

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. RA-07-186
)	
BOARD OF REGENTS, University)	DECISION NO. 322
of Hawaii,)	
)	FINDINGS OF FACT, CON-
Petitioner.)	CLUSIONS OF LAW AND
)	ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 17, 1991, the BOARD OF REGENTS, University of Hawaii (BOR or Employer), filed a Petition for Clarification or Amendment of Appropriate Bargaining Unit with the Hawaii Labor Relations Board (Board). In its petition, the BOR requested the exclusion of Position No. 82635, Assistant Specialist, from bargaining unit 7 (Faculty of the University of Hawaii and the community college system). The BOR contends that the incumbent of the position will report to the Dean of Student Affairs, at the University of Hawaii at Manoa (UH) and will be an individual concerned with confidential matters affecting employee-employer relations and should be excluded from bargaining pursuant to Subsection 89-6(c), Hawaii Revised Statutes (HRS).

The BOR submitted the following documents with the petition:

1. Affidavit of James H. Takushi, Director of Personnel, University of Hawaii (UH), regarding Position No. 82635, dated December 17, 1991;

2. Position description for the Assistant Specialist (Exhibit A);
3. Class specifications for the Assistant Specialist (Exhibit B);
4. Table of Organization, Office of Student Services, UHM (Exhibit C); and
5. Letter, dated December 2, 1991, from James H. Takushi to J. N. Musto, Executive Director of the University of Hawaii Professional Assembly (UHPA), requesting concurrence with the proposed exclusion of Position No. 82635 (Exhibit D).

Based on the affidavit of James H. Takushi and the documents submitted in support of the petition, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The BOR is the public employer, as defined in Section 89-2, HRS, of employees of the UH which includes employees in bargaining unit 7.

The UHPA is the certified exclusive representative of the employees in bargaining unit 7.

The UHPA concurs with the BOR's proposed exclusion of position No. 82635 from bargaining unit 7 and is deemed to have waived the right to a hearing thereon (Exhibit D).

According to the Position Description, the position will work in the Office of the Dean of Student Affairs at the UHM as the Student Advocate to implement UH Executive Policy E1.203,

the sexual harassment policy. The position will perform advocacy, counseling and educational activities on sexual harassment and related discrimination issues. The position will perform the following duties in the approximate percentage of worktime:

- (1) Counseling complainants in sexual harassment cases and advising complainants of legal issues and their rights; acting as a confidential counselor to students who perceive themselves to have been subjected to sexual harassment (50%);
- (2) Advising and assisting complainants in preparing and filing complaints against students and University faculty, staff or administrators, which may result in recommendations calling for discipline of employees of the University (10%);
- (3) Advocating on behalf of complainants throughout the harassment complaint process (10%);
- (4) Conducting educational programs on sexual harassment and related discrimination issues; developing peer counseling groups (10%);
- (5) Providing complainants and others with information and advice as to their rights and responsibilities under University Policy E1.203; providing information and advice regarding current state and federal statutes and regulations concerning sexual discrimination (10%); and
- (6) Performing other relevant tasks as assigned (10%).

According to the specifications for the Assistant Specialist class, positions in this class perform their duties under general direction with latitude for independent judgment in the field of specialization, carry out assigned functions and routine duties competently and supervise clerical help. (Exhibit B).

DISCUSSION

Section 89-6, HRS, establishes 13 public employee bargaining units and provides in part:

(a) All employees throughout the state within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(7) Faculty of the University of Hawaii and the community college system; . . .

Upon a review of the duties and responsibilities of Position No. 82635, the Board concludes that the subject position performs duties which are characteristic to the Unit 7 faculty of the University of Hawaii and community college system.

Section 89-6, HRS, however, specifies which employees are to be excluded from any appropriate bargaining unit and coverage under Chapter 89 and provides in part:

No . . . individual concerned with confidential matters affecting employee-employer relations . . . shall be included in any appropriate bargaining unit or entitled to coverage under this chapter.

In interpreting the exclusionary language of Section 89-6, HRS, the Board, in various decisions, established criteria

which must be met in order to justify an exclusion. In its interpretation of the legislative intent of the above cited section, the Board, in Decision No. 95, Hawaii Government Employees' Association, 2 HPERB 105 (1978), stated:

Giving the subject statutory phrase its plain and ordinary meaning, the Board believes that the Legislature intended to exclude from coverage of Chapter 89, HRS, those individuals who, in the regular course of their employment, are concerned with matters "not intended for the eyes or ears of the rank-and-file or their negotiating representative" affecting employee-employer relations. We are of the opinion that the confidential matters must directly produce an effect upon or influence or alter employee-employer relations.

Id. at 145-147.

In defining what constituted confidential matters affecting employee-employer relations, the Board noted:

As to the question of secretness of the data, it should be noted that under our law supervisors may be included in units. Hence, confidential employees must know matters pertaining to employee-employer relations which are not made known to included supervisors. Included supervisors may have authority to exercise independent judgment respecting hiring, transfers, suspensions, layoffs, recalls, promotions, discharges, assignments, rewards, discipline, grievance adjustments and still be considered includable. Thus, the material with which employees must be concerned in order to be considered confidential employees under Chapter 89, HRS, must be different than that which is known by supervisors concerning such aforementioned personnel matters. (Cite omitted).

The Board is of the opinion that the term employee-employer relations includes collective bargaining (contract negotiations, application and administration) and all matters affecting employee-employer relations which are made non-negotiable by Subsection 89-9(d), HRS, but upon which the employer

is required by Subsection 89-9(c), HRS, to consult with the unions.

Id. at 147.

As summarized in Decision No. 95, supra, the following criteria must be met to designate an employee as confidential for exclusion pursuant to Section 89-6, HRS:

1. Working in the regular course of one's employment with matters
2. which are not intended for the eyes and ears of the rank-and-file and the unions
3. and which matters are capable of producing an effect or influence upon or change in employee-employer relations
4. such work normally being performed as a subordinate to an individual who is a managerial employee who formulates and effectuates management policy in the field of employment relations.

Id. at 147.

After a review of the duties and responsibilities of Position No. 82635, the Board concludes that the position will regularly work with matters of a confidential and sensitive nature which are matters capable of producing an effect on or influencing employee-employer relations. The position, located in the office of the Dean of Student Affairs, is responsible for advising and assisting complainants in preparing and filing complaints against UH personnel which may result in recommendations calling for disciplinary actions against other bargaining unit members. As such, the subject position has access to and is involved with matters which are not intended for the eyes and ears of the rank-and-file and the unions. Serious conflicts of


interest may result if the position is included in the bargaining unit. State of Hawaii, 1 HPERB 403 (1973).

ORDER


Position No. 82635 is concerned with confidential matters affecting employee-employer relations and should be, pursuant to Section 89-6, HRS, excluded from bargaining unit 7 and coverage under Chapter 89, HRS.

DATED: Honolulu, Hawaii, January 15, 1992.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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