

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. 93-3(R)
ILWU, LOCAL 142, AFL-CIO,	)	ORDER NO. 1014
	)	
Petitioner,	)	ORDER DETERMINING COLLEC-
	)	TIVE BARGAINING UNIT AND
and	)	DIRECTING ELECTION OF
	)	COLLECTIVE BARGAINING
HAWAII JOB CORPS/MANAGEMENT	)	REPRESENTATIVE
AND TRAINING CORPS,	)	
	)	
Employer.	)	
	)	

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ORDER DETERMINING COLLECTIVE BARGAINING UNIT AND  
DIRECTING ELECTION OF COLLECTIVE BARGAINING REPRESENTATIVE

On October 1, 1993, Petitioner INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (ILWU), LOCAL 142, AFL-CIO (ILWU) filed a Petition for Determination of Collective Bargaining Unit and Election of Collective Bargaining Representative with the Hawaii Labor Relations Board (Board). Petitioner requested the Board to proceed pursuant to Section 377-5, Hawaii Revised Statutes (HRS), and its administrative rules, to determine the exclusive bargaining representative for the affected employees.

On October 26, 1993, the Board conducted a pre-election conference with ILWU and employer HAWAII JOB CORPS/MANAGEMENT AND TRAINING CORPS (Job Corps). At the conference, the parties raised the following issues related to the composition of the appropriate bargaining unit: (1) whether or not the Job Corps' facility on Maui would be included in the bargaining unit; and (2) whether or not the Job Corps' senior residential advisors are supervisors and therefore excluded from the appropriate collective bargaining unit.

The Board scheduled a hearing on the foregoing issues on November 4, 1993.

On October 29, 1993, ILWU filed Petitioner's Application for Issuance of Subpoena Duces Tecum. On November 1, 1993, Job Corps filed Employer's Petition to Quash Subpoena Duces Tecum as to Paragraphs 8, 10, and 11(d), objecting to the subpoena for Ken Dugan on the basis that the information requested in paragraphs 8, 10 and 11(d) is overly burdensome and irrelevant to the issues in this case. Thereafter, on November 2, 1993, Job Corps filed Employer's Supplemental Petition to Quash Subpoena Duces Tecum as to Paragraphs 6 and 7, objecting to the subpoena on the basis that the individuals identified in paragraphs 6 and 7 are managerial employees and expressly excluded from the proposed collective bargaining unit and that the request would require review of approximately 500 personnel and other related documents.

Specifically, paragraphs 6, 7, 8, 10, and 11(d) of the subpoena request:

6. Any and all personal files, records, documents and other papers which would verify when Tony Frederico was involved at any time in the following employment actions in behalf of Hawaii Job Corp[].
  - a. The hiring of any employee or in effectively recommending the hiring of any employee.
  - b. The transfer of any employee or in effectively recommending the transfer of any employee.
  - c. The suspension of any employee or in effectively recommending the transfer [sic] of any employee.
  - d. The lay off of any employee or in effectively recommending the lay-off of any employee.
  - e. The recall of any employee or in effectively recommending the recall of any employee.

- f. The promotion of any employee or in effectively recommending the promotion of any employee.
- g. The discharge of any employee or in effectively recommending the discharge of any employee.
- h. The assignment of job duties and responsibilities to any employee or in effectively recommending the assignment of job duties and responsibilities to any employee.
- i. The granting or withholding of any rewards to any employees or in effectively recommending the granting or withholding of any rewards to any employee.
- j. The discipline of any employee or in effectively recommending the discipline of any employee.
- k. The direction of any employee or in effectively recommending the direction of any employee.
- l. The adjustment of any grievance of any employee or in effectively recommending the adjustment of any grievance of any employee.

7. Any and all personal files, records, documents and other papers which would verify when Nicky Raiwalui was involved at any time in the following employment actions in behalf of Hawaii Job Corp[ ].

- a. The hiring of any employee or in effectively recommending the hiring of any employee.
- b. The transfer of any employee or in effectively recommending the transfer of any employee.
- c. The suspension of any employee or in effectively recommending the transfer [sic] of any employee.
- d. The lay off of any employee or in effectively recommending the lay-off of any employee.
- e. The recall of any employee or in effectively recommending the recall of any employee.
- f. The promotion of any employee or in effectively recommending the promotion of any employee.
- g. The discharge of any employee or in effectively recommending the discharge of any employee.

- h. The assignment of job duties and responsibilities to any employee or in effectively recommending the assignment of job duties and responsibilities to any employee.
- i. The granting or withholding of any rewards to any employees or in effectively recommending the granting or withholding of any rewards to any employee.
- j. The discipline of any employee or in effectively recommending the discipline of any employee.
- k. The direction of any employee or in effectively recommending the direction of any employee.
- l. The adjustment of any grievance of any employee or in effectively recommending the adjustment of any grievance of any employee.

8. The original or true copies of books, records, or documents of Hawaii Job Corp[] showing the names, job classifications, wage rates, and date of employment of all individuals in the employ of Hawaii Job Corp[] as of the last payroll prior to October 1, 1993.

\* \* \*

10. Payroll and other records showing the names, job classifications, wage rates, dates of employment, location of employment, job duties, and hours of work of the following categories of positions, employees, and classifications for a 90 day period preceding October 1, 1993, for all employees of Hawaii Job Corp[].

- a. All "full-time employees" of Hawaii Job Corp[].
- b. All "part-time employees" of Hawaii Job Corp[].
- c. All other employees of Hawaii Job Corp[].

11. Employee policies applicable to all employees of Hawaii Job Corp[] including but not limited to the following:

\* \* \*

- d. All material distributed by Hawaii Job Corp[] establishing wage, hours, and terms and conditions of work of employees.

On November 4, 1993, ILWU filed a Memorandum in Opposition to Employer's Petition to Quash Subpoena Duces Tecum as to Paragraphs 8, 10 and 11(d) and Employer's Supplemental Petition to Quash Subpoena Duces Tecum as to Paragraphs 6 and 7.

At the hearing held on November 4, 1993, the Board deferred ruling on the respective petitions to quash the subpoena. Based on the arguments presented, the Board finds that the information requested in paragraphs 6, 7, 8, 10 and 11(d) of the subpoena is overly broad and burdensome in light of the limited scope of the issues at hand. Moreover, the Board finds that the record in this case contains sufficient evidence to support the Board's determination of the appropriate bargaining unit. Accordingly, the Board grants Employer's Petition to Quash Subpoena Duces Tecum as to Paragraphs 8, 10 and 11(d) and Employer's Supplemental Petition to Quash Subpoena Duces Tecum as to Paragraphs 6 and 7.

Also at the November 4, 1993 hearing, ILWU and Job Corps stipulated that the appropriate collective bargaining unit would include Job Corps' facility on Oahu only, and not its Maui facility. Tr. 11/4/93, p. 9. In addition, the Board determined that the ILWU's petition was supported by a sufficient showing of interest. Id., p. 11.

The hearing continued on November 15, 1993. Thereafter, on December 16, 1993, ILWU filed its Post-Hearing Memorandum of the ILWU Local 142, and Job Corps filed Employer's Post-Hearing Brief.

At this time, the sole issue presented is whether or not Job Corps' senior residential advisors are supervisors for purposes of determining the appropriate collective bargaining unit. Based on the facts of this case, the Board determines that senior residential advisors are not supervisors for the reasons set forth below.

DETERMINATION OF COLLECTIVE BARGAINING UNIT

The Board has jurisdiction over this case pursuant to Section 377-2, HRS, which mandates that the Board administer the Hawaii Employment Relations Act (the Act). Specifically, Section 377-5(b), HRS, provides that:

Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 377-1, the board, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this chapter, shall conduct an appropriate hearing upon due notice and it shall decide in each case the unit appropriate for the purpose of collective bargaining.

In this case, the proposed collective bargaining unit includes certain employees of Job Corps, a program sponsored by the U.S. Department of Labor, which provides comprehensive services to disadvantaged youths between the ages of 16 and 24 in the areas of basic education, vocational skills training and social skills development. Job Corps is a residential program that operates 24 hours a day, seven days a week. At its Oahu facility, Job Corps houses approximately 200 students in four dormitories to which senior residential advisors and residential advisors I and II are assigned.

ILWU proposes to include senior residential advisors, along with residential advisors I and II, in the collective bargaining unit. Conversely, Job Corps contends that senior residential advisors are supervisors within the meaning of the Act and therefore, should be excluded from the proposed collective bargaining unit.

Section 377-5(a), HRS, provides, in relevant part, the following:

Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining.

In addition, Section 377-1(3), HRS, provides, in pertinent part, that the term "[e]mployee' . . . shall not include . . . any person employed in an executive or supervisory capacity . . . ." Furthermore, Section 377-1(13), HRS, provides, in relevant part, that:

"Person employed in an executive or supervisory capacity" means any employee who has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring or firing and as to the advancement, promotion, or demotion of other employees will be given particular weight . . . .

Consequently, if the Board determines that senior residential advisors are employed in a supervisory capacity, pursuant to Section 377-1(13), HRS, senior residential advisors must be excluded from the proposed collective bargaining unit.

The Board is guided by the National Labor Relations Board (NLRB), which has stated that "the burden of proving that one is a supervisor rests on the party alleging that such status exists."<sup>1</sup> Tucson Gas & Electric Co., 241 N.L.R.B. 181, 100 L.R.R.M. 1489 (1979).

In support of their position, Job Corps argues that their senior residential advisors exercise supervisory authority based on their ability to: (1) evaluate employee performance; (2) counsel employees and effectively recommend discipline; (3) direct work assignments; (4) recommend promotions and transfers; and (5) attend the AIM (Adventures in Management) program. However, these arguments are not supported by the evidence, based on the record as a whole.

While the senior residential advisors' job description suggests that they perform supervisory work, see Employer's Exhibit 1, the evidence reveals that their actual work falls short of the statutory definition to warrant supervisory status. Other than the fact that senior residential advisors have attained senior status

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<sup>1</sup>The National Labor Relations Act defines the term "supervisor", in relevant part, as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1988). The Board notes that this definition is much broader than that provided in Section 377-1(13), HRS.



and perform evaluations of lower ranking employees, there is little evidence to show that senior residential advisors have different job duties from residential advisors I and II.

Job Corps argues that senior residential advisors evaluate residential advisors I and II through completion of 90-day and annual assessment forms, and this procedure is evidence of senior residential advisors' impact on employee tenure, pay raises and future advancement in the company. Although the NLRB has conferred supervisory status on employees who exercise independent judgment in evaluating other employees, see Virginia Manufacturing Company, Inc., 311 N.L.R.B. No. 102, 143 L.R.R.M. 1368, 1370 (May 28, 1993), the NLRB has found that unless an employee evaluation constitutes an effective recommendation for promotion, wage increase or discipline, the authority to evaluate a co-worker does not in itself create supervisory status. Passavant Health Center, 284 N.L.R.B. 887, 125 L.R.R.M. 1274, 1278 (1987) (finding that nurses' authority to evaluate employees did not rise to level of statutory supervisory authority).

In this case, senior residential advisors testified that in certain instances, their evaluations, which are completed in pencil, have been altered and recommendations ignored, suggesting that their input has been disregarded. Tr. 11/15/93, pp. 120-26. In addition, the record indicates that employee wages basically correlate to company seniority or the employee's date of hire and not to the recommendations made by senior residential advisors. Emp. Ex. 11. This evidence indicates that while senior residential advisors do perform evaluations, the appraisals are not effective

in recommending promotions, wage increases or discipline for the employees evaluated.

In addition, Job Corps argues that senior residential advisors exercise supervisory authority because they are authorized and expected to counsel and recommend discipline for residential advisors I and II. The NLRB has found that an employee is not a supervisor when he or she can recommend disciplinary action to his or her supervisor, but not decide what action, if any, will be taken. Bodolay Packaging Machinery, Inc., 263 N.L.R.B. 320, 111 L.R.R.M. 1180, 1181 (1982) (finding leadman not a supervisor where he recommended disciplinary action to foreman, who in turn, decided what action to take). In addition, "the mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority." Passavant Health Center, 284 N.L.R.B. 887, 125 L.R.R.M. at 1276, citing Heritage Manor Center, 269 N.L.R.B. 408, 413, 115 L.R.R.M. 1336 (1984).

In this case, senior residential advisors record and report employee infractions, and at times, recommend disciplinary action. However, senior residential advisors do not decide whether or not any ensuing disciplinary action will be taken, nor do they have the power to actually discipline other employees. Tr. 11/15/93, pp. 16-17, 19, 96-97, 116, 178. Moreover, since the evidence suggests that residential advisors I and II may also report employee infractions, Id., pp. 117-18, the authority of senior residential advisors appears similar to that of residential advisors I and II. In sum, there is little evidence to indicate

that senior residential advisors have any formidable disciplinary powers which would affect employee job status or tenure.

Job Corps further argues that senior residential advisors have the authority to direct work assignments. The NLRB has found that where challenged employees perform the same work as their co-workers and assign duties that are routine matters, no independent judgment is exercised to warrant supervisory status. Howland Hook Marine Terminal Corp., 263 N.L.R.B. 453, 111 L.R.R.M. 1001, 1003 (1982) (finding foreman not a supervisor when he announced daily work from list prepared by management); St. Alphonsus Hospital, 261 N.L.R.B. 620, 110 L.R.R.M. 1157 (1982) (finding challenged employee spent ninety percent of time doing same work as rank and file employees and authority was of routine nature).

The evidence in this case supports a finding that the actual work of senior residential advisors and residential advisors I and II is rather routine and predetermined. Tr. 11/15/93, p. 100. In fact, the record in this case indicates that senior residential advisors spend a major portion of their time performing duties shared with the residential advisors I and II. Id., pp. 100-02, 127. Essentially, senior residential advisors perform the same job as residential advisors I and II. Id. Based on this evidence, the Board finds that senior residential advisors do not direct work assignments to warrant a finding of supervisory status.

Job Corps also asserts that senior residential advisors have the power to recommend promotions and transfers. However, there is insufficient evidence to support a finding that the evaluations and recommendations of senior residential advisors are

pivotal in influencing promotions and transfers. Id., pp. 26-27, 103.

Finally, Job Corps claims that the attendance of senior residential advisors at the AIM program, which is reserved exclusively for Job Corps' supervisory and managerial employees, further evidences their supervisory status. However, the NLRB has found that attendance at a management training workshop is insufficient to establish supervisory status. St. Alphonsus Hospital, 261 N.L.R.B. 620, 110 L.R.R.M. at 1157. In this case, the evidence indicates that after attending the AIM program, senior residential advisors noticed no change in their job duties or responsibilities. Tr. 11/15/93, pp. 77-78, 147. Based on this evidence, the Board is not convinced that senior residential advisors are supervisors by virtue of their attendance at the AIM program.

Job Corps does not allege, nor does the record in this case indicate that senior residential advisors have the power to hire and fire other employees. Id., pp. 13-17, 92-93, 178. More importantly, the record does not support a finding that particular weight is given to senior residential advisors' suggestions and recommendations as to the hiring or firing and as to the advancement, promotion, or demotion of other employees. Essentially, there is no true delineation of duties between senior residential advisors and residential advisors I and II. The status of "senior residential advisor" is basically a title conferred upon an employee upon promotion.

Based on the facts of this case, the Board finds that, in effect, Job Corps' senior residential advisors neither possess nor

exercise the statutory indicia of supervisory authority, as set forth in Section 377-1(13), HRS. As such, the Board finds that senior residential advisors are not supervisors and are properly included in the proposed collective bargaining unit.

Accordingly, the Board hereby determines the appropriate collective bargaining unit as follows:

**INCLUDED:** All full-time residential advisors, including senior residential advisors, residential advisors I and residential advisors II of Job Corps at its 7600 Kokohead Park Road, Honolulu, Hawaii location.

**EXCLUDED:** Center director, program director, group life manager, residential living supervisors, on-call residential advisors and supervisors as defined in the Act.

#### DIRECTION OF ELECTION

In view of the foregoing rulings, and pursuant to Section 377-5(c), HRS, the Board hereby directs that an election be conducted in accordance with the terms and conditions set forth below.

1. **SECRET BALLOT ELECTION.** An election by secret ballot shall be conducted by a Board representative among eligible employees to determine whether or not the employees desire to be represented by the ILWU. The election shall be held at a mutually agreed upon time and place as indicated in the Notice of Election which shall be issued by the Board.

2. **BARGAINING UNIT.** The appropriate bargaining unit shall consist of the following:

**INCLUDED:** All full-time residential advisors, including senior residential advisors, residential advisors I and residential advisors II of Job Corps at its 7600 Kokohead Park Road, Honolulu, Hawaii location.

EXCLUDED: Center director, program director, group life manager, residential living supervisors, on-call residential advisors and supervisors as defined in the Act.

3. ELIGIBLE VOTERS. The eligible voters shall be those regular employees included within the unit described above who appear on the payroll of Job Corps as of January 31, 1994.

Employees who did not work during certain payroll periods because they were ill or on vacation or temporarily laid off and employees in the armed forces of the United States who present themselves in person at the polls are eligible. However, employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of election are ineligible.

A list of eligible voters shall be submitted to the Board by Job Corps by February 28, 1994 and approved by the ILWU. The list will be attached to the Notice of Election as Exhibit "A".

4. NOTICE OF ELECTION. The Board shall prepare and issue a Notice of Election. Job Corps shall post copies of the Notice of Election at designated times and at such places on the premises of Job Corps so as to afford all interested persons notice of the pending election.

5. OBSERVERS. Job Corps and ILWU shall be entitled to station an equal number of authorized observers selected from among the nonsupervisory employees of Job Corps in the designated polling place during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. The Board representative may have other duly authorized representatives present at the time of voting to assist in any manner.

6. HANDING OUT BALLOTS. Each voter shall be handed a ballot by the Board representative in the presence of the observers. The representative shall be authorized to explain to any voter making inquiry regarding the method of marking the ballot. The services of an interpreter may be employed if necessary. Any further information requested by any voter shall be given only by the representative and only after agreement of both observers.

7. MARKING OF BALLOTS. Each ballot shall be marked by pencil or pen in only one of the squares shown on the ballot. Ballots not marked or improperly marked or ballots signed shall be rejected.

8. CHALLENGES AND REPORTS THEREON. All challenged ballots shall be counted separately and the reason for the challenge recorded in a manner prescribed by the Board representative. If challenged ballots are determinative of the election, the Board shall investigate the challenge and make a finding with respect thereto, which finding shall be binding upon all parties.

9. DETERMINATION OF ELECTION. A majority of the valid ballots cast shall determine the question of representation for the employees of Job Corps who are included in the bargaining unit hereinbefore described.

Immediately upon the conclusion of the election, the votes shall be counted and tabulated by the Board representative in the presence of the observers, and the representative shall report

to Job Corps and ILWU the results of the election by furnishing a Tally of Ballots.

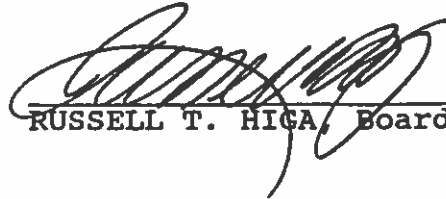
Thereafter, the Board shall certify the results of the election in accordance with the provisions of the Act.

DATED: Honolulu, Hawaii, February 14, 1994.

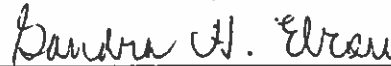
HAWAII LABOR RELATIONS BOARD



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