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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: RA-03-83a
)	RA-04-83b
GEORGE R. ARIYOSHI, Governor)	RA-13-83c
of the State of Hawaii,)	
)	DECISION NO. 249
Petitioner,)	
)	FINDINGS OF FACT, CONCLU-
and)	SIONS OF LAW AND ORDER
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME LOCAL 152,)	
AFL-CIO,)	
)	
Intervenor.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On March 22, 1985, GEORGE R. ARIYOSHI, Governor of the State of Hawaii [hereinafter referred to as State], filed a Petition for Clarification or Amendment of Appropriate Bargaining Unit with the Hawaii Labor Relations Board [hereinafter referred to as Board].

The State asserts that positions performing dental hygiene services in the State Dental Hygiene Program, Division of Dental Health, Department of Health, should be transferred from bargaining unit 13 (Professional and scientific employees other than registered professional nurses) to bargaining unit 3 (Nonsupervisory employees in white collar positions) and bargaining unit 4 (Supervisory employees in white collar positions), as appropriate. The HAWAII GOVERNMENT EMPLOYEES ASSOCIATION [hereinafter referred to as HGEA] objects to the proposed transfer.

On April 12, 1985, the HGEA filed a Petition for Intervention in the instant case with the Board. By Order, dated April 18, 1985, the Board granted the petition for intervention since the HGEA as the exclusive representative of bargaining unit 13 alleged a sufficient interest for its participation in the proceeding.

A prehearing conference was held on May 20, 1985. Hearings were held on November 13, 14 and December 10, 1985. Posthearing Briefs were submitted by the State and the HGEA on January 17, 1986.

Upon a full review of the record in this case, the Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

GEORGE R. ARIYOSHI is and was, for all times relevant, the public employer as defined in Section 89-2, Hawaii Revised Statutes [hereinafter referred to as HRS], of employees of the State of Hawaii which includes employees in bargaining units 3, 4 and 13.

The HGEA is and was, for all times relevant, the exclusive representative as defined in Section 89-2, HRS, of employees in bargaining units 3, 4 and 13.

The 26 positions in question, titled Dental Hygienist II, are located within the State Department of Health. The positions are currently included in bargaining unit 13 (Professional

and scientific employees other than registered professional nurses). Board Exhibit 1.

The governmental unit responsible for the dental hygiene program in the State of Hawaii is the division of dental health, located in the State Department of Health. The division is headed by Dr. Manuel Kau.

In his testimony, Dr. Kau stated that the work of dental hygienists in the program is primarily concerned with the topical application of fluoride and is restricted to four basic areas; namely, topical fluoride application, inspection, dental health education, and referrals for follow-up. Transcript [hereinafter referred to as Tr.] Vol. 1, pp. 61-62.

The topical application of fluoride as described by Dr. Kau involves the following:

The hygienist goes into the school setting, arranges for a work site, assembles the equipment that she transports in, and assigns schedules to classrooms so that children come in at assigned times.

The cleaning of teeth and the application of fluoride by the hygienist is as follows:

Three children are brought into the clinic setting at one time, and the hygienist proceeds by cleaning the teeth (prophylaxis) for one child on the portable dental chair. After this cleaning, the child is set into a chair adjacent to the portable dental chair, and the hygienist proceeds with the prophylaxis on the second child. The hygienist then proceeds with the topical fluoride application on the first child doing

one-half of the mouth at a time. The mouth is isolated with cotton rolls, using a cotton roll holder, and fluoride solution is painted on with a cotton-tip applicator. The timer is set for four minutes, and the dental hygienist then proceeds to the second child, isolating the teeth with cotton rolls, blowing the teeth dry, and applying the fluoride for four minutes. After the four-minute period expires on the first child, the cotton rolls are removed, the other side is isolated and fluoride is applied in a similar way. The first child then waits for the four-minute period to expire and the second child gets the fluoride application on the opposite side. Using this method, about four children per hour are processed. Tr. Vol. 1, pp. 63-64.

Dr. Kau testified that the topical fluoride application is the primary duty of dental hygienists and that the other activities of dental hygienists, i.e., inspection, education and referral for follow-up, are conducted on a "concurrent basis." Tr. Vol. 1, p. 62.

The union's witness, Kathleen Brogden, a dental hygienist, disputed Dr. Kau's view that the application of topical fluoride constitutes the major function of dental hygienists to the degree that inspection, dental health education and referrals for follow-up are limited in scope or that the vast majority of time is spent strictly on topical fluoride application. Brogden asserted that the inspection and education function take up just as much time as the application of topical fluoride and occurs concurrently therewith. Tr. Vol. 3, p. 18.

Inspection entails the general observation of the child's mouth for any unusual condition, such as physical impairments and for any abnormalities in the teeth, gums and occlusion, using a mouth mirror and explorer. If any dental abnormalities are observed, a referral slip is completed for the child to take home at the end of the day. The dental hygienist does not make any diagnosis of the abnormality, but is required to state on the referral slip that the child is in need of dental attention and that a visit to the dentist is indicated. Tr. Vol. 1, p. 71; Tr. Vol. 3, p. 35. Dr. Kau stated that the inspection is part of the procedure for providing the topical fluoride application, which normally takes 15 minutes per child, and the inspection usually takes 30 seconds to a minute of the time. Tr. Vol. 1, p. 72.

The education function involves individual as well as occasional group instruction. The individual instruction is performed "chairside" at the same time that the other activities take place. It involves informing the child of standard good oral hygiene practices, such as the effect of sugars and how to brush the teeth correctly and of any oral hygiene problems the child may have. Tr. Vol. 1, p. 173. Group instruction involves on the average for each dental hygienist a presentation two times per year, usually for 20 minutes to half an hour. Tr. Vol. 1, p. 74.

Referral for follow-up is alluded to above in the discussion of the inspection function.

Testimony indicated that topical fluoride application to four children could be accomplished in a one-hour period, or in a seven-hour work day, 28 children per day. Tr. Vol. 1, p. 69. Thus the standard is 4,000 topical fluoride applications per dental hygienist per year. Tr. Vol. 3, p. 41.

The new minimum qualification specification requires completion of an accredited two-year training program in dental hygiene and possession of a license. Employer's Exhibit 10. The license is also obtainable upon completion of an accredited two-year training program. Employer's Exhibit 14.

At the University of Hawaii, the certificate in dental hygiene program requires one year of pre-dental hygiene requirements, and two more years of dental hygiene courses. For a bachelor of science degree in dental hygiene, an additional year of study is added to the certificate program. Tr. Vol. 2, p. 18.

With regard to the certificate program, the one year pre-dental hygiene work requirement is a requirement of the University of Hawaii for accreditation purposes. Tr. Vol. 2, p. 21.

State licensure requires that applicants complete and pass both the National board and State board examinations in dental hygiene. Tr. Vol. 2, p. 34.

CONCLUSIONS OF LAW

The State requests that the subject 26 dental hygienist positions be transferred from bargaining unit 13 to bargaining units 3 and 4, as appropriate. It argues that the dental

hygienists employed in the dental hygiene program of the Department of Health do not meet the definition of professional employees as contained in Section 89-2, HRS. This provision reads as follows:

§89-2 Definitions. As used in this chapter:

"Professional employee" includes (A) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (B) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (A) (iv), and (ii) is performing related work under the supervision of a professional employee as defined in (A).

Subsection 89-6(a), HRS, establishes 13 public employee bargaining units and provides, in part:

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

* * *

- (3) Nonsupervisory employees in white collar positions;
- (4) Supervisory employees in white collar positions;

* * *

- (13) Professional and scientific employees, other than registered professional nurses.

The Board analysis revolves around an application of the definition of professional employees as contained in Section 89-2, HRS, to the job qualifications, duties and responsibilities of dental hygienists as portrayed in testimony in this case.

Section 89-2, HRS, is divided into two clauses (A) and (B). Clause A is broken into four subparts, (i)-(iv). Clause B is broken into two subparts, (i) and (ii). Each clause provides a means by which an employee can be determined to be professional. Under the first clause, all four criteria in subparts (i) through (iv) must be satisfied to meet the criteria for a professional employee. Each clause will be discussed in turn.

A. Requirements for Professional Employee Designation

- (i) Work Predominantly Intellectual and Varied in Character as Opposed to Routine Mental, Manual, Mechanical or Physical Work.

The work of the subject dental hygienists as broken into the four areas of topical application of fluoride, inspection, education and referral for follow-up is clearly "routine mental, manual, mechanical, or physical work," as opposed to work "predominantly intellectual and varied in character," as those terms are employed in Section 89-2, HRS. The union witness, Ms. Brogden, established that in the process of applying the topical fluoride, dental hygienists are required to employ unwaivering judgment and alertness in the inspection of each

child's mouth. They must be alert to any dental and related irregularities or signs of disease, and for signs of needed treatment, immediate or otherwise. This responsibility is further complicated by the fact that special education children are also given treatment by dental hygienists, and these children necessitate the use of additional judgment, intellect and alertness. The Board recognizes that any occupation dealing with treatment and maintenance of the human body requires the use of a high degree of care, alertness, judgment and skill. However, the position in question has as its primary duty a function narrowly circumscribed by its limitation primarily to the topical application of fluoride in a school setting. Because the task is so narrowly circumscribed, it takes on a character which fits the description of "routine mental, manual, mechanical, or physical work" and fails to meet the requirement of being "predominantly intellectual and varied." The evidence indicates that the duties and responsibilities of dental hygienists do not tip the balance so as to be properly characterized as predominantly intellectual and varied. The work takes on aspects of being intellectual and varied, as well as aspects of being routine mental, manual, mechanical or physical work. In the Board's judgment, the work is more the latter than the former, i.e., more of a routine than varied type of work.

(ii) Exercise of Discretion and Judgment.

The Board concludes that the work in question involves the consistent exercise of discretion and judgment in its performance. While the immediate treatment it involves, i.e., the

topical application of fluoride, is a relatively straightforward task, evidence indicates that the dental hygienist, as a part of assigned job duties, is required to also, as a part of the inspection task, exercise discretion and judgment in looking for disease and abnormalities and in keeping alert for any adverse or abnormal reactions from the child being treated. While evidence indicates that abnormalities or disease are the clear exception rather than the rule in inspecting the children, it is clear that the nature of the work requires that the dental hygienist consistently employ discretion and judgment in the act of being alert and sensitive to the condition and peculiarities of each child undergoing treatment.

(iii) Standardization of Output Produced or
Results Accomplished.

Evidence indicates that the output of each dental hygienist can, in fact, be standardized in relation to a given period of time. Evidence was that four children could be treated per hour, or for a seven-hour work day, 28 treatments per day. Per year, this works out to 4,000 topical applications per dental hygienist. The union witness confirmed that she is able to meet or come close to this standard. The Board concludes that the work is such that the output produced can be standardized in relation to a given period of time. Subpart (A) (iii) of the definition is thus not met.

(iv) Academic Requirements.

Subpart (A) (iv) of the definition requires that knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructions and study in an institution of higher learning or hospital, as distinguished from a general academic education or from an apprenticeship or from training in a performance of routine mental, manual or physical processes.

The Board concludes that the issue presented by this clause reduces to the requirements of the class, i.e., the fact that just a two-year certificate is required in the minimum qualifications for the job and in the licensure requirements. The two-year certificate requirement does not fit the characterization of professional schooling. The fact that a baccalaureate degree is not required clearly indicates that the requirement of prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital is not met. Petitioner's Exhibit 10, Minimum Qualifications Specifications.

The Board concludes that the dental hygienist's job description fails to meet Subparts (i), (iii), and (iv) of Clause (A) of Section 89-2, HRS.

(B) Entry-Level Professionals

Section 89-2, HRS, provides in the second of its two main clauses in the definition of a professional employee that an employee with the educational experience set forth in Clause (A)

who is performing related work under the supervision of a professional employee as defined in Clause (A) is also a professional employee within the meaning of Section 89-2, HRS. However, as the Board has concluded that dental hygienists do not meet the educational standards for professional employees as set forth in subpart (A) (iv), they are excluded from consideration as professional employees as described in Clause (B). Moreover, they do not perform related work under the supervision of a professional employee as defined in (A). Testimony was clear that dental hygienists do not work closely with Dr. Kau but that their contact with him was limited to a September staff meeting. The union witness indicated that her supervisor was also a dental hygienist. Tr. Vol. 3, pp. 32-33. The Board agrees with the State that Clause (B) should be interpreted as requiring that positions cannot be designated professional merely because an employee may have a professional degree if the credentials are unrelated to the work performed.

ORDER

For the reasons stated herein, the Board concludes that the subject positions are to be included in the white collar non-supervisory and supervisory bargaining units, as appropriate. The Board hereby approves the transfer of the 26 positions listed in State's Exhibit 12 from bargaining unit 13 to bargaining units 3 and 4, as appropriate.

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

DATED: Honolulu, Hawaii, July 9, 1987.

HAWAII LABOR RELATIONS BOARD



MACK H. HAMADA, Chairperson



JAMES K. CLARK, Board Member



JAMES R. CARRAS, Board Member

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