STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of COUNTY OF HAWAII, Petitioner.	CASE NO. RA-04-231 DECISION NO. 475 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 2, 2008, 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 alleges that the duties and responsibilities of Position No. OO-04773, Highway Superintendent, EM-03, warrants exclusion from bargaining unit 04 as a top-level managerial position. The position will serve as the assistant to the Highway Division Chief, Department of Public Works, Highway Maintenance Division. The position will plan, direct, and coordinate the daily operations and activities relating to the maintenance, repair, and construction of highways, streets, roads, bridges, drainage facilities, appurtenant structures, roadsides, and facilities under the jurisdiction of Department of Public Works. This position will assist in the formulation and implementation of program policies, guidelines, goals, and objectives; and assist in overseeing the fiscal and personnel requirements for the division. Michael R. Ben (Ben), County Director of Human Resources and Petitioner's representative, states in an affidavit attached to the petition, that the Hawaii Government Employees Association (HGEA or Union) was consulted on the transfer of the position from included to excluded status.

By letter dated September 5, 2008, the Board informed Randy Perreira (Perreira), Executive Director, HGEA, of the filing of the instant petition and requested the HGEA's position on the exclusion of the Highway Superintendent, EM-03. On September 10, 2008, the HGEA, by Deputy Executive Director Nora A. Nomura, indicated its concurrence with the exclusion of the position.

On October 6, 2008, Ben filed an affidavit with the Board with an Amended Table of Organization for the County of Hawaii, Department of Public Works, Highway Maintenance Division, Attachment D-1, attached to replace Exhibit D previously submitted to the Board.

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 of Hawaii.

2. The HGEA is the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit 04.

3. According to the position description for Position No. OO-04773, Highway Superintendent, EM-03, the position plans, directs, and coordinates the daily operations and activities relating to the maintenance, repair, and construction of highways, streets, roads, bridges, drainage facilities, appurtenant structures, roadsides, and facilities under the jurisdiction of the Department of Public Works. The position reports to the Highway Division Chief of the Department of Public Works - Highway Maintenance Division.

   The position performs the following duties in the approximate percentages of time:

   a. Administrative: Participates in formulating and implementing divisional policies and procedures, rules and regulations. Administers and manages policies and procedures. Reviews and recommends overall program requirements to formulate long-range goals and objectives. Interprets and enforces statutes, codes, ordinances, policies, rules and regulations. Participates in preparing and justifying division's budget requests and Capital Improvement Project (CIP) recommendations. Approves requisitions for materials and supplies. Determines project requirements for personnel, equipment, and materials and maintains costs records by projects. Assists in overseeing personnel recruitment for the division; assigns and reviews the work of subordinates; evaluates the performance of subordinate supervisors; recommends personnel actions including hiring, promotion, transfers, disciplinary actions, and termination; approves leave requests. Participates in conducting investigations and handling grievances. Investigates and resolves administrative problems in the districts. Assists in developing, directing, and implementing in-service training and safety programs. Recommends, implements and maintains operating policies and procedures, including the establishment of criteria and guideline for work priorities. 60%

   b. Operations: Plans, directs, and coordinates a County-wide program involving the operation, maintenance, and repair of highways, streets, roads, bridges, drainage facilities appurtenant structures and adjacent

areas for each district which includes operational schedules, priorities, materials, and equipment needs. Reviews operations reports and evaluates efficiency of operations. Develops and implements new work methods and practices to increase job efficiency. Reads, interprets, and applies engineering plans, designs, and specifications in performing improvements and repairs to structures and facilities. Conducts on-site inspection of in-house work projects such as drainage systems, sidewalks, driveway connections, etc., including on-site visits to ensure maximum use of equipment and personnel. Responds to and coordinates island-wide emergency and disaster relief efforts. Assists in coordinating the effective utilization of all available resources. 40%

Attachment B.

4. By letter dated July 28, 2008, Ronald K. Takahashi, Deputy Director of Human Resources, County of Hawaii, inter alia, followed up on prior correspondence advising Perreira of the proposed exclusion of the Highway Superintendent and requesting the HGEA's concurrence with the exclusion. Attachment A-2.

5. On September 2, 2008, the County filed the instant Petition requesting exclusion of the Highway Superintendent.

6. By letter dated September 5, 2008, the Board Chair informed Perreira, that the County filed the instant petition and requested acknowledgment of HGEA's concurrence with the position's exclusion. Thereafter on September 10, 2008, the Board received the letter with HGEA's concurrence signed by Nora A. Nomura for Perreira. The Board includes the foregoing letter in the record of these proceedings.

7. According to the class specifications, the Highway Superintendent, EM-03, plans, directs, and coordinates the daily operations and activities relating to the maintenance, repair, and construction of highways, streets, roads, bridges, appurtenant structures, roadsides, and facilities under the jurisdiction of the Department of Public Works. The class is distinguished by its responsibility to plan, direct, and coordinate the daily operations of all districts relative to the maintenance, repair, and construction of highways, streets, roads, bridges, appurtenant structures, roadsides, and facilities.

Attachment C.

8. According to the Position Organization Chart for the County of Hawaii, Department of Water Supply, Administration Division, the position is below

the Highway Division Chief and is at or near the top of the Highway Maintenance Division, Department of Public Works.

Attachment D-1.

9. The Board finds that Position No. OO-04773, Highway Superintendent, EM-3, will exercise considerable discretion in serving as the assistant to the division head of the Department of Public Works, Highway Maintenance Division. The position will formulate and implement program policies, guidelines, procedures, goals and objectives relating to the operations and activities involving the maintenance, repair, and construction of highways, streets, roads, bridges, drainage facilities, appurtenant structures, roadsides, and facilities under the jurisdiction of the Department of Public Works. The position will also assist in overseeing administrative operations, including the fiscal and personnel requirements for the division.

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.]
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> * * *
>
> 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.

5. Based upon a review of the duties and responsibilities of Position No. OO-04773, Highway Superintendent, EM-03, the Board concludes that the position is at or near the top of an ongoing complex agency and will exercise considerable discretion in serving as the assistant to the division head of the Department of Public Works, Highway Maintenance Division. The position will formulate and implement program policies, guidelines, procedures, goals and objectives relating to the operations and activities involving the maintenance, repair, and construction of highways, streets, roads, bridges, drainage facilities, appurtenant structures, roadsides, and facilities under the jurisdiction of the Department of Public Works, including Operations in South Hilo, Puna, Ka'u, Kona, Kohala and Hamakua. The position will also assist in overseeing administrative operations, including the fiscal and personnel requirements for the division. As such, the position will have significant authority and latitude for individual initiative and independent judgment in the overall administration of the division. Based on the position's respective duties and responsibilities, the Board concludes that the position is a top-level managerial position and should be excluded from bargaining unit 04 and the coverage of HRS Chapter 89.

ORDER

Position No. OO-04773, Highway Superintendent, EM-03, is hereby excluded from collective bargaining unit 04, and the coverage of HRS Chapter 89 as a top-level managerial employee.

DATED: Honolulu, Hawaii, October 7, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

COUNTY OF HAWAII, Petitioner
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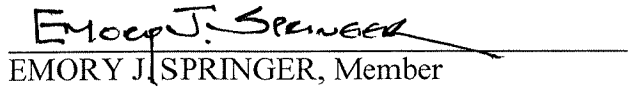

EMORY J. SPRINGER, Member

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