

FINDINGS OF FACT

1. IKEMOTO is an Adult Corrections Officer (ACO) V, Lieutenant, with the Kauai Community Correctional Center (KCCC) and is an employee as defined in HRS § 89-2. IKEMOTO is included in bargaining unit 10 composed of institutional, health and correctional workers.
2. SAKAI is the Director of PSD and the representative of a public employer within the meaning of HRS § 89-2.
3. IKEMOTO applied for a promotion to the position of ACO VI, Captain, at KCCC.
4. IKEMOTO was interviewed and tested for the position.
5. By letter dated April 24, 2002, IKEMOTO was notified by Clayton Kitamori, Personnel Management Specialist, that he was not selected for the position.
6. Thereafter, by letter dated May 9, 2002, IKEMOTO's representative requested the PSD Personnel Officer to provide a written statement of the reasons for the denial of the promotion pursuant to Section 16.06(d) of the applicable Unit 10 collective bargaining agreement.
7. By letter dated May 10, 2002, IKEMOTO, by his representative, filed a grievance on the denial of his promotion contending that Sections 16.06a, 16.06b, 16.06c, 16.07 and 17.03e of the collective bargaining agreement were violated.
8. On May 17, 2002, IKEMOTO filed an appeal to the Civil Service Commission contesting his non-selection on the bases that PSD failed to conduct an impartial selection; failed to provide just opportunity for the most competent employee; and failed to provide systematic classification of his position through an adequate job evaluation.
9. By letter dated May 21, 2002, IKEMOTO, by his representative, filed a grievance regarding the failure of PSD to respond to his written request for a statement of the reasons for the denial of the promotion within the time period set forth in the collective bargaining agreement (Section 16.06(d)).
10. By letter dated May 24, 2002, SAKAI denied IKEMOTO's grievance because the ACO VI position "is an excluded position and is not covered by the Bargaining Unit 10 Agreement." SAKAI further acknowledged that IKEMOTO had filed an appeal with the Civil Service Commission requesting

IKEMOTO's promotion to ACO VI because PSD allegedly failed to conduct an impartial selection and also failed to provide an adequate job evaluation. Therefore the matter would be addressed in the complaint before the Civil Service Commission.

11. By letter sent by fax on June 24, 2002, IKEMOTO's representative disagreed with PSD's interpretation that the ACO VI is an excluded position and requested that the matter be submitted to arbitration.

12. By letter dated June 27, 2002, SAKAI responded to IKEMOTO:

Under the Hawaii Revised Statutes, Chapter 89, arbitration is reserved specifically for employee organizations, therefore, the Department cannot honor your request for arbitration. This matter should be addressed by the Civil Service Commission, the agency with whom you filed your complaint.

13. Article 15.16 Step 3 Arbitration provides:

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

14. By letter dated July 31, 2002, SAKAI responded to IKEMOTO's letter received on July 24, 2002. SAKAI stated:

Mr. Ikemoto was sent a letter dated April 24, 2002 advising him of his score (58.40). Out of three applicants, Mr. Ikemoto scored the lowest. Seniority is considered only when other factors are relatively equal.

Based on the above, Mr. Ikemoto was denied the promotion.

15. The instant ACO VI position is excluded from the bargaining unit.

DISCUSSION

Complainant contends that he was improperly denied promotion to the ACO VI position and he was not told of the reasons for his non-selection. Respondent filed the instant

motion contending, inter alia, that the Board lacks jurisdiction over a promotional dispute involving movement to an excluded position.

There is no dispute that the Captain's position which Complainant sought a promotion to is excluded from collective bargaining.¹ HRS § 89-2, Definitions, provides, in part, as follows:

“Employee” or “public employee” means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6(c).

In spite of the foregoing reference to HRS § 89-6(c) containing the statutory exclusions of positions from collective bargaining, HRS § 89-6(f), as amended in 2002 in Act 253, presently contains the exclusions.

HRS § 89-6(f) provides as follows:

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

- (1) Elected or appointed official;
- (2) Member of any board or commission;
- (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;
- (4) Secretary to top-level managerial and administrative personnel under paragraph (3);
- (5) Individual concerned with confidential matters affecting employee-employer relations;
- (6) Part-time employee working less than twenty hours per week except part-time employees included in unit (5);
- (7) Temporary employee of three months' duration or less;
- (8) Employee of the executive office of the governor or a household employee at Washington Place;

¹In Decision No. 215, George R. Ariyoshi, 4 HLRB 25 (1986), the Board found that ACO VI positions, including Position No. 28215 at issue here, were properly excluded from collective bargaining unit 10 as top-level managerial positions.

- (9) Employee of the executive office of the lieutenant governor;
- (10) Employee of the executive office of the mayor;
- (11) Staff of the legislative branch of the State;
- (12) Staff of the legislative branches of the counties, except employees of the clerks' offices of the counties;
- (13) Any commissioned and enlisted personnel of the Hawaii national guard;
- (14) Inmate, kokua, patient, ward or student of a state institution;
- (15) Student help; or
- (16) Staff of the Hawaii labor relations board.

In Case No. CE-05-430, Janet Weiss, the employee contended that the employer refused to hire her for a summer school position in retaliation for previously filing grievances. While the Board recognized that it has jurisdiction over prohibited practice complaints alleging discrimination for the exercise of protected rights, the Board found that since summer school teachers are specifically excluded from the bargaining unit, it lacked jurisdiction over the hiring for a summer school teaching position. Accordingly, the Board dismissed the complaint in Order No. 1749, dated August 19, 1999.

Similarly, in Case No. CE-13-453, Lance M. Rabacal, the employee sought a promotion to an excluded position and the Board found that the movement from an included position to an excluded position is not covered by HRS Chapter 89 or the applicable Unit 13 collective bargaining agreement. Thus, in Order No. 1949, dated November 1, 2000, the Board dismissed the complaint for lack of jurisdiction because the employee challenged the employer's non-selection for a position which is outside of the bargaining unit and excluded from collective bargaining.

As the instant case involves identical issues, based on the foregoing the Board concludes that it lacks subject matter jurisdiction over the instant complaint which alleges violations of the Unit 10 collective bargaining agreement for a promotion to an excluded position.

CONCLUSIONS OF LAW

1. HRS § 89-2 provides that "Employee" or "public employee" means any person employed by a public employer except elected and appointed official and such other employees as may be excluded from coverage in HRS § 89-6(f).
2. Although IKEMOTO is an employee included in a collective bargaining unit, he challenges the Respondent's action in filling a position which is outside of

the bargaining unit and excluded from collective bargaining. As such, the Board lacks jurisdiction over the complaint.

ORDER


The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, October 3, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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