

Rec'd

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
STATE OF HAWAII,)	Cases No. <u>RA-13-10</u>
)	
Petitioner,)	<u>RA-03-14</u>
)	
and)	
)	Decision No. <u>42</u>
HAWAII GOVERNMENT EMPLOYEES')	
ASSOCIATION, LOCAL 152,)	
HGEA/AFSCME,)	
)	
Exclusive Representative.)	
_____)	

DECISION AND ORDERS

The Petitioner (also referred to hereafter as the Employer) filed its petition herein on November 27, 1973, and its amended petition on February 5, 1974.

By said petitions the Employer sought to exclude from appropriate bargaining units the entire staff of the Ad Hoc Commission on Operations, Revenues and Expenditures of the State (hereafter referred to as the Commission). Said staff consists of the positions of Executive Secretary (Position No. E9552), three research analyst positions (Position Nos. E9830, E9831, E9832), and a secretary (Position No. E9833). If included, all of the staff would be in Unit 13 except for the secretary who would be in Unit 3. During the hearing on this matter the respondent employee organization, the Hawaii Government Employee's Association (hereafter HGEA)* petitioned for inclusion of a position described in essence as that held

 *The HGEA is the exclusive representative for Units 3 and 13.

by Karen Iwamoto, an employee of AmFac who has been loaned to the Commission by her private sector employer and who performs the duties of a research analyst.

The grounds upon which the Employer sought to exclude the employees were that they were individuals "concerned with confidential matters affecting employer-employee relations," and were employees of the executive office of the Governor. See Section 89-6(c), Hawaii Revised Statutes (hereafter HRS).

The instant case involving all of the above-described positions, after due notice, came on for hearing before the entire Board on February 11, 12, and 15, 1974, at the Board's hearing room in Honolulu.

The hearing was held on record with testimony under oath; a transcript was made. Both parties had full opportunity to present evidence and argument on all issues involved. Briefs were submitted by both parties on March 8, 1974, and the Employer submitted a reply brief on March 13, 1974.

FINDINGS OF FACT

1. The Ad Hoc Commission on Operations, Revenues and Expenditures of State was created by Executive Order No. 73-1 which was executed on August 3, 1973, by Governor John A. Burns. (Employer's Exhibit 1).

2. Pursuant to said executive order, members of the Commission were appointed by the Governor. Its members include representatives of business, labor, and government. (Tr. I, 38-39).

3. Pursuant to said executive order, the staff of the Commission is paid out of funds of the Governor's Office. (Tr. I, 107).

4. The Commission recommended the hiring of the individuals who fill the subject positions, except for Karen Iwamoto who was not hired, but the appointing authority was the Governor. (Tr. I, 65).

5. AmFac's offer of the services of Karen Iwamoto was accepted by the Commission and she works more than 20 hours a week on Commission work and there was no evidence that she will not be working for the Commission for more than three months. (See Employer's Exhibit 22).

6. The Chairman of the Commission is Andrew Ing, financial vice-president for Hawaiian Electric Company. (Tr. I, 9).

7. The commissioners are not compensated for their services but are reimbursed for expenses. (Section 26-41, HRS).

8. The staff members, other than Miss Iwamoto, are compensated by the State and all of them work for more than 20 hours a week and are or have been employed for more than three months. (Employer's Exhibits 6, 14 A B C D, and 18).

9. The Commission staff is housed on the fourth floor of the Capitol building, not in the executive chambers of the Governor. (Tr. I, 62-63, 74).

10. In establishing the Commission, the Governor did not follow Section 75, Act 218, Session Laws of Hawaii 1973. (Tr. I, 110; Employer's Exhibit 1).

11. Instead he appointed the Commission pursuant to the power invested in him by Section 26-41, HRS. (Employer's Exhibit 1).

12. As stated in Executive Order 73-1, the mission of the Commission is to:

". . . review taxes and revenues, expenditures, and governmental operations and to make such recommendations necessary to improve the efficiency and effectiveness thereof."

13. Neither the Commission nor its staff is involved in giving advice or making recommendations on collective bargaining policies or tactics. (Tr. I, 41).

14. The Commission relies heavily upon the staff to do research, make preliminary proposals, and advise it. It is anticipated that the staff will write preliminary drafts of the recommendations which will go to the Governor. (Tr. I, 14, 21-22, 70, 184; Tr. II, 49-50, 86, 88, 92).

15. Some of the areas which the Commission and its staff are studying include: employee fringe benefits (Tr. I, 16); collective bargaining cost items (Tr. I, 18-19); amendments of Chapter 89, HRS (the public employment collective bargaining law) (Tr. I, 19; Tr. II, 45, 53); the concept of equal pay for equal work and the compatibility of civil service laws with collective bargaining (Tr. I, 194); expenditure cuts which could result in a reduction of the work force (Tr. I, 37); the impact of collective bargaining on the fiscal position of the State (Tr. I, 42); employee productivity (Tr. II, 16-17); cost effectiveness of programs (Tr. II, 44); tenure (Tr. II, 46). The staff work includes doing research from secondary sources and conducting interviews with resource persons some of which are confidential (Tr. I, 128; Tr. II 39, 108).

16. The meetings of the Commission are public, but its deliberations are conducted privately. (Tr. I, 28, 31).

17. The work product of the Commission and its staff will take the form of recommendations. (Employer's Exhibit 1; Tr. I, 44).

18. The Commission's recommendations in general will focus upon the State's fiscal plight. (Employer's Exhibit 1; Tr. I, 11). The Chairman of the Commission believes that the

State will continue to be "in the red" unless one or more of the following alternatives are adopted: (1) a reduction of government spending; (2) an increase of revenues; or (3) both of the foregoing. (Tr. I, 11).

19. Compensation of State employees absorbs approximately 70 to 90 per cent of the State's operating budget. (Tr. I, 16).

20. It was the uncontroverted opinion of the Commission Chairman and the Executive Secretary that any recommendation to hold to present expenditure levels or reduce them could, if adopted, have a direct impact on the number of people the State would employ. (Tr. I, 37, 129).

21. The staff works very closely together and all staff members are privy, through physical proximity, staff discussions, access to files, and typing of reports, to work in progress. (Tr. I, 160-163).

CONCLUSIONS OF LAW

In its brief, the HGEA adverted to a letter written by the Chairman of this Board under the date of August 28, 1973. Said letter was intended to informally establish guidelines concerning the routine and ministerial processing of exclusions and inclusions. It does not constitute the enunciation of formal rules or regulations and is not binding in this case. The letter was intended only to have a mediating effect to help employers and unions process inclusions and exclusions before they came formally before this Board.

This case is sui generis. It presents an instance in which the chief executive of the State has established,

pursuant to Section 26-41, HRS, an ad hoc body to advise him on matters which are paramount ingredients in effective management on the State.

The Commission is looking into the sources and utilization of the very life blood which keeps the State able to perform all of its functions -- its income and expenses -- and to make independent recommendations as to how best to manage them to promote better and more efficient government service and put the State back in a healthy fiscal posture.

That the work product of the Commission will take the form of recommendations rather than the actual implementation of policy is not controlling in this case. The recommendations must be the best possible and said Commission and its staff can fashion if they are to be of any value to the State.

In this context, it was felt by the Chairman of the Commission, the Executive Secretary of the Commission, and the State's Director of Budget and Finance that the staff must work independently of any conflicts of interest, outside pressures, or potentials therefor. (Tr. I, 37, 113-114; Tr. III, 50).

Given this unique situation and the unique mission of this particular Commission this Board believes that an underlying purpose of Section 89-6(c), HRS, that certain employees should be excluded from collective bargaining units to avoid conflicts of interests, will best be served if the subject positions are excluded from any appropriate unit. In a time for fiscal belt-tightening the staff of a commission such as that under consideration here could be put in a definite conflict of interest situation if any claim upon their loyalties could be made by their being involved, as bargaining unit members, on that side of the collective bargaining table which is, quite

understandably, interested in getting as big a slice of the State's fiscal pie as possible. They might find themselves facing decisions which could have a direct impact on themselves as employees. Confidentiality permeates their entire working process while it is in its preliminary stages. Early publication, or leakage of their work products, the views of the resource people they interview, or the connection of those views with resource people who wish to remain anonymous could impair the work and credibility of the Commission. (See Tr. I, 37-38, 113-114). We appreciate that the staff does not work in a top secret atmosphere every minute of the day; neither do most people who clearly occupy positions in which they are expected to keep major matters confidential. And, while we believe that in many respects much of this confidentiality is necessitated by considerations other than those required in the collective bargaining field, we are convinced that the unique task of the subject employees does involve them in making decisions and choices respecting matters that do affect employer-employee relations. Even though these choices result only in recommendations, we believe that these recommendations must be made without any conflicting interests if they are to be of value to the State and its chief executive. To avoid this conflict or the potential for a conflict of interest, these employees are regarded by this Board as individuals "concerned with confidential matters affecting employer-employee relations." (Section 89-6(c), HRS).

Note that the above-quoted exclusionary language does not require that the subject employees implement policy affecting employer-employee relations. It is enough that their work requires them to be concerned with such matters. Their work relates to, bears on, and is, in large measure about subjects having

an affect on employer-employee relations. This is all the word "concerned" means.

This decision is not to be construed in any way as setting a precedent for other ad hoc commissions established under Section 26-41, HRS, to provide advice to the executive branch. This Board is compelled to the conclusion it reaches in this case because of the mission of the ad hoc body and the kind of work its staff performs and the impact such work could have on employer-employee relations.

This case presented a situation which was sui generis -- an ad hoc commission advising the very highest level of state management as to how best the vast enterprise, the State of Hawaii, should raise and conserve revenues, provide governmental services efficiently and economically, and get the State out of "the red." And the fact that presently 70 to 90 per cent of the State's operating budget is devoted to the labor component cannot be ignored by the Commission or this Board.

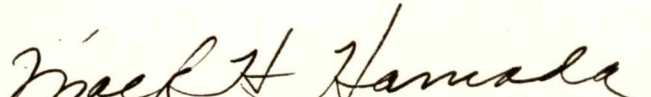
Because we have ruled that the occupants of the subject positions and Karen Iwamoto are individuals "concerned with confidential matters affecting employee-employer relations," we find it unnecessary to deal with the question of whether said individuals are employees "of the executive office of the governor." For the same reason, we do not go into the question raised by the HGEA as to whether Miss Iwamoto, the AmFac employee loaned to the Commission, is an employee of the State of Hawaii.


ORDERS

Case No. RA-13-10: It is hereby ordered that the positions of Executive Secretary of the Ad Hoc Commission on Operations, Revenues and Expenditures of the State and the subject research analyst positions be excluded from the bargaining unit.

Case No. RA-03-14: It is also ordered that the position of the secretary on the staff of said Commission be excluded from the bargaining unit.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


John E. Milligan, Board Member

Dated: April 3, 1974

Honolulu, Hawaii

DISSENTING OPINION

I feel strongly compelled to dissent from the majority opinion of my fellow Board members in Case Nos. RA-13-10 and RA-03-14.

The Employer has requested the exclusion of all five staff personnel of the Governor's Ad Hoc Commission on Operations, Expenditures and Revenues. The Employer's case for exclusion is based on two grounds, first that the employees in question are concerned with confidential matters affecting employer-employee relations and secondly that the Commission and staff are employees of the executive office of the Governor.

Section 89-6(c), HRS, can be termed the exclusion section of our Collective Bargaining in Public Employment Law, Chapter 89, HRS. Among the many classes of excludable public employees, Section 89-6(c), HRS, also denies coverage under Chapter 89 to any ". . . individual concerned with confidential matters affecting employee-employer relations (and) employee of the executive office of the governor." None of the five Commission staff employees falls within this law.

In Hawaii Government Employees' Association, et al, HPERB Decision No. 18b (June 12, 1972), this Board defined excludable confidential employees as those who "in the course of the performance of their duties be regularly exposed to confidential information pertaining to labor management relations of public employment." In State of Hawaii, et al, HPERB Decision No. 40 (Dec. 28, 1973), this Board again defined confidential employees. In this more recent decision the Board declared 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."

Applying this test, set forth by this Board, to the facts of the case at hand, I find little to warrant the exclusion of the Commission's staff personnel.

The testimony of Commission Chairman Ing indicated that the primary emphasis of the Commission is to determine the fiscal impact of various state programs. The amount of time expended on matters actually related to labor relations appears limited. Under such a direction and focus, the staff cannot be said to be regularly exposed to confidential labor management information.

Moreover, Executive Order No. 73-1, Employer's Exhibit No. 1, states that the Commission's function and duties are to review taxes and revenues, expenditures and governmental operations and to make such recommendations necessary to improve the State's efficiency and effectiveness. I find nothing in this language to support a finding that the Commission or its staff is involved regularly with confidential labor management information.

Additionally, I find nothing confidential about the type of information gathered by the staff. The primary labor item referred to at the hearing is the wages or salaries paid to the public employees. Such information, although pertaining to public employer-employee relations, can hardly be termed confidential since it is public information.

Another fact that discredits the Employer's argument of confidentiality is the nature of the Commission meetings. In the August 3, 1973, Commission minutes, Employer's Exhibit No. 2, it is stated that all meetings after orientation will

be open to the public. This policy to have the Commission meetings open to the public was also articulated by Chairman Ing.

The second ground for exclusion argued by the Employer is that the Commission's staff are employees of the executive office of the Governor. This contention is without merit for several reasons. Initially, Commission Chairman Ing testified that the Governor has not exercised direction nor control over the Commission or its staff. Additionally, Mrs. Kosaki, the Commission Executive Secretary, testified she received no directions from the Governor, and does not report to him.

Secondly, it does not appear to me that our Legislature intended the staff of an ad hoc commission to be excluded as employees of the executive office of the Governor. The State telephone directory is instructive on this point. Under the heading of Office of the Governor, listings are included for Daniel Aoki, administrative assistant; Donald Horio, press secretary; and the late Jack Reynolds, collective bargaining agent. These people, among the others listed are or were in intimate contact with, and surround the Governor. Even Ad Hoc Commission Chairman Ing stated that employees in the executive office of the Governor were people who surround the Governor, including Mr. Aoki and Mr. Horio. The staff of an ad hoc commission does not fall within this class of excludable employees.

Based on this rationale, I find little to support the Employer's contention that the Commission's staff members are excludable as employees of the Governor's office.

Despite the lack of evidence to support the Employer's two grounds for exclusion, the majority has imaginatively reasoned that the uniqueness of the Commission, when viewed in

terms of its mission and method of operation, warrants exclusion of the staff members in keeping with the underlying "conflict of interest" thrust of Section 89-6(c), HRS. I find this rationale distressing.

In Hawaii Government Employees' Association, et al, supra, this Board was faced with its initial question involving Section 89-6(c), HRS. In grappling with interpreting that section, the Board established its basic philosophy stating that the exclusionary language of Section 89-6(c), HRS, should be narrowly construed.

The Board went on in that case to hold that when the alleged conflict of interest is sufficiently minimal and in the absence of a statutory mandate, there is no commonsense reason to deny employees the opportunity to freely engage in concerted activities and the right to decide for themselves whether or not they wish to be represented in their dealings with their employer by a labor organization.

The decision in this case by the majority, in absence of a statutory mandate to exclude those employees in positions of conflict or potential conflict of interest, is of a legislative nature.

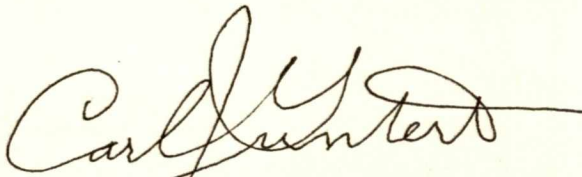
In view of the fact that this Board has already established guidelines to determine confidentiality, the extension of such guidelines by the majority, in this particular case, appears to me to violate and disregard not only the intent and purpose of Section 89-6(c), HRS, but also the entire chapter.

The right of an employee to enjoy the benefits granted by Chapter 89, HRS, should not be denied absent a clear rational basis. My reading of Section 89-6(c), HRS, and review of the transcript and exhibits convinces me that the denial of the

benefits afforded under the chapter to the five employees in question is unwarranted.

For the reasons set forth above, I conclude that the Commission's staff personnel have every right to be included in the appropriate bargaining unit.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

A handwritten signature in cursive script, reading "Carl J. Guntert". The signature is written in dark ink and is positioned above a horizontal line.

Carl J. Guntert, Board Member

Dated: April 3, 1974

Honolulu, Hawaii