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Case No. 23-DR-00-120

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

ACADEMIC LABOR UNITED,

Petitioner,

and

UNIVERSITY OF HAWAII; BOARD OF
REGENTS, University of Hawai'i; DAVID
LASSNER, President, University of Hawai'i;
HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO; and UNIVERSITY
OF HAWAII PROFESSIONAL
ASSEMBLY,

Intervenors.

CASE NO. 23-DR-00-120

ORDER NO. 4019

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECLARATORY ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY ORDER

1. Introduction and Statement of the Case

Petitioner ACADEMIC LABOR UNITED (Petitioner or ALU) asks the Hawai'i Labor Relations Board (Board) to issue three declaratory rulings in its Petition for Declaratory Ruling (Petition). The Board does not have jurisdiction to weigh in on the constitutional issues ALU raises, but in this Decision the Board issues its Declaratory Rulings on the remaining issues that arise under Hawai'i Revised Statutes (HRS) Chapter 89.

1.1. Statement of the Case

After ALU filed its Petition with the Board, five parties submitted Petitions for Intervention. No one opposed the Petitions for Intervention.

At the status conference on September 26, 2023, the Board granted the Petitions for Intervention from Intervenors UNIVERSITY OF HAWAI'I (UH); BOARD OF REGENTS, University of Hawai'i (BOR); and DAVID LASSNER, President, University of Hawai'i (Lassner, and collectively with UH and BOR, UH Intervenors); Intervenor HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA); Intervenor AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME); and Intervenor UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA, and collectively with the UH Intervenors, HGEA, and AFSCME, Intervenors).

The Board also granted the Petition for Intervention from INTERNATIONAL UNION, UAW (UAW); however, because UAW's interest focuses on providing information about national efforts in collective bargaining for graduate assistants, rather than specific questions about the HRS Chapter 89 issues, the Board limited UAW's participation to providing an amicus brief and did not add UAW as a named party to the proceedings.

The Board ordered that the parties simultaneously brief the HRS Chapter 89 issues raised by ALU, with no reply briefs accepted. After receipt of UAW's amicus brief and ALU and the Intervenors' briefs, the record was closed.

1.2. Issues

The issues in the Petition that the Board has jurisdiction over, and which the parties were asked to brief, are:

- 1) Whether ALU's graduate assistant members are "public employees" within the meaning of HRS Chapter 89; and
- 2) Whether ALU's graduate assistant members are **not**:
 - 'nonsupervisory employees in blue collar positions,'
 - 'supervisory employees in blue collar positions,'
 - 'supervisory employees in white collar positions,'
 - 'teachers and other personnel of the department of education,'
 - 'educational officers and other personnel of the department of education,'
 - 'registered professional nurses,'
 - 'institutional, health and correctional workers,'
 - 'firefighters,'
 - 'police officers,'

- ‘state law enforcement officers,’ or
- ‘state and county ocean safety and water safety officers

within the meaning of HRS § 89-6.

2. Background and Findings of Fact

2.1. Parties

ALU is an unincorporated organization that represents graduate assistants at the University of Hawai‘i (UH).

The UH Intervenors are members of the employer¹ group for bargaining units 7 and 8² (BU 7 and BU 8 respectively).

UHPA and HGEA are exclusive representatives³ for BU 7 and BU 8, respectively.

AFSCME is an international labor organization that has four Hawai‘i affiliates.⁴

2.2. Background

After the State of Hawai‘i amended its Constitution in 1968, public sector employees gained the right to collectively bargain as prescribed by law. To enact this change, in 1970, the Hawai‘i State Legislature (Legislature) created HRS Chapter 89, Collective Bargaining in Public Employment, which set forth the laws that govern how public employees may organize, collectively bargain, and strike.

Even though the Constitution and the relevant statutes give public employees a broad right to collectively bargain, those rights are not without exception. Certain groups of public sector employees have been excluded from collectively bargaining under HRS Chapter 89 since 1970.

However, for those public employees allowed to collectively bargain under HRS Chapter 89, the Legislature created a list of appropriate bargaining units. All employees who are allowed to collectively bargain under HRS Chapter 89 must be placed in one of those statutorily defined bargaining units. Because the bargaining units are statutorily defined, the Legislature is the only entity that can create new bargaining units.

In 1972, HLRB’s predecessor, the Hawai‘i Public Employment Relations Board (HPERB) dealt with cases involving the initial makeup of bargaining units, including BU 7 and BU 8.

The issue of graduate assistants' placement in BU 7 and BU 8 was raised and considered by HPERB, and various parties weighed in on the issues. In determining the proper composition of the bargaining units, HPERB did not decide whether graduate assistants were public employees under HRS Chapter 89 or whether they would be entitled to collective bargaining rights under another statutory scheme.

The Hawaii Federation of College Teachers argued that graduate assistants are teachers and are, therefore, part of the faculty; however, BOR and UHPA both argued that graduate assistants are not faculty members and thus should not be a part of BU 7. After the hearing, the HPERB Hearing Officer determined that graduate assistants should be excluded from BU 7 because they are classified on a different compensation schedule and because the nature of their appointments and work differed from that of the faculty. Based on those findings, HPERB found that graduate assistants were excluded from BU 7. *See* Haw. Federation of College Teachers, et al., Board Case No. R-07-12, Decision No. 21, July 17, 1972 (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-21.pdf>) (Decision No. 21).

When considering the composition of BU 8, HPERB found that, once a graduate assistant completes their academic work, their employment is terminated and they have no possibility of continuing their employment with their department as a graduate assistant. HPERB further noted that graduate students were excluded from membership in the Hawai'i employees' retirement system under HRS Chapter 88, despite its broad definition of employees. Graduate assistants did not have social security deducted from their compensation and their salary could be exempt from federal income tax.

Additionally, HPERB recognized that the Constitution at that time required that BOR have the "power in accordance with law to formulate policy, and to exercise control over the university." The Legislature determined the initial bargaining units through considering occupational categories based on existing compensation plans. The salary schedule set up by BOR for graduate assistants differed from the other non-faculty personnel in the University of Hawai'i system. Further, UH treated graduate assistants differently than other non-faculty personnel in terms of access to benefits and the lack of social security and income tax withholdings. Additionally, any employment relationship established between a graduate assistant and the University of Hawai'i system was dependent on the student's status as a student, which made the graduate assistants primarily students, not employees.

Based on this information, HPERB found that graduate assistants were excluded from BU 8. *See* Haw. Federation of College Teachers, et al., Board Case No. R-08-13, Decision No.25, December 1, 1972 (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-25.pdf>) (Decision No. 25).

2.3. UH's Present Treatment of Graduate Assistants

The treatment of Petitioner's graduate assistants has evolved over the years. So too must the law and interpretation of HRS Chapter 89 adapt. The law, while codified in statute and supported by case law, is also meant to evolve in interpretation with changes in facts and circumstances to accomplish the goals of the statutory scheme.

Unlike the graduate assistants that HPERB considered in 1972, the current graduate assistants represented by ALU have a much wider range of duties and responsibilities. Graduate assistants today typically are given a nine or eleven-month appointment, and their duties may range from assisting faculty members to serving as the instructors of courses.

Today, graduate assistants have a multi-step salary schedule set by BOR. This salary schedule is based on considering graduate assistants 0.50 full-time equivalent (FTE) positions. While graduate assistants who are full-time students are exempt from the Federal Insurance Contributions Act (FICA) tax, graduate assistant salaries are subject to both federal and state income tax withholding.

Graduate assistants also are eligible for benefits including tuition exemptions, health plan benefits, and other types of leave.

UH has also set out a grievance procedure that graduate assistants may use if issues arise.

3. Analysis and Conclusions of Law

3.1. Declaratory Ruling Standards; Jurisdiction

Declaratory rulings have a unique and independent role in the statutory scheme; namely, declaratory rulings are determinations of whether and in what way a statute, agency rule, or order, applies to the factual situation raised by an interested person. *See Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Hawai'i 184, 197, 159 P.3d 143, 156 (2007).

Hawai'i Administrative Rules (HAR) § 12-43-50 states that "[a]ny employee, public employee, public employer, exclusive representative, or interested person who has standing under this chapter may petition the [B]oard for a declaratory ruling as to the applicability of any statutory provision or of any rule or order of the [B]oard subject to its jurisdiction." In turn, HRS § 89-5 establishes the Board's authority over Chapter 89, HRS, including the authority to "[r]esolve controversies under this chapter[.]" HRS § 89-5(i)(3). However, the Board, as an administrative agency, can only wield powers expressly or implicitly granted to it by statute. *TIG Ins. Co. v. Kauhane*, 101 Hawai'i 311, 327, 67 P.3d 810, 826 (App. 2003).

The Board finds that ALU does have standing to pursue a declaratory ruling as the Petitioner is an interested person. *See, Asato v. Procurement Policy Board*, 132 Hawai'i 333, 344,

322 P.3d 228, 239 (2014). However, the Board does not have jurisdiction to decide any constitutional issues, and, therefore, declines jurisdiction over all such issues. Haw. Gov't Emp. Ass'n, AFSCME Local 152 v. Lingle, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010). Constitutional analyses are unnecessary for the Board to decide statutory issues presented under HRS Chapter 89. *Id.* at 207, 239 P.3d at 11.

In construing and applying HRS Chapter 89, “our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.” Ka Pa‘akai O Ka‘Aina v. Land Use Commission, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000). The Board notes that while it must follow this rule of statutory construction, it also acknowledges that the law does evolve over time with changing facts and circumstances. To this end, the Board believes that the law, including HRS Chapter 89, was never intended to be stagnant.

HPERB's Decision No. 21 and Decision No. 25 are not final determinations of whether graduate assistants are employees under HRS Chapter 89. Acad. Lab. United v. Bd. of Regents of the Univ. of Haw., 153 Hawai'i 202, 209, 529 P.3d 680, 687 (2023). Rather, they are determinations that graduate assistants did not belong in BU 7 or BU 8. *Id.*

The Board is not bound by the determinations in Decision No. 21 and Decision No. 25 that graduate assistants do not belong in BU 7 or BU 8 because the Board can and has amended the composition of bargaining units. *See, e.g., Bd. of Regents, Univ. of Haw.*, Board Case No. RA-07-186, Decision No. 322 (January 15, 1992) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-322.pdf>); Bd. of Regents, Univ. of Haw. v. Haw. Gov't Emp. Ass'n, Board Case No. RA-08-188, Decision No. 328 (October 29, 1992) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-328.pdf>). Accordingly, Decision No. 21 and Decision No. 25 are not relevant to this proceeding.

3.2. HRS § 89-2 Definition of “Public Employee”

The first question that the Board considers is whether ALU's graduate assistant members are “public employees” within the meaning of HRS Chapter 89. Based on the evidence, the Board finds the graduate assistants represented by ALU are public employees under HRS §§ 89-2 and 89-6 and, therefore, have the right to organize for collective bargaining.

HRS § 89-2 sets out that “‘Employee’ or ‘public employee’ means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].” Therefore, the relevant issue to determine whether graduate assistants are employees under Chapter 89 requires the Board to look at the exclusions under HRS § 89-6(f).

HRS § 89-6(f) provides:

- (f) 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; provided that nothing in this paragraph shall prohibit a member of a collective bargaining unit from serving on a governing board of a charter school, on the state public charter school commission, or as a charter school authorizer established under chapter 302D;
 - (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;
 - (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;
 - (16) Staff of the Hawaii labor relations board;

- (17) Employees of the Hawaii national guard youth challenge academy; or
- (18) Employees of the office of elections.

The Board finds that none of the exceptions in HRS § 89-6(f) are applicable to graduate assistants. Therefore, graduate assistants employed by UH are employees under HRS Chapter 89.

Most of the exceptions under HRS § 89-6(f) clearly do not apply to ALU's graduate assistant members. The UH Intervenors argued that certain exceptions do apply to the graduate assistant members, but the Board must reject those arguments.

HRS § 89-6(f)(14) and (15) prevent both students of state institutions and student help from qualifying as employees under HRS Chapter 89.

The phrase "student help" is not defined in HRS § 89-6(f); accordingly, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. State v. Choy Foo, 142 Hawai'i 65, 72, 414 P.3d 117, 124 (2018). When there is ambiguity, the meaning of ambiguous words may be sought by examining the context or resorting to extrinsic aids to determine legislative intent. Citizens Against Reckless Dev. v. Zoning Board of Appeals, 114 Hawai'i 184, 194, 159 P.3d 143, 153 (2007).

The relevant language of HRS § 89-6(f) could have been written by the Legislature to specifically exclude graduate assistants from being eligible to engage in collective bargaining. It could have been accomplished by listing graduate assistants or by including such individuals in definitions of student help or student of a state institution. The Legislature chose not to do so. The history of the statute does not indicate a clear intent of the Legislature to exclude graduate assistants from collective bargaining.⁵

Based upon the totality of circumstances, the Board concludes that graduate assistants are not "students of a state institution" or "student help" for purposes of exclusion from collective bargaining pursuant to HRS § 89-6(f)(14) and (15). There is a lack of any specific exclusion for graduate assistants in HRS § 89-6(f) and no evidence has been presented that the Legislature intended to exclude graduate assistants from the right to collective bargaining.

The Board finds that the Petitioner's graduate assistant members are public employees employed by a public employer. *See*, HRS § 89-2; Columbia University, 364 NLRB No. 90 (2016). The fact that graduate assistants also have some other non-employment relationship with the University is irrelevant to this determination.

3.3. HRS § 89-6 Appropriate Bargaining Units

As for the determination of what categories the graduate students are **not** included in, it appears to be undisputed among the parties and the Board agrees that the declarations submitted and the facts clearly demonstrate that the Petitioner is not described in any of the bargaining units listed by Petitioner and included in HRS 89-6.

Specifically, Petitioner’s graduate assistant members are **not** included in any of the following units identified in HRS § 89-6: (1) nonsupervisory employees in blue collar positions; (2) supervisory employees in blue collar positions; (4) supervisory employees in white collar positions; (5) teachers and other personnel of the department of education; (6) educational officers and other personnel of the department of education; (9) registered professional nurses; (10) institutional health and correctional workers; (11) firefighters; (12) police officers; (14) state law enforcement officers; or (15) state and county ocean safety and water safety officers.

No evidence has been provided nor is there any evidence of which the Board is aware which would properly place Petitioner’s members in any of these units as defined by statute or by prior Board orders.

4. Declaratory Order

For the reasons stated above, the Board declares that Petitioner’s graduate assistant members are public employees as defined under HRS § 89-2. The Board further declares that Petitioner’s graduate assistant members are **not** included in any of the following units identified in HRS § 89-6: (1) nonsupervisory employees in blue collar positions; (2) supervisory employees in blue collar positions; (4) supervisory employees in white collar positions; (5) teachers and other personnel of the department of education; (6) educational officers and other personnel of the department of education; (9) registered professional nurses; (10) institutional health and correctional workers; (11) firefighters; (12) police officers; (14) state law enforcement officers; or (15) state and county ocean safety and water safety officers. This case is closed.

DATED: Honolulu, Hawai‘i, _____ January 4, 2024 _____.

HAWAI‘I LABOR RELATIONS BOARD



[Signature]

R. OSHIRO, Chair


SESNITA A.D. MOEPONO, Member


STACY MONIZ, Member

ACADEMIC LABOR UNITED and UNIVERSITY OF HAWAII; BOARD OF REGENTS,
UNIVERSITY OF HAWAII; DAVID LASSNER, PRESIDENT, UNIVERSITY OF HAWAII;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO;
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-
CIO; AND UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY
CASE NOS. 23-CE-05-976; 23-CU-05-400; 23-CE-05-978; 23-CU-05-399; 23-CE-05-979; 23-
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¹ HRS § 89-2 defines “employer” or “public employer” as:

“Employer” or “public employer” means the governor in the case of the State, the
respective mayors in the case of the counties, the chief justice of the supreme court in the
case of the judiciary, the board of education in the case of the department of education,
the board of regents in the case of the University of Hawaii, the Hawaii health systems

corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

² HRS § 89-6(a)(7) and (8) define BU 7 and BU 8 as:

(7) Faculty of the University of Hawaii and the community college system;

(8) Personnel of the University of Hawaii and the community college system, other than faculty;

Further, HRS § 89-6(d)(4) defines the employer group for BU 7 and BU 8 as:

For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote.

³ HRS § 89-2 defines “exclusive representative” as:

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

⁴ These affiliates include HGEA; United Public Workers, AFSCME, Local 646, AFL-CIO; United Nurses Associations of California/Union of Health Care Professionals (UNAC/UHCP); and AFSCME Local 928.

⁵ *See*, Act 36, Session Laws of Hawai‘i 1973 and its legislative history.