

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
HAWAII NURSES ASSOCIATION,)	Case No. <u>RA-09-26</u>
)	
Petitioner,)	Decision No. <u>75</u>
)	
and)	
)	
STATE OF HAWAII,)	
)	
Employer.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Petitioner, Hawaii Nurses Association (hereafter HNA), filed the subject unit clarification petition with this Board on June 2, 1976. The Board initially set the matter down for hearing on June 28, 1976. However, because of a number of requests for rescheduling, the case was not heard until October 4, 1976. The transcript of the October 4 hearing was received by the Board on January 5, 1977. Counsel for the HNA waived his right to submit a brief. (Tr. 153)

The issue in this case is whether the position of director of nursing at Samuel Mahelona Hospital, Kauai, should continue to be excluded from Unit 9.

It is the HNA's position that the position should be included in the unit; the public employer believes the position should continue to be excluded from the unit.

Based upon the entire record herein, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The State of Hawaii is a public employer.

The HNA is the exclusive representative of collective bargaining unit 9 (registered professional nurses).

The position which is the subject of this case is Position No. 20739. The position carries the title director of nursing.

At the time the position was originally excluded from Unit 9, it was classified as a Registered Professional Nurse VII. Stipulation for Conduct of Election, Case No. R-7, dated January, 1972. Said position was reallocated to Registered Professional Nurse VI, SR-24, in September, 1975.

The occupant of the subject position is Marie Freeman, who was first placed in the position on October 20, 1975. (Tr. 7)

Samuel Mahelona Hospital is a long-term care facility and hospital on the island of Kauai. Presently, it is certified for the use of 76 beds in the following categories: 56 are for patients requiring skilled nursing and intermediate care; 16 are for psychiatric patients; and 4 are for patients requiring acute care and isolation, including patients suffering from tuberculosis. (Tr. 7)

The State Department of Health is charged with the responsibility for administering the county hospitals. Sections 27-1(3), 27-21, 27-22, Hawaii Revised Statutes (hereafter HRS). Samuel Mahelona Hospital and Kauai Veterans Memorial Hospital both are public hospitals on the island of Kauai which come under this responsibility of the Department of Health.

The Department of Health is headed by a single executive who is known as the director of health. Section 26-13, HRS.

The executive head of each department, such as the director of health, is, subject to the approval of the Governor, the ultimate authority with respect to the creation or abolition of positions, and the appointment, removal, transfer, and change of duties, titles, and compensation of offices and positions within his department. Section 26-39, HRS. He may prescribe regulations for the functioning of his department and all of the employees therein. Section 26-38, HRS.

By implication, and as a matter of common sense, he may delegate these functions subject to his ultimate authority. See Section 26-38, HRS. (Tr. 10, 26, 27, 67, 101)

Mr. Richard Johnston is an employee of the Department of Health. He is the hospital systems administrator for Kauai County. He is also the administrator of Kauai Veterans Memorial Hospital. (Tr. 123)

Mr. John English is the full-time administrator of Samuel Mahelona Hospital and has his office in that facility. (Tr. 8)

As stated earlier, Marie Freeman is the director of nursing at Samuel Mahelona Hospital. Her position, which is the subject of this case, is currently excluded from collective bargaining unit 9. Mrs. Janet Kawamura, an RPN VI, SR 24, is the director of nursing at Kauai Veterans Memorial Hospital. Her duties and responsibilities are essentially identical to Marie Freeman's.

Mrs. Kawamura's position, by the same stipulation which excluded Mrs. Freeman's, was included in Unit 9. (Tr. 86, 98)

The duties and responsibilities carried out by Mrs. Freeman which this Board considers pertinent to the issue of unit inclusions and exclusions are the following:

Mrs. Freeman exercises independent judgment in her work. (Tr. 12)

She supervises 10 RPN's and 16 LRN's. (Tr. 9, 13)

She has been involved as an employer representative in handling employee grievances. (Tr. 21)

She believes that she has the power effectively to recommend the termination of employees' services, but has never had occasion to do so. (Tr. 26, 31)

She has close daily two-way communication with John English, the hospital administrator. Her conferences with Mr. English include discussions concerning collective bargaining agreements. (Tr. 36) The contracts she is involved in administering are those for Units 1, 3, 9 and 10. (Tr. 39)

She does not participate in negotiations for the Unit 9 contract. (Tr. 34) She merely was asked for information pertinent to negotiations on such subjects as staffing needs. This information was submitted through "the chain of command." (Tr. 34)

When there was a possibility of a Unit 1 strike last year, Mr. English showed her the Department of Health strike plan. Two other employees at Samuel Mahelona, the accountant and the personnel technician, were also shown the plan. Mrs. Freeman gathered information for Mr. English who was working on a contingency plan in the event of a strike. (Tr. 37-38)

She and the hospital administrator and no lower ranking nurse are involved in formulating new programs for care of the mentally retarded and an intermediate care function. (Tr. 43)

She interviews and hires nurses, subject to the review of Mr. English. (Tr. 46)

In dealing with interpretations of collective bargaining agreements, if she cannot get clarification from Mr. English or the personnel technician, she deals directly with Mr. Stanley Wild, who is the Department of Health's personnel director for the State-county hospital system. Mr. Wild shares the "management interpretation" of the contract with her. (Tr. 39-40)

Mr. Johnston believes the director of nursing position at Samuel Mahelona is the closest managerial person to the administrator. (Tr. 128)

The director of nursing at Samuel Mahelona is in charge of departments, other than nursing; she supervises more than 50 percent of the employees of the hospital. (Tr. 128)

The hospital administrators such as Mr. Johnston and Mr. English are informed of the demands made by unions in collective bargaining and are asked by the Department of Health to make input on the impact the proposals would have on the hospitals. (Tr. 125)

The director of nursing, with the hospital administrator, formulates proposals or recommendations for additional positions in the hospital, the classification and pay of employees in the hospital, and the interpretation and implementation of collective bargaining agreements. (Tr. 127)

The Director of Nursing, in some of her supervisory dealings with subordinates, is, as a professional employee, merely behaving as one would

expect an experienced, senior ranking professional to act in teaching, counseling and guiding junior members of the nursing profession. However, she also performs administrative functions which are not solely attributable to the fact that she is an experienced member of a scientifically trained profession.

CONCLUSIONS OF LAW

The resolution of the issue of whether the position of director of nursing at Samuel Mahelona Hospital should be excluded from or included in collective bargaining unit 9, depends upon the application to the facts in the record sub judice of the statutory language in Subsection 89-6(c), HRS, which states:

"No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director, or chief of a state or county department or agency, or any major division thereof as well as his deputy, first assistant, and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations, part time employee working less than twenty hours per week, temporary employee of three months duration or less, employee of the executive office of the governor, household employee at Washington Place, employee of the executive office of the mayor, staff of the legislative branch of the State, city and county of Honolulu and counties of Hawaii, Maui and Kauai, employee of the executive office of the lieutenant governor, inmate, kokua, patient, ward or student of a state institution, student help, or any commissioned and enlisted personnel of the Hawaii national guard, shall be included in any appropriate bargaining unit or entitled to coverage under this chapter."

If the director of nursing position is to be excluded, it is because it falls within the following language of the subsection:

"...and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations..."

To date, this Board's most comprehensive effort to ascertain the proper meaning to be assigned to this language is reflected in Decision 18(b), Case No. R-12-8, May 16, 1972.

In said decision, the Board noted that under Chapter 89, HRS, supervisors were included in units and thus to be excluded as a top-level managerial employee, one had to possess powers greater than those of a supervisor. In said decision, the board stated:

"It is our opinion that the exclusionary language of Section 89-6(c), supra, should be narrowly construed, particularly for optional appropriate bargaining units. Hence, unless the evidence in the record demonstrates that an employee has managerial and administrative responsibilities substantially different from supervisory employees per se, his exclusion from the unit would not be consistent with the policy of the Act. Nor would it be consistent with legislative intent for us to exclude an employee on grounds of confidentiality unless the extent of his involvement 'with confidential matters affecting employee-employer relations' is greater than which is normally accorded to supervisors."

The Board further quoted with approval the decision in Textron, Inc., 196 NLRB 127, 80 LRRM 1099 (1972) as containing language consistent with the intention of our Legislature because said decision limited the scope of the managerial exclusion to employees concerned with management policies in the labor relations area.

Although this Board did not rest its decision solely upon Textron, it found the Textron language a fitting limitation

on the language in Section 89-6(c), HRS. For reasons not relevant to this case, the Textron decision was reversed by the Supreme Court of the United States. NLRB v. Textron, Inc., 416 U.S. 267, 85 LRRM 2945 (1974).

Even in the absence of the Textron reversal, this Board would have felt compelled to reexamine its ruling in Decision 18(b) for the simple reason that in said decision too much reliance was placed upon case law from other jurisdictions interpreting other statutes while too little emphasis was placed upon the words of our own statute. Nothing in Subsection 89-6(c) warrants limiting the language "top-level managerial and administrative personnel" to individuals who are concerned with management policies in the labor relations area only. These statutory words are unqualified. However, when the statute speaks of confidentiality, it does limit this exclusionary criterion to "confidential matters affecting employer-employee relations." This limitation with respect to confidential employees, side by side with a total absence of any such limitation with respect to top-level managerial and administrative individuals, is strong indication that the legislature did not intend a Textron like limitation to be read into the interpretation of the language respecting top-level managerial and administrative personnel.

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;¹ or

2. The extent to which the individual determines, formulates and effectuates his employer's policies.²

Consideration also will be given to the extent to which placement of an individual in a collective bargaining unit would create a strong possibility of a conflict of interest arising.

Respecting the problem of conflict of interest, the subjectivity of the individual employee is not significant. What would be significant would be true incompatibility between the functions of the individual's position and inclusion in a unit. Both employers and exclusive representatives are entitled to representatives, on the one hand, and constituents, on the other, who are not by unit determination placed on both sides of the issues in collective bargaining.

Whether a particular position satisfies these criteria is a question of fact to be determined on a case by case basis by this Board.

Based upon the record herein, the director of nursing at Samuel Mahelona Hospital does make input into the formulation and implementation of the employer's policy. The crucial question with regard to the subject position is how much authority does it possess to carry out managerial and administrative functions and is it at a high enough

¹See Section 89-9(d), HRS, which sets forth basic management rights.

²See Ford Motor Company, Chicago Branch, 66 NLRB 1317, 17 LRRM 394; Retail Clerks v. NLRB, 366 F 2d 642 62 LRRM 2837 (D.C. Cir. 1966); cert. denied, 386 U.S. 1017, 65 LRRM 2059 (1967).

level in the State hierarchy to warrant designation as "top-level managerial and administrative." It is, to be sure, a top-level managerial position at Samuel Mahelona Hospital. Does that make it a top-level managerial position for purposes of 89-6(c), HRS?

The Board believes it does. The hospital constitutes a complex, self-contained work unit of significant size. There is no professionally trained medical person at the hospital in a higher ranking position than Mrs. Freeman. Without her professional expertise and input, the administrator could not run the hospital. Her duties extend beyond responsibility for supervising nurses. She also supervises employees other than nurses.

Admittedly, because a great deal of what Mrs. Freeman does falls in the category of professional expertise, the case that she is a top-level managerial employee is intermixed with her professional role. Nevertheless, a case was made out and this Board does hold that the position of director of nursing at Samuel Mahelona falls within the statutory language "any other top-level managerial and administrative personnel."

A case was also made out in support of the employer's contention that the director of nursing should be excluded as an "individual concerned with confidential matters affecting employee-employer relations."

In Decision 18(b), the Board also addressed the meaning of this statutory basis for exclusion.

In that Decision, the Board stated:

"Further research shows that the National Labor Relations Board uses the term 'confidential employee' to embrace those individuals who assist and act in a confidential capacity to persons exercising managerial functions in the field of labor relations. While we generally agree with the definition used by the National

Labor Relations Board, we find the criteria used by the New York Public Employment Relations Board more appropriate for our purposes as it relates specifically to confidential employees in the public sector. In its decision, In the Matter of State of New York and New York State Employees Council 50, Case Nos. C-0002, et al., 2 NY PERB 3335, Par. 2-3044 (1969), the New York Public Employment Relations Board, in part, stated:

'In submitting to the parties, . . . a list of exclusions from this unit, we proposed certain exclusions on the grounds of confidentiality. The criteria utilized by this Board in such exclusions were to exclude those staff positions intimately related to public employment labor relations, such as the budget function and personnel function of each agency, and in addition, those individual positions who would, in the course of the performance of their duties, be regularly exposed to confidential information pertaining to labor-management relations of public employment. A very substantial number of those individual positions who would come within this second criteria cannot be identified by job title or job specification. . . .'

"We, therefore, adopt the definition and rationale of the New York Public Employment Relations Board in our determination of which employees are involved in confidential matters affecting employee-employer relations."³

We find that while the director of nursing has only limited and indirect input into the negotiation process, she does have significant exposure to and assistance with development of such confidential matters as the strike plan, and has access to the employer's interpretation of the collective bargaining agreements covering employees at the hospital. These facts, plus her confidential relationship with the

³ On the record before us, we do not find it necessary, at this time, to deal with whether the language in Decision 18 overly restricts the term "employee-employer relations" in subsection 89-6(c), HRS.

administrator on matters concerning running the hospital, clearly make her an "individual concerned with confidential matters affecting employee-employer relations."

It is the conclusion of this Board that the director of nursing at Samuel Mahelona Hospital is both a top-level managerial" individual and an "individual concerned with confidential matters affecting employee-employer relations."

We make no ruling on Mrs. Kawamura's position because the status of that position was not the subject of this case.


ORDER

The position of Director of Nursing at Samuel Mahelona Hospital shall continue to be excluded from bargaining unit 9.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


John E. Milligan, Board Member


James K. Clark, Board Member

Dated: March 10, 1977

Honolulu, Hawaii