufficiently versed in the operations of the Lab School as to be able to assume such duties.

For the foregoing reasons, the position in question should be not be excluded from bargaining unit 7.



JAMES K. CLARK, Board Member

BOARD OF REGENTS, University of Hawaii and UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY; CASE NO. RA-07-82
DECISION NO. 240
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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