

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. RA-08-175
	)	
BOARD OF REGENTS, University	)	DECISION NO. 323
of Hawaii,	)	
	)	FINDINGS OF FACT, CON-
Petitioner,	)	CLUSIONS OF LAW AND
	)	ORDER
and	)	
	)	
HAWAII GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME LOCAL 152,	)	
AFL-CIO,	)	
	)	
Intervenor.	)	
_____	)	

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On August 29, 1990, the BOARD OF REGENTS of the University of Hawaii (UH, 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 alleges that Position No. 80796, previously classified as a UH Environmental Safety Specialist V and included in bargaining unit 8 (Personnel of the UH and Community College system) has been reclassified to Director of Environmental Health and Safety, which is encompassed within the University of Hawaii Executive/Managerial Classification plan. As such, the BOR contends that the position is a top-level managerial and administrative position properly excludable under the provisions of Section 89-6(c), Hawaii Revised Statutes (HRS).

On October 5, 1990, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA or Union) filed a Petition for Intervention in the proceedings. The Board granted the HGEA's Petition for Intervention in Order No. 805, issued on October 9, 1990. A hearing was held on November 21, 1990. The parties were accorded full opportunity to present witnesses and arguments and submitted post-hearing briefs on December 27, 1990.

Based upon a full consideration of the record in this case, 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 the employees of the UH, including the employees in bargaining unit 8.

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 8.

According to the position description, the Director of Environmental Health and Safety is under the general direction of the Director of Campus Operations and is located in the Environmental Health and Safety Office of Campus Operations at the UH Manoa campus. The position will administer, through subordinate professional program specialists, the management and implementation of systemwide and Manoa campus Environmental Health and Safety programs. The position will perform the following duties in the approximate percentages of worktime:

- (1) Administer the implementation of various system-wide Environmental Health and Safety programs including the Radiation Safety, Diving Safety, Biological Safety, Industrial Hygiene, and Fire Safety Programs, and direct and administer a health and safety training program (75%);
- (2) Plan and direct program and financial document preparation including operating and biennial budgets, personnel reports, inventory control, and program status and activity reports (10%);
- (3) Direct the review of plans for all new construction and modifications of existing facilities within the campus, and coordinate a Capital Improvement Project (CIP) program with the University's Facilities Planning and Management Office for the upgrading of campus facilities to ensure compliance with applicable health and safety regulations (5%);
- (4) Act on behalf of the Office of the President in abating violations when cited by enforcing agencies; serve in an Executive or Ex-Officio capacity on various committees such as the Radiation Safety Committee, Diving Control Board, and Institutional Biosafety Committee; and coordinate campus activities with other State health and safety agencies, such as the Department of Labor's Division of



Occupational Safety and Health and the Department of Health's Hazard Evaluation and Emergency Response Branch (5%); and

- (5) With delegated authority from the President, act as the University's safety coordinator and chair the University's Health and Safety Committee and advise and assist other University campuses on matters relating to environmental and occupational health and safety, abating cited violations, evaluating potentially hazardous conditions, and conducting inspections as necessary (5%). BOR's Exhibit (Ex.) D.

According to the class specifications, the position involves "planning and administering the implementation of radiation, diving, biological, and fire safety programs, hazardous waste disposal, and occupational safety and health programs; developing appropriate policies, procedures, and prevention and control measures for each of the program areas; directing the review of plans for all construction and modification of existing facilities on the Manoa campus to ensure compliance with applicable health and safety regulations; preparing and executing program budgets; acting on behalf of the President in abating violations; and serving on various health and safety committees." BOR's Ex. E. According to the Table of Organization, the

position will supervise a staff of eleven employees--ten Environmental Safety professionals and one Secretary I--within the Environmental Health and Safety Office. BOR's Ex. A; Tr.

p. 85. Presently, the position supervises five professional and one clerical position. BOR's Ex. D.

James Oshiro, UH Personnel Officer VI, testified that Position No. 80796 is at the head of an ongoing complex organization which has many diverse and overlapping functions with other campus organizations located throughout the U.H. system. Tr. pp. 37-38. Oshiro recommended that the position be classified managerial because in his opinion, it met the criteria reflected in the Board's Decision No. 95. Tr. p. 45. According to Oshiro, the position participates regularly in decision making and policy making processes, has the authority to determine program objectives as well as determine the means and resources needed to achieve those objectives, and is vested with the authority to act for the agency in dealing with a significant number of employees. Tr. pp. 46-47.

On cross-examination, Oshiro testified that the responsibilities of the subject position were similar to those of the old position, but that in the past those responsibilities were not carried out. Tr. p. 67.

According to the prior position description for the Director of Environmental Health (previously classified as a UH Environmental Specialist V) the position was formerly designated as the Director of the Office of Environmental Health and Safety.

The position was responsible for the development, management, and administration of the Manoa campus' Environmental Health and Safety programs. Work entailed the application of advanced knowledge and skills in administering an office and carrying out its assigned functions, and coordinating all campus environmental health program functions in order to ensure the health and safety of faculty, staff, students and visitors. The position performed the following duties in the approximate percentages of worktime:

- (1) Administer the execution of the Manoa campus' Environmental Health and Safety programs including the Radiation Safety, Hazardous Materials Management and Laboratory Safety programs; administer the maintenance and inspection of fire suppression equipment in campus facilities; develop and administer a campus health and safety training program; and coordinate campus departmental activities in the health and safety area (60%);
- (2) Plan, organize, and direct the operations of an office responsible for environmental health and safety; including the preparation of biennial and annual operating budgets and the preparation and processing of fiscal and personnel documents (25%);
- (3) Review plans for all new construction and modification of existing facilities within the campus,



and coordinate a CIP program with the University's Facilities Planning Office for the upgrading of campus facilities to ensure compliance with applicable health and safety regulations (10%); and

- (4) Act on behalf of the Office of the Chancellor in abating violations when cited by enforcing agencies; serve in an Executive or Ex-Officio capacity on various environmental committees and coordinates activities with other State safety agencies, such as the Dept. of Labor's Division of Occupational Safety and Health (5%). BOR's Ex. B.

According to the prior class specifications for the Director of Environmental Health (previously classified as a UH Environmental Safety Specialist V), the position was involved in the application of advanced knowledge and skills in administering an office responsible for environmental health and safety and carrying out its assigned functions, including coordinating all campus environmental health program functions in order to protect the health and safety of all faculty, staff, and students. The position operated under general administrative supervision with wide latitude for the exercise of independent judgment, initiative, and decision making and supervised a staff of highly skilled professional and technical employees, which may have included subordinate level supervisors. BOR's Ex. A.

Noel Ono, HGEA Classification Officer, testified that the Director of Campus Operations and the Vice-President for Finance and Operations have systemwide responsibility for administering environmental health and safety programs. Tr. pp. 110-111. Further, after reviewing the position descriptions for both the Environmental Safety Specialist V and the Director of Environmental Health and Safety, Ono found the two job descriptions to be very similar. He believed that semantic changes in the use of certain verbs accounted for the differences between the two job descriptions. Tr. p. 105. In Ono's opinion, the subject position is characteristic of the existing Environmental Safety Specialist V class which is included in Unit 8. Tr. pp. 106-107.

The incumbent of the subject position, Roy Takekawa, testified that his job responsibilities had shifted away from the handling of day-to-day type operations, to developing more policies to deal with the various safety and health issues that have come up over the past several years. Tr. pp. 88-89.

The current Director of Campus Operations, Allan Ah San, added that Takekawa has the final say on funding and in effect influences the final outcome of any decision or policy to be implemented. Tr. pp. 97-98. Ah San testified that he defers all technical matters relating to the environmental health and safety program to Takekawa and is totally dependent upon his knowledge and skills. Tr. pp. 99-100. On cross examination, Ah San indicated that his dependence on Takekawa as a technical



expert as well as for promulgating policies, began prior to the position being reclassified. Tr. p. 101.

#### DISCUSSION

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

No . . . top-level managerial and administrative personnel . . . 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 determining whether an individual occupies a top-level managerial or administrative position, the Board, in Decision No. 75, Hawaii Nurses Association, 1 HPERB 660 (1977), stated, in pertinent part:

This board believes that the proper test of 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 the authority and judgment to direct employees, determine 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.

Id. at 666 [footnotes omitted].

In Decision No. 95, Hawaii Government Employee's Association, 2 HPERB 105 (1978), the Board supplemented this criteria by stating:

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 policy 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.

\* \* \*

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, defined the term policy 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 or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions". 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 the methods, means and extent of achieving such objectives.

The term "formulation" 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 assumed that all persons in State government, except for elected officials, judges and certain other officers not here relevant, have supervision and that their decisions technically take the form of recommendations subject to approval by higher authority. It is the function of a position, not its place on the organizational chart upon which top-level manager or administrator is based. "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". State of New York, supra.



After a thorough review of the duties and responsibilities of the Director of Environmental Health and Safety, the Board concludes that the position is responsible for administering and implementing the various Safety and Health programs throughout the University system. The testimony of Ah San tends to establish that the position will have a high degree of authority and independence in operating the Office of Environmental Health and Safety. In fact, according to Ah San, all of his division heads have "independence and authority with respect to operational planning, program planning and budget planning for their specific areas with respect to who, what, when and how and why." Tr. p. 96.

The issue here is at what level and to what extent does the subject position exercise "the authority and judgment to direct employees, determine methods, means and personnel, by which the employer's operations are to be carried out." While it appears that the position is afforded a wide degree of latitude and discretion with which to carry out its duties and responsibilities, the Board does not believe based on the evidence that the position possesses the authority and judgment to determine methods, means and personnel by which the Employer's operations are to be carried out.

Although absolute discretion or authority to act is not a prerequisite to finding that an individual formulates policy, in the instant case, the subject position relinquishes most if not all of its authority and judgment to the Director of Campus

Operations, who, according to class specifications, "has overall and final authority for systemwide support activities and is recognized as the top technical authority in the program areas administered". Union Ex. H. The subject position's authority and judgment is further diluted by the Vice President for Finance and Operations who is responsible for "the day-to-day operational activities in facilities management, auxiliary services, environmental health and safety. . . ." Union Ex. I.

In addition, although the Board believes that the authority to classify positions should be left with the respective parties, it finds the position descriptions for the Director of Environmental Health and Safety and the UH Environmental Safety Specialist V to be very similar, and that based on the similarities, the positions are not significantly different to warrant a managerial exclusion.

According to the position description for the Environmental Safety Specialist V, the major duties and responsibilities of the position involve "the development, management, and administration of the Manoa campus' Environmental Health and Safety programs." BOR Ex. B. Similarly, according to the position description for the Director of Environmental Health and Safety, the position "administers through subordinate professional specialists, the management and implementation of systemwide and Manoa campus Environmental Health and Safety programs." BOR Ex. D.

As Union witness Ono alluded to in his testimony, the difference between the terms "development, management, and administration" and "management and implementation" is cosmetic and only involve semantic changes. Tr. p. 105.

Furthermore, the Board finds the use of the term "systemwide" in the position description for the Director of Environmental Health and Safety to be extraneous. Taken in context, the term implies that the increase in the subject position's job responsibilities (which include increased participation in policy and decision making) resulted from the need to implement "system wide" Environmental Health and Safety programs.

However, under cross examination, the BOR's witness, James Oshiro testified that in effect the incumbent in the subject position should have been managing and implementing a system wide Environmental Health and Safety program prior to the position being reclassified, but had failed to do so. Tr. pp. 65-67.

The incumbent in the position, Roy Takekawa, indicated that the basic difference between the job responsibilities for the Environmental Safety Specialist V and the Director of Environmental Health and Safety, dealt with the amount of manpower that was available to each position. He testified that the Environmental Safety Specialist V position was originally responsible for only two programs but that "on paper, we had responsibility for these other areas as wells (sic) as fire safety, but



those were handled on a very--because of our lack of manpower and actually lack of expertise in those areas, we had to depend on outside sources." Tr. p. 86.

The testimony of Oshiro and Takekawa tend to establish that the addition of professional personnel within the Environmental Health and Safety Office provided the subject position with the manpower needed to administer and implement the various system wide Environmental Health and Safety programs. This in turn led to the significant increase in the subject position's duties and responsibilities. However, prior to being reclassified, the subject position was responsible for the same duties and responsibilities, only the incumbent (Takekawa) could not carry them out due to the lack of manpower. The Board finds that the subject position did not incur a material increase in the degree of difficulty or complexity in its job duties and responsibilities, but rather, is fulfilling the job requirements that were established prior to reclassification.

Thus, the Board concludes that the duties and responsibilities of the subject position are consistent with the Environmental Safety Specialist V, which is included in the bargaining unit.

#### CONCLUSIONS OF LAW

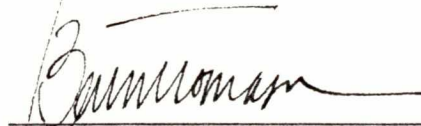
Position No. 80796 is not a top-level managerial or administrative position.

ORDER

Position No. 80796, Director of Environmental Health and Safety, should remain in the appropriate bargaining unit.

DATED: Honolulu, Hawaii, February 21, 1992.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



GERALD K. MACHIDA, Board Member



RUSSELL T. HIGA, Board Member

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