

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
STATE OF HAWAII,)	
)	
Petitioner,)	
)	Cases No. RA-03-8
and)	<u>RA-13-9</u>
)	
HAWAII GOVERNMENT EMPLOYEES')	Decision NO. 40
ASSOCIATION, Local 152, HGEA/)	
AFSCME,)	
)	
Respondent.)	

DECISION AND ORDERS

The Petitioner (also referred to hereafter as the Employer) filed with this Board its petition in Case No. RA-03-8, on October 26, 1973, and its petition in Case No. RA-13-9 on November 27, 1973. With the assent of the parties, the cases were consolidated for hearing.

In Case No. RA-03-8, the Employer seeks to exclude from bargaining unit 3 (non-supervisory white collar employees) Ms. Lois Ikegami who occupies the position of secretary to the Assistant Vice President of Academic Affairs at the University of Hawaii.

In Case No. RA-13-9, the Employer seeks to exclude from bargaining unit 13 (professional and scientific employees) Mr. Wayne Omuro, Project Administrator of the Central Administrative Unit which is a part of the Department of Social Services and Housing.

Case No. RA-03-8 after due notice came on for hearing before the entire Board on November 14, 1973. The hearing in Case No. RA-13-9, was, after due notice, held before the Board on November 28, 1973.

Said hearings were held on record with all testimony under oath and a transcript was made. Both parties had full opportunity to present evidence and argument on all issues involved.

On the basis of the entire record in these proceedings, this Board makes the following Findings of Fact, Conclusions of Law and Orders.

CASE NO. RA-03-8

FINDINGS OF FACT

1. The Petitioner is a public employer as defined in Section 89-2(9), Hawaii Revised Statutes (hereafter H.R.S.)

2. The Respondent (hereafter H.G.E.A.) is the exclusive representative of units 3 and 13.

The above findings are incorporated by reference in the discussion hereafter of Case No. RA-13-9.

3. The Assistant Vice President of Academic Affairs at the University of Hawaii is Mr. Dewey Kim (Tr. 53)

4. Mr. Kim's secretary is Ms. Lois Ikegami. (Tr. 129)

5. The H.G.E.A. is the certified exclusive representative for unit 8 (personnel of the University of Hawaii and the Community College system, other than faculty) as defined by Section 89-6(a)(8), H.R.S. (Tr. 12)

6. Ms. Ikegami presently is included in unit 3 as defined in Section 89-6(a)(3), H.R.S. (Tr. 141)

7. Mr. Kim was assigned to serve on the University's Academic Task Force for collective bargaining and on the Policy Coordinating Counsel for collective bargaining. (Tr. 8)

8. Mr. Kim is the vice chairman and secretary of the aforesaid task force.

9. The task force is concerned with collective bargaining for units 7 and 8. There is no evidence that it was or will be involved with unit 3 or that Mr. Kim will be involved with collective bargaining for unit 3. (Tr. 10, 26, 39, 64, 66, 109)

10. Mr. Kim participated in no negotiating sessions for unit 8. (Tr. 114)

11. Mr. Kim's responsibilities included developing data for the employer's negotiating team for negotiations for units 7 and 8. (Tr. 19)

12. Prior to the commencement of negotiations, Mr. Kim also did anticipatory work on exclusions and inclusions, salaries, leaves, and grievance procedures for unit 8. (Tr. 120 - 122)

13. In this process, he wrote no proposals or memoranda, but was consulted and gave opinions. (Tr. 122)

14. In his consultive capacity Mr. Kim was expected to do more than provide data. His role included, while working within the task force, the development of positions as the bargaining stance to be taken by the Employer on specific issues. As stated by Dr. Kenneth Lau, Secretary of the University: "In other words to develop the alternative postures as to what they would want to put on the table with respect to the work load proposals." (Tr. 19) Mr. Kim did not formulate final policy on bargainable issues but was involved in a small group of persons who were to discuss "positions management would take". (Tr. 78)

15. Mr. Kim was given a copy of the H.G.E.A.'s proposals during negotiations and was asked by Kenneth Lau to react to the proposals. In so doing he was involved in discussions concerning professional leave for unit 8 personnel. (Tr. 115)

16. Ms. Ikegami, Mr. Kim's secretary, has access to confidential matters affecting employer-employee relations in units 7 and 8. There is no evidence that she has access to such matters pertaining to unit 3. (Tr. 39)

17. Ms. Ikegami, was used to some extent, in typing up an employer proposal and counter proposal for negotiations. In this capacity, she was working under the direction of Dr. Kenneth Lau, Secretary of the University, who is the University's spokesman in unit 7 and 8 negotiations. (Tr. 20, 46)

18. Ms. Ikegami is part of a group of secretaries on the second floor of the University's main administration building (Bachman Hall) who do "typing and the work for the negotiating staff." (Tr. 39)

19. Ms. Ikegami saw, had access to, and was responsible for keeping confidential a copy of the unit 8 proposals made by the H.G.E.A. (Tr. 127)

20. Ms. Ikegami sees and reads all mail and documents coming to Mr. Kim, except for those someone might take into him directly. (Tr. 131, 145-146)

21. Ms. Ikegami has access to all of the files on the second floor of Bachman Hall, including the files of the University's President and Dr. Lau. (Tr. 135)

22. Ms. Ikegami saw the unit 8 proposals prior to the time negotiations were held on them. (Tr. 143)

CONCLUSIONS OF LAW

The Employer contends that Section 89-6(c), H.R.S., requires the exclusion of Ms. Ikegami on the grounds that she is an "individual concerned with confidential matters affecting employee-employer relations".

The HGEA's position is that she is not such an individual and particularly is not concerned with confidential matters pertaining to unit 3.

Section 89-6(c) provides that a confidential employee shall not "be included in any appropriate bargaining unit".

In Case No. R-12-8, Decision No. 18, issued on June 6, 1972, this Board adopted the New York Public Employment Relations Board's definition of a confidential employee. Therein, we concluded, in part, that a confidential employee is one who holds a position which requires him or her, in the performance of his or her duties, to "be regularly exposed to confidential information pertaining to labor-management relations of public employment".

We find that the facts in this case demonstrate that Ms. Ikegami indeed is a confidential employee as defined above. We believe that Mr. Kim is privy to the Employer's most confidential internal meetings concerning collective bargaining and that he is expected to make input into planning for collective bargaining for both units 7 and 8.

Moreover, Ms. Ikegami has on occasion, and may reasonably be expected in the future, to do confidential work for Dr. Kenneth Lau who is directly involved in unit 7 and 8 negotiations.

As such we find Ms. Ikegami is a confidential employee.

There remains to be discussed the question of whether she is to be excluded because the confidentiality of her work in employee-employer relations pertains only to units 7 and 8 and she is a unit 3 employee.

As stated above, Section 89-6(c), H.R.S., states that if an employee is a confidential one, said employee shall not be involved in any unit. We believe the policy behind this provision to be one of not putting an employee in a situation in which there is a potential for a conflict of interest. We have no reason to believe that the H.G.E.A. or Ms. Ikegami would ever take advantage of the fact that she is privy to confidential matters pertaining to unit 8, which is represented by the H.G.E.A. The integrity of the union and Ms. Ikegami are not questioned. Nevertheless, the legislative policy must be honored.

In a case decided by the New York PERB, Board of Education, Union Free School District No. 23, Town of Oyster Bay, Nassau County, Massapequa, New York, and Massapequa Federation of Teachers, Local 1442, AFT, (Decision 3-4018, Sept. 4, 1970) a clerical worker's supervisor took part in negotiations for the teachers unit. The clerical worker was not in the teachers unit. Her supervisor took no part in clerical negotiations. Nevertheless, his secretary was excluded from the negotiating unit as a confidential employee.

The superior in question in the New York case was in a situation somewhat akin to that on the second floor of Bachman Hall where Dr. Lau has created, in essence, a pool of confidential secretaries who may be called upon by him to work on collective bargaining matters.

The New York decision said:

"The above facts demonstrate that the assistant superintendent is involved on the primary level in the formulation of the employer's employment relations policies. Therefore, as all his secretaries assist him in all aspects of his work, I find that they should be excluded from the negotiating unit as confidential employees."

In the instant case, Dr. Lau, the University's spokesman in negotiations for units 7 and 8, testified in a response to a question as to whether the "thirteen or fourteen secretaries [on the second floor of Bachman Hall] are all involved in labor relations":

"Well, they are involved in the sense that they handle the materials for their respective offices, but in addition to that I have asked all these girls to consider themselves in effect a complex, so that -- a complex in the sense of being a unit to assist us, when we need additional work during periods when negotiations reach an intensive stage and we need some of them to work in the evening, on Saturdays and Sundays and rather than have the same girls doing all the over-time work, we have asked these girls to stand by so that we can, in effect, spread the work among them.

"MR. HAMADA: Didn't you use the particular secretary [Ms. Ikegami]?"

"A I have used her, yes.

"MR. HAMADA: In typing up the University's proposals and counter-proposals?"

"A To a limited extent in the typing of a proposal and counter-proposal, in typing up final drafts and documents I have used her, yes." (Tr. 45-46)

In view of the foregoing it is our opinion that Ms. Ikegami in her present position should be excluded from unit 3 on the grounds that she is an "individual concerned with confidential matters affecting employee-employer relations."

During the hearing on this matter, there was some discussion of an agreement which had been made between the union and one of the counties regarding the inclusion of an employee. We feel it necessary to point out that such an agreement is not binding upon this Board and does not have value as precedent in unit determination or clarification hearings.

FINDINGS OF FACT

1. The position in issue in this case is Position No. 24347, Project Director of the Central Administrative Unit in the Department of Social Services and Housing.

2. This is a new position.

3. The incumbent in the position is Wayne Omuro.

4. The mission of Mr. Omuro's office is to administer a 7 million dollar federally funded program and involves primarily making purchase of service contracts with private and state agencies for the provision of a variety of programs involving human welfare, such as health and counseling programs. (Tr. 11, Tr. 74) Additionally, Mr. Omuro monitors and may modify or terminate such contracts or effectively recommend such actions. (Tr. 11, 37, 38, 39, 77, 91-92)

5. Organizationally, Mr. Omuro's position is on the same level as that of division administrators in his department. (Tr. 13)

6. He attends top level staff meetings in his department at which policies are formulated. (Tr. 32)

7. Mr. Omuro is directly accountable to the head of the department. (Tr. 12)

8. As head of the Central Administrative Unit, Mr. Omuro has been given the authority to make decisions and effective recommendations which would have a direct impact on employment relations. These recommendations could result in the hiring, firing or transfer of bargaining unit members. (Tr. 36, 37, 38, 77, 91-92, 97-99)

9. While Mr. Omuro, by his own actions cannot, without the approval of higher authority, hire or terminate employees, the responsibilities given to him are such that it can reasonably be expected that his recommendations will carry great weight regarding such matters. (Tr. 11, 38, 39, 56, 59, 74)

10. Mr. Omuro is not directly involved in collective bargaining, but his decisions and recommendations will have an impact on employer-employee relations. (Tr. 62, 67).

CONCLUSIONS OF LAW

It is the decision of this Board that the above facts establish that Mr. Omuro's duties and responsibilities respecting the implementation of management policy place him in the excludable category of "top-level managerial and administrative personnel" under Section 89-6(c), H.R.S. Hence, he should be excluded from the appropriate bargaining unit.

This decision is in line with the Board's consideration of who should be excluded as managerial employees in Case No. R-12-8, Decision No. 18 (June 6, 1972).

Therein we noted that the policy of our Act would be carried out by applying the principles set forth in Textron, Inc., 196 NLRB No. 127, 80 LRRM 1099 (1972). In Case No. R-12-8 we excluded a Captain in charge of research and development from unit 12, although he was not directly involved in collective bargaining, but did perform duties which had an impact on employment policies.

As stated in the Textron case at 80 LRRM 1099, 1101:

"And it may be that other than purely labor relations managerial employees should unquestionably be excluded because of their

responsibility with respect to policies which are inextricably intertwined and of necessity affect or impinge upon the labor relations area. For instance, a corporate representative, charged with the duty of determining where an employer's plants should be located or what capital expenditures a corporation ought to make, may well have such broad managerial discretion as to necessarily involve the determination of matters affecting employment and employment policies that he should be excluded from coverage. It may be that his decisions inevitably will encompass the field of labor relations, even though corporate organization charts may not, on their face, classify him as charged directly with labor relations policymaking."

We find that Mr. Omuro's duties and responsibilities are inextricably bound up with and impinge upon the labor relations area and that his loyalty must be to management so that his decisions may be made free of any potential conflict of interest which might arise if he were in a collective bargaining unit.

We have decided that the two positions which are the subject of these cases should be excluded from collective bargaining units on the basis of evidence presented and the legal conclusions we drew based upon such evidence. This Board, however, is concerned about the vast number of exclusions from certain units which took place during the early phases of implementing collective bargaining in the public sector. The large number of exclusions resulted from stipulations made with an eye toward early elections under our new law. The time has certainly come for a reevaluation of those early exclusions by both the unions and the public employers and, in its turn, this Board. No employee who should be enjoying the benefits of being a member of an appropriate bargaining unit should be denied that privilege. This Board urges the employers and unions to meet, reason together, and make every good faith effort to

narrow the list of exclusions wherever warranted. The early determination of units is not wholly lamentable; it did result in most public employees receiving benefits under negotiated contracts much sooner than would have been possible if initial unit determinations had been severely scrutinized in lengthy contested hearings. However, a reassessment of the initial exclusions is in order and the entire Board encourages the concerned parties to commence at this time this reassessment.

ORDERS

CASE NO. RA-03-8

It is hereby ordered that the position of secretary to the Assistant Vice President for Academic Affairs at the University of Hawaii be excluded from the bargaining unit.

CASE NO. RA-13-9

It is similarly ordered that the position of Director of the Central Administrative Unit in the Department of Social Services and Housing be excluded from the bargaining unit.



Mack H. Hamada, Chairman



John E. Milligan, Board Member

Date: December 28, 1973

Honolulu, Hawaii

DISSENTING OPINION

I feel compelled to disagree with the majority opinion in Cases No. RA-03-8 and RA-13-9.

1. With respect to Case No. RA-03-8, the facts presented in evidence do not, in my opinion, warrant an exclusion of Lois Ikegami, secretary to the Assistant Vice President for Academic Affairs at the University of Hawaii, from unit 3. This is so because her involvement with confidential matters relating to employer-employee relations is casual and infrequent.

Moreover, the test for excluding persons such as secretaries from collective bargaining on the grounds that they are "confidential employees" focuses upon the degree of involvement their bosses have with collective bargaining and labor relations. B.F. Goodrich Co., 115 NLRB No. 103, 37 LRRM 1383 (1956). Mr. Dewey Kim, in my opinion, has served as no more than a casual advisor and sounding board in collective bargaining. He does not formulate the University's collective bargaining positions, participate in negotiations, or serve on the negotiating team. The University cannot, by choosing to widely distribute materials relating to collective bargaining or attempting to involve a large number of secretaries who happen to be located on the second floor of Bachman Hall in some aspects of collective bargaining, make out a case for a blanket exclusion of all the people in that location from collective bargaining.

Mr. Kim, evidently does some advisory work and perhaps accumulates data on how matters arising in the collective bargaining process affect his area of responsibility at the University. The fact that he may be consulted on collective bargaining proposals as they concern his responsibilities and

may participate in informal, internal conferences respecting collective bargaining are not enough to warrant the exclusion of his secretary. Ethyl Corp., 118 NLRB No. 185, 40 LRRM 1376 (1957); Minneapolis - Moline Co., 85 NLRB No. 109, 24 LRRM 1443 (1949); Chrysler Corporation, 173 NLRB No. 160, 69 LRRM 1506 (1968). The fact that Ms. Ikegami may, from time to time, stand in for or substitute for Dr. Lau's secretary is not enough to warrant her exclusion, either. Firestone Tire and Rubber Co., 201 NLRB 43, 82 LRRM 1193 (1973). Also, the fact that Mr. Kim may occasionally handle grievances is not enough to warrant his secretary's exclusion. Holly Sugar Corp., 193 NLRB No. 150, 78 LRRM 1420 (1971).

I feel that in the organizational rush to get units determined and have the elections held expeditiously the unions frequently stipulated to a vast number of exclusions of employees who rightfully should be included in appropriate collective bargaining units. This Board, with some exceptions, acceded to these exclusions. I appreciate that a great deal of time would have been consumed by lengthy formal hearings on these exclusions. At this time, it is my hope that the employers and the affected unions will, in a spirit of cooperation and fair play, re-examine these previous wholesale exclusions. Some employees and officers certainly do occupy positions of confidentiality and I would certainly concur with the correctness of their exclusion. However, I am profoundly concerned that a large number of employees who rightfully should be enjoying the benefits and rights of membership in collective bargaining units are being denied the opportunity to do so which the Legislature intended to confer upon them when it enacted Chapter 89, H.R.S. The instant majority opinion, I am convinced, only

contributes, improperly, two more employees to that body of excluded employees who I believe should be included in bargaining units.

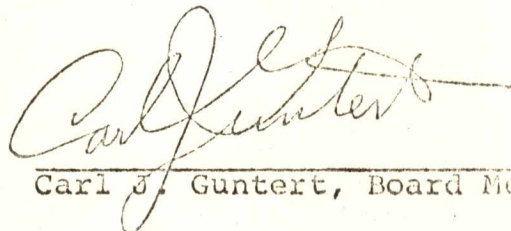
2. With respect to Case No. RA-13-9, concerning Mr. Wayne Omuro, Director of the Central Administrative Unit in the Department of Social Services and Housing, the facts are clear that he has no direct role regarding collective bargaining. Also, except, for one chart, there is no evidence even supporting the conclusion that he is a division head. It is true that his recommendations, if accepted by the head of his department, the appropriate officials in the Department of Budget and Finance, and the Governor, could have an impact on employment matters. If, for example, he recommended a cut in funds for a state operation it could result in layoffs, terminations, or "bumping". However, all he does is make recommendations based on whatever expertise he may have respecting social, health, and related programs. But he is several steps away from making the ultimate decision on these matters. I regard him as an individual entrusted with administering federal funds to achieve certain results. I do not, however, see in the evidence anything that convinces me that he can, without substantial checks by superiors, call any shots on his own that would ipso facto result in the hiring, firing, transfer or termination of any employees.

It appears that Mr. Omuro is acting as a planner working out proposals, which, if adopted, could result in an altered structure in the delivery of social services by the State. Some may further draw the inference that this fact, if true, makes Mr. Omuro, indeed, a top level managerial employee. I think it reasonable to draw a very different

inference: if the matters Mr. Omuro is reviewing and drawing up plans for are sensitive as well they may be, I am convinced that he alone will have little say, after the planning stage, as to whether his recommendations are to become policy. The persons who will have a say in this matter are his superiors and they will be the ones who will be determining and effectuating policy. If Mr. Omuro is good at his job, his recommendations may be received with respect, but that does not change the fact that they are only recommendations passed on to policy makers.

Mr. Omuro is so new in this position that the amount of latitude he will have, the amount of deference which will be given his recommendations, and the amount of policy making, if any, he will engage in are matters of sheer speculation. The only witnesses on these matters were in favor of the exclusion; their testimony was in opinion form and was selfserving.

It is my considered opinion that there is insufficient evidence in the record to support Mr. Omuro's exclusion from unit 13 on any ground.



Carl J. Guntert, Board Member

Dated: December 28, 1973

Honolulu, Hawaii