

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. DR-03-54
)	
LEWIS W. POE,)	DECISION NO. 365
)	
Petitioner.)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND DECLARATORY
)	ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY ORDER

On June 8, 1994, Petitioner LEWIS W. POE (POE) filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board). POE requested clarification as to when an employee legally becomes an essential employee within the meaning or scope of Section 89-12, Hawaii Revised Statutes (HRS). POE specifically requested an interpretation of Section 89-12(c)(2)(B), HRS, and another statutory provision in Section 89-12(c)(2) which states, "[a]fter receipt of notice, it shall be the duty of the essential employee to contact the public employer for the essential employee's work assignment."

FINDINGS OF FACT

According to POE's affidavit submitted in support of his petition, Decision No. 351 (April 16, 1994) and Order No. 1033 (April 16, 1994) designated five Tower Operator I positions as essential.¹ POE stated that his immediate supervisor, Allen F. Sandry, distributed a regular and a revised work/strike schedule

¹In fact, however, the Board designated three Tower Operator I positions as essential in Order No. 1033 issued on April 16, 1994 and Decision No. 352 issued on April 22, 1994.

for the month of April 1994. On or about Tuesday, April 19, 1994, POE was informed by the Hawaii Government Employees Association (HGEA) that as a member of Unit 03 he was legally an essential worker only when notified in accordance with Section 89-12(c)(2), HRS.²

The Board takes notice that on or about April 14, 1994, John Waihee, III (State), by and through his attorneys, filed a Motion for Interlocutory Order Pending Issuance of Final Board Decision in Case Nos.: S-03-29a, S-04-29b and S-13-29c with the Board. The State requested that certain positions be designated as

²Section 89-12(c)(2), HRS, provides as follows:

The public employer shall give notice to an essential employee:

- (A) By serving or delivering a copy thereof to the essential employee being notified; or
- (B) By mailing a copy thereof by certified or registered mail, return receipt requested, deliverable to the addressee only, addressed to the essential employee being notified at the essential employee's place of residence; or
- (C) If service cannot be effected as set forth in (2)(A) or (2)(B) above, or if the strike is in progress, by publishing at least once a day for three consecutive days, a copy thereof in both of the newspapers having the largest general circulation in the State. After the final publication, it shall be conclusively presumed that the essential employee has received such notice.

After receipt of notice, it shall be the duty of the essential employee to contact the public employer for the essential employee's work assignment.

essential pro tempore, until such time as the Board has the opportunity to complete its investigation and issue its final decision on the matter. Thereafter on or about April 15, 1994, the State filed an Amended Exhibit "A" to Petitioner's Motion for Interlocutory Relief which designates the following request for the Harbors Division, Oahu District:

<u>BU AND CLASS TITLE</u>	<u>TOTAL NO. OF EMPLOYEES</u>	<u>MIN. NO. ESSENTIAL EMPLOYEES</u>	<u>WHEN REQUIRED</u>
03 Tower Oper I	5	3	To be placed on 8 hr shifts; 24 hrs/day; 7 days/ week

The Board also takes notice that on or about April 16, 1994, the Board issued Order No. 1033, Order Granting Petitioner's Motion for Interlocutory Relief Pending Issuance of Final Board Decision. The Board ordered that the positions set forth in the exhibits attached to Petitioner's motion were deemed to be essential and were required to be staffed in order to avoid an imminent danger to the health and safety of the public.

With regard to the case at bar, the Board designated three Tower Operator I positions as essential. The Board further ordered that the General Orders issued in Decision No. 351, John Waihee, III, 5 HLRB 304 (1994) were incorporated by reference.

In Decision No. 351, the Board ordered, in part, the following as General Orders:

1. The class or position titles identified in the foregoing portion of the order are designated as essential positions.

2. The Employer may designate any or all incumbents in the essential positions as essential employees. Each incumbent in an essential position, regardless of designation as an essential employee, shall notify the Employer of his or her current residence and mailing addresses and telephone numbers prior to the onset of a strike by Units 03, 04 and 13 employees. The Employer shall inform incumbents in essential positions that they may be designated as essential employees and that they are required to supply this information.
3. The Employer shall designate employees to fill essential positions. Each Employer shall give notice to an essential employee in accordance with Subsection 89-12(c)(2), HRS. It is the duty and responsibility of the essential employee to contact the Employer for his or her work assignment. This duty continues throughout the duration of the strike. . . . [Emphasis added.]

On April 20, 1994, POE received a letter entitled, "Notice to Essential Employees," from Calvin M. Tsuda, Deputy Director for the Harbors Division of the Department of Transportation. The Notice, dated April 17, 1994, addressed to POE states:

Dear Essential Employee:

Pursuant to Section 89-12(c), Hawaii Revised Statutes, the Hawaii Labor Relations Board (HLRB) has issued a Decision and Order designating specific classes of work at certain workplaces as positions essential to the health and safety of the public. The Department is thereby authorized to select employees to fill those essential positions in the event of a strike by your bargaining unit.

You have NOT been scheduled to work as yet. However, as an incumbent to an essential position you MAY be selected to fill that essential position as the need arises. At that time, we will notify you of the place, days and hours that you are to report for

work. Please be sure that we have your current telephone number, to expedite contacting you. When contacted, you must report for work as scheduled and a written notice will be given to you. If you fail to report for work as scheduled and are not able to show good cause for your failure to report, you may be subject to disciplinary and/or other legal action.

If you have any questions, please contact:
Mr. Barry Kim
587-2100

Exhibit A.

On April 22, 1994, the Board issued Decision No. 352, John Waihee, III, 5 HLRB 320 (1994), which rescinded the interlocutory order issued in the case on April 16, 1994. Based upon its investigation, the Board designated three Tower Operator I positions as essential; one per eight hour/shift; 24 hours/day; 7 days/week. The Board also included the General Orders referenced above in Decision No. 352.

POE also attached a Notice To Essential Employees addressed to Ms. Beverly Miller to the subject petition. That notice states:

Dear Essential Employee:

Pursuant to Section 89-12(c), Hawaii Revised Statutes, the Hawaii Labor Relations Board (HLRB) has issued a Decision and Order designating specific classes of work at certain workplaces as positions essential to the health and safety of the public. The Department is thereby authorized to select employees to fill those essential positions in the event of a strike by your bargaining unit.

You have been selected to fill an essential position. As an essential employee, you must work during the strike as scheduled. Your work schedule is as follows:

Place: Aloha Tower
Days: beginning April 18, 1994; and
thereafter as scheduled
Hours: 2:30 p.m. to 10:30 p.m.; and
thereafter as scheduled

If you fail to report for work as specified above and are not able to show good cause for your failure to report, you may be subject to disciplinary and/or other legal action.

If you have any questions, please contact:
Mr. Barry Kim
587-2100

Exhibit B.

DISCUSSION

In this petition, POE requests clarification of when an employee becomes an essential employee under applicable statutes. POE claims that he was notified by his employer that he was an essential employee and therefore reported to work. POE claims that he is thus legally entitled to standby compensation and/or standby pay.

Subsection 89-12(a), HRS, provides that participation in a strike is unlawful for any employee who is an essential employee.

Section 89-2, HRS, sets forth the definitions of "essential employee" and "essential position" and provides as follows:

"Essential employee" means an employee designated by the public employer to fill an essential position.

"Essential position" means any position designated by the board as necessary to be worked in order to avoid or remove any imminent or present danger to the public health or safety, which position shall be filled by the public employer.

According to the foregoing definitions, the Board designates the essential positions necessary to be worked and the public employer fills the position or assigns the public employee to the essential position. Section 89-12(c)(2), HRS, which is set forth supra, provides for the notice requirements which the employer must comply with in order to properly notify essential employees. Thus, the Board concludes that the employee becomes an essential employee when the employee is notified by the employer that he or she is designated to fill an essential position. Once the employee is notified that he or she is designated as an essential employee, pursuant to Section 89-12(c)(2), HRS, the employee is required to contact the employer for the employee's work assignment. The employee cannot participate in a strike by refusing to perform the assigned services. By contrast, an incumbent in an essential position, i.e., an employee who occupies a position which has been designated by the Board as essential but has not been designated to fill an essential position, retains the right to participate in a strike.

In this case, the letter to POE states that he had not been scheduled to work but as an incumbent to an essential position, he might be selected to fill that position as the need arose. If POE were selected to fill the essential position, the employer would notify him of the place and time to report to work. POE was advised to apprise the employer of his current telephone number to expedite contacting him. When contacted, POE would be required to work as scheduled and a written notice would be given to him. The letter further notified POE that failure to report for

work as scheduled without good cause could result in discipline or other legal action.

The letter received by POE is somewhat confusing in that it is entitled "Notice to Essential Employee" and contains the salutation "Dear Essential Employee." However, the Board finds that despite the misleading title and salutation, which could lead a recipient to believe that he or she had been designated an essential employee, the entire content of the notice clearly indicates that the recipient of the notice had not yet been designated as an essential employee and would be so designated only after receiving notification of the "place, days and hours" to report for work. It is apparent that the employer, in sending out the notice under discussion was attempting to comply with Board General Order No. 2 (set forth above) by informing incumbents in essential positions that they may be designated as essential employees.

The letter to POE is contrasted with the letter addressed to Ms. Miller. It is clear from the letter addressed to Ms. Miller that the employer designated Ms. Miller to fill an essential position and also scheduled her for work. Thus, upon receiving such notice she was an essential employee and precluded from participating in the strike.

Based upon the foregoing, the Board concludes that an employee becomes an essential employee when the employee is notified by the employer that he or she has been designated to fill an essential position. The Board further concludes that POE failed

to establish any entitlement to standby compensation. There is no basis in the record to establish that the employer directly or constructively placed him on standby status.

CONCLUSIONS OF LAW AND DECLARATORY RULING

The Board has jurisdiction over the instant petition pursuant to Section 91-8, HRS, and Administrative Rules Section 12-42-9.

A public employee becomes an essential employee when the employee is notified by the employer that he or she has been designated to fill an essential position.

DATED: Honolulu, Hawaii _____ April 11, 1995 _____.

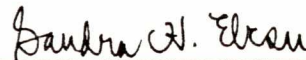
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