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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

COUNTY OF HAWAII,

Petitioner.

CASE NO. RA-13-227

DECISION NO. 466

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 28, 2007, the COUNTY OF HAWAII ("County" or "Employer") filed a Petition for Clarification or Amendment of Appropriate Bargaining Unit with the Hawaii Labor Relations Board ("Board"). In its petition, the County alleged that the duties and responsibilities of new Position No. OO-04671, Civil Defense Administrative Officer, EM-03, warrant its exclusion from collective bargaining as top-level managerial position as the positions will serve as the Civil Defense Agency's homeland security and anti-terrorism officer. The position will formulate and implement the County's operational plans and procedures relating to homeland security and anti-terrorism and will the assist the Administrator in directing and coordinating civil defense operations and emergency activities. Michael R. Ben, County Director of Human Resources and Petitioner's representative, states in an affidavit attached to the petition, that the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO ("HGEA") concurs with the exclusion of the position.

Based upon a review of the petition, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The COUNTY OF HAWAII is the public employer, as defined in Hawaii Revised Statutes ("HRS") § 89-2, of the employees of the County, including the employees in bargaining unit 13.
2. The HGEA is the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit 13.
3. According to the position description for Position No. OO-04671, Civil Defense Administrative Officer, EM-03, the position serves as the agency's

homeland security and anti-terrorism officer and will perform the following duties in the approximate percentages of time:

- a. Serves as the agency's homeland security and anti-terrorism officer; plans and develops County's programs and coordinates activities with agencies of the Federal and State governments. Manages, reviews, and reports on the County's Department of Homeland Security Grants program. Manages, reviews, and reports on the County's Critical Infrastructure Plan. As the anti-terrorism officer, must obtain security clearance equal to Department of Defense secret security clearance to access confidential information. Serves as a liaison to the County's Citizens Corps program; serves as the agency's contact for the Community Emergency Response Teams. 40%.
- b. Assists the Civil Defense Administrator in serving as a first responder on-call and in directing and coordinating civil defense operations in office and field locations prior to, during, and after alerts or disaster periods on a rotational basis. Administers and coordinates the civil defense operations for assigned districts when disaster occurs county-wide. Operates a County vehicle and responds to emergencies and conducts site inspections under various time, adverse weather, and terrain conditions. Performs under various physical conditions such as traversing over lava flows, rocky and sandy beach, mountainous and uneven terrain. 25%.
- c. Formulates and updates civil defense operational plans to ensure the safety of the County and its citizens on matters relating to homeland security and anti-terrorism. Assists in the preparation, review, and updates in matters of nuclear, natural, or man-caused disasters. 15%.
- d. Participates in the supervision, assignment, and review of the work of subordinates; recommends personnel actions including hiring, promotion, discipline, and termination. Assists in administering, supervision and coordinating the county's civil defense and disaster relief programs. 15%.
- e. Performs other related duties as required or assigned. Assumes duties in absence of the administrator. 5%.

In addition, after hours, weekend, and holiday work is required. On 24-hour call status in anticipation of natural disaster or enemy attack. Performs long hours of duty during civil defense alerts and emergencies.

Exhibit B.

4. By letter dated February 26, 2007, Deputy Director of Human Resources Ronald K. Takahashi ("Takahashi") notified HGEA Executive Director Russell Okata ("Okata") of the proposed exclusion of the new Civil Defense Administrative Officer position from bargaining unit 13 as the position will serve as the Civil Defense Agency's homeland security and anti-terrorism officer. Takahashi requested the HGEA's concurrence with the proposed exclusion. On March 8, 2007, Ralph Boyea, HGEA's Hawaii Division Chief, concurred with the proposed exclusion.

Exhibit A.

5. According to the class specifications, the Civil Defense Administrative Officer assists in the administration of the County's civil defense and disaster relief programs; develops, recommends, and implements plans for the operation of government and related agencies in times of emergencies; serves as the agency's homeland security and anti-terrorism officer; coordinates programs with agencies of the Federal and State governments; and performs other related duties as required. The class is distinguished by its responsibility to assist in the administration of the County's civil defense and disaster relief programs and/or to serve as the agency's homeland security and anti-terrorism officer.

Exhibit C.

6. According to the Position Organization Chart for the Civil Defense Agency, the Civil Defense Administrative Officer is at or near the top of the organization and reports to the agency Administrator.

Exhibit D.

7. The Board finds that Position No. OO-04671, Civil Defense Administrative Officer, EM-03, as the homeland security and anti-terrorism officer for the Civil Defense Agency, is responsible for planning, directing and administering the agency's program relating to homeland security. The position will exercise considerable discretion in developing and implementing objectives and directing the work of the agency relating to homeland security.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject petition pursuant to HRS § 89-6.

2. HRS § 89-6(f) provides, in part, as follows:

The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

* * *

- (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;
3. In interpreting the exclusionary language of HRS § 89-6, 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].

4. In Decision No. 95, Hawaii Government Employees' 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 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 p. 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 144-45.

6. Based upon a review of the duties and responsibilities of Position No. OO-04671, Civil Defense Administrative Officer, EM-03, the Board concludes that the position is at or near the top of an ongoing complex agency and assists in administering and coordinating the County's civil defense and disaster relief programs and directs the work of the agency relating to homeland security. The position will supervise the preparation and review of civil defense operational plans to ensure the safety of the County and its citizens against nuclear, natural or man-caused disasters. Thus, the position will exercise considerable discretion in developing and implementing the department's programs and policies by administering and coordinating the civil defense operations for assigned districts. The position will prepare and report on the County's Department of Homeland Security Grants program as well as prepare reports on the County's Critical Infrastructure Plan. As such, the position has significant authority and latitude for individual initiative and independent judgment in the overall administration and operations management of the agency as it relates to homeland security and anti-terrorism. Based on the position's duties and responsibilities, the Board concludes that the position is a top-level managerial position and should be excluded from bargaining unit 13 and coverage under HRS Chapter 89.

ORDER

Position No. OO-04671, Civil Defense Administrative Officer, EM-03, is hereby excluded from collective bargaining unit 13, and the coverage of HRS Chapter 89 as a top-level managerial employee.

DATED: Honolulu, Hawaii, April 26, 2007.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

Copies sent to:

Michael R. Ben
Russell K. Okata
Joyce Najita, IRC