

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. RA-08-208
)	
BOARD OF REGENTS, University)	DECISION NO. 380
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 January 10, 1996, the BOARD OF REGENTS, 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. 80590, UH Director of Waikiki Aquarium has been reclassified to Waikiki Aquarium Director. The BOR contends that the position should be excluded from bargaining unit 08 because it is a confidential and top-level managerial position involved with administrative and managerial work, which includes directing, organizing, coordinating and controlling activities of the Waikiki Aquarium. The BOR, therefore, contends that the position is properly excludable under the provisions of Section 89-6(c), Hawaii Revised Statutes (HRS).

On January 19, 1996, 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. 1285, issued on February 5, 1996. A hearing commenced on March 8, 1996. The BOR indicated that it would submit a new position description for the position and the Union indicated that it would concur with the exclusion based on new information received.

Thereafter, on May 10, 1996, the petitioner submitted the following documents:

1. Affidavit of Evelyn H. Nowaki (Nowaki), Director of Faculty Human Resources and Legal Affairs, regarding Position No. 80590, dated April 19, 1996;

2. Position description for Director, State Aquarium (Exhibit A);

3. Class specifications for the Director, State Aquarium (Exhibit B); and

4. Letter, dated March 29, 1996, from Peggy S. Hong, System Director of Human Resources (Hong) to Russell Okata, Executive Director, HGEA, requesting and receiving concurrence with the proposed exclusion of Position No. 80590 (Exhibit C).

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 08.

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 08.

According to the revised position description for the Director of the State Aquarium, the position heads a major subdivision of the University of Hawaii and is directly responsible for the executive management of its administrative, financial, personnel and operational support functions. In addition, the position is directly responsible for the coordination of new program initiatives and oversight of the physical infrastructure. The incumbent directs the work of the Waikiki Aquarium with considerable discretion to determine the method, means and personnel to carry out the mission and goals for each of the Aquarium's six branches. The position will perform the following duties in the approximate percentage of worktime:

- (1) Directs long and short-range planning studies to determine future resources and physical and operational facility requirements and to project changes in program scope. Supervises the regular conduct of utilization analyses of existing resources to plan for appropriate modifications. Directs all planning activities and preparation of program and management policies, strategies, plans, organization and staffing, schedules, funding and budget in a manner consistent with the mission and goals of the State Aquarium and the standards required to maintain its accreditation and long-term financial stability. Monitors the building,

grounds maintenance and physical plant operations to ensure employee and public safety and animal welfare, as well as upkeep of positive appearances as a major visitor attraction (35%);

- (2) Is responsible for the development and control of the State Aquarium's total budget, including expenditure and accounting of general fund and special fund allocations; financial management of all extramural funds; fund raising and membership program with 4,000+ members and control of proceeds therefrom; operation of a retail business with annual sales of \$500,000+ and inherent cash flow, profit margin, inventory control and independent accounting system responsibilities; and direction of the publicity and marketing programs and campaigns. Is solely responsible for the hire, discipline and termination of State Aquarium employees. Oversees the personnel management of 38 full-time civil service, APT and RCUH employees in six operational divisions and 120 volunteers; formulates operating policies and procedures to ensure quality and productivity; develops staffing plans; investigates EEO/AA and other complaints and determines appropriate corrective action, including discipline; and is the Step 1 designee under the Unit 08 grievance procedures. Deals directly with Federal, State, City and County agencies governing

animals in captivity, endangered species, marine mammals, water quality and wastewater management and is solely responsible for compliance with their statutes and regulations (25%);

- (3) Is responsible for the ethical care and management of all live organisms, specimens and exhibits. Directs the search for live exhibit organisms and other exhibit materials; collection, proper accession procedures, quarantine, feeding and husbandry of organisms; design of exhibits, life support systems, water quality tests of display habitats; ensures compliance with all applicable federal and state laws and regulations, including preparation and submittal of requisite reports; conduct of research on aquaculture and husbandry techniques, including field work, and psychological, behavioral and other studies not adversely affecting the organisms. Conceptualizes and develops innovating new exhibits to captivate viewers' attention, including interactive devices involving computers, CD-ROM, audio/visual media and other means to ensure user participation and learning (20%);

- (4) Oversees the planning and development of educational programs serving over 30,000 students annually, including the Blue Water Marine Laboratory, outreach programs, lecture series,

trips, travel tours, programs for school children, training programs for volunteers, and the production of educational materials. Ensures the coordination of the State Aquarium education programs with those of the Department of Education and private schools and sees that scientific accuracy and appropriate teaching methods are used by Aquarium educators (15%); and

- (5) Serves as the chief public spokesperson for the State Aquarium; serves on committees and attends public hearings which affect the interests of the State Aquarium; represents the University of Hawaii in dealing with other national and international aquariums, zoos, museums; and serves as liaison and ex-officio member of the Board of Directors of the Friends of the Waikiki Aquarium (5%). Exhibit A.

According to class specifications, the Director of the State Aquarium is a single-position class which is directly responsible for the executive management of the State Aquarium. The incumbent directs the work of the State Aquarium with considerable discretion to determine the methods, means, and personnel to carry out the mission and goals of the Aquarium through multiple functional branches. The Aquarium is a quasi-private institution supported in large measure by private donations and proceeds from retail activities. The budget of the State Aquarium is funded by the State as an entity separate from the University (i.e., line item in Culture and Recreation as opposed to

Higher Education). The Director is solely responsible for compliance with Federal and State statutes and regulations relative to animals in captivity, endangered species, marine mammals and water quality. The Director, on behalf of the University, deals directly with Federal and State regulatory agencies which enforce these provisions.

The Director is responsible for the allocation and management of a multi-million dollar annual budget, an accounting system independent of the University as well as the general fund accounting system, an on-site gift shop with sales of over half-million dollars annually, education programs serving 30,000 children and adults annually, a community membership program with over 4,000 members with substantial contributions to the Aquarium, an active public relations program, the Blue Water Marine Laboratory and a variety of sophisticated live exhibits, including interactive video, laser disc and computer equipment. Management also includes responsibility for employer-employee relations such as investigating, hearing and decision-making on employee grievances, EEO/AA complaints and disciplinary issues.

The Director serves as the chief spokesperson for the UH on animal rights issues affecting the State Aquarium, represents the State and the University in dealing with other national and international aquariums, zoos, and museums.

The work of the Director is subject to review by the Senior Vice President for Research and Graduate Education for the accomplishment of program objectives. The Director exercises significant authority, wide latitude for individual initiative and

independent judgment in the overall administrative and operational management of the State Aquarium.

The Legislature, in Act 184, Session Laws of Hawaii, 1995, retitled the Waikiki Aquarium as the State Aquarium. The State Aquarium is now organizationally located one level below the Senior Vice President for Research and Graduate Education, a position which is equivalent to a Deputy Director of a State department. The Director of the State Aquarium now reports directly to the Senior Vice President for Research and Graduate Education with full responsibility for the State Aquarium.

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:

* * *

(8) Personnel of the University of Hawaii and the community college system, other than faculty;

* * *

Upon a review of the duties and responsibilities of Position No. 80590, the Board concludes that the subject position performs duties which are characteristic to the Unit 08, Personnel of the University of Hawaii and the community college system, other than faculty.

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 employer-employee 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 regulations.

Id. at 147.

The Director is in charge of the program and management policies of the State Aquarium. Such responsibility extends to staffing, scheduling and budgeting of the Aquarium. Because the Director directs the Aquarium's personnel and resources to meet the goals of the Aquarium, the position has the ability to profoundly produce an effect upon or alter employee-employer relations.

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 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 Employees' Association, supra, 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.

Id. at 143.

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 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.

Id. at 144-145.

The work of the Director of the State Aquarium is subject to review by the Senior Vice President for Research and Graduate Education; however, the Director has significant authority, latitude for individual initiative and independent judgment in the

overall administrative and operational management of the State Aquarium. Because of the Director's control over all aspects of the State Aquarium, which includes all planning activities, the development of the Aquarium's exhibits and the solvency of the Aquarium, it is the Director who is instrumental in structuring the Aquarium's policies to fulfill its mission. The Director of the State Aquarium is the top-level policy-maker.

After a review of the duties and responsibilities of Position No. 80590, the Board finds that the position will head the State Aquarium, a major subdivision of the University of Hawaii, and will directly be responsible for the executive management of its administrative, financial, personnel and operational support functions as well as coordination of new program initiatives and oversight of the physical infrastructure including new construction.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject petition pursuant to Section 89-6, HRS.

Based on the position's duties and responsibilities, the Board concludes that the subject position is a confidential and a top-level managerial position.

Consequently, under the provisions of Section 89-6, HRS, and previous Board decisions, the position should be excluded from bargaining unit 08 and coverage under Chapter 89, HRS.

ORDER


Position No. 80590 is hereby excluded from collective bargaining unit 08 and coverage of Chapter 89, HRS, as a confidential and top-level managerial employee.

DATED: Honolulu, Hawaii, July 26, 1996.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

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