STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>COUNTY OF HAWAII,<br><br>Petitioner,<br><br>and<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Exclusive Representative. | ) | CASE NO. RA-13-217<br><br>DECISION NO. 451<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 2, 2005, 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 new Position No. OO-04442, Liquor Control Administrative Officer, EM-03, warrant its exclusion from collective bargaining as a top-level managerial position. The County contends that the position will serve as the principal and top-level administrative assistant to the Director of the Department of Liquor Control performing a wide range of duties including the formulation and implementation of policies and procedures, the development of programs and objectives, and the administration of the department to ensure efficient and effective operations. Michael R. Ben, County Director of Personnel and Petitioner's representative, states in an affidavit attached to the petition, that the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) concurs with the exclusion of the position from bargaining unit 13.

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, including the employees in bargaining unit 13.

2. The HGEA is the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit 13.

3. According to the position description for the Liquor Control Administrative Officer, the position serves as the principal assistant to the Director of Liquor Control and is responsible for planning, directing, and coordinating the licensing and enforcement of the Liquor Commission. The position will perform the following duties in the approximate percentage of worktime:

   a. Plans, directs, and coordinates all inspectional and investigative functions and activities relative to the enforcement and licensing divisions. 30%

   b. Establishes internal operating procedures for the execution of the enforcement and licensing function. 10%

   c. Assists in development of programs and objectives for the department; develops and recommends the formulation of short and long range plans and goals. 10%

   d. Coordinates liquor law activities with other regulatory or law enforcement agencies. 5%

   e. Initiates studies of existing liquor laws, regulations, and policies and recommends revisions as needed. 5%

   f. May testify before legislative committees and County Council. 5%

   g. May testify at Commission meetings to advise on matters. 5%

   h. Oversees the administrative functions, including fiscal and personnel matters; reviews staffing and requests position action to meet operational needs; prepares and justifies the department's budget; oversees inventory and expenditures; consults with director on the resolution of administrative problems. 20%

   i. Directs in-service training of staff. 5%

j. In the absence of the Director, shall be responsible for the operations of the department as directed by the Director. 5%

Exhibit B.

4. According to the class specifications, the Liquor Control Administrative Officer, EM-03, plans, directs, and coordinates the licensing and enforcement functions of the Liquor Commission, and serves as the principal assistant to the Director, Department of Liquor Control. The class is distinguished by its responsibility for planning, directing, and coordinating the licensing and enforcement functions of the Liquor Commission and serves as the principal assistant to the Director, Department of Liquor Control.

Exhibit C.

5. By letter dated May 12, 2005, Deputy Director of Personnel Rodney T. Kaido notified Russell Okata, Executive Director, HGEA of the proposed exclusion of the Liquor Control Administrative Officer from bargaining unit 13 as the position will serve as the principal assistant to the Director of the Department of Liquor Control. The position will also plan, direct, and coordinate the licensing and enforcement functions of the Liquor Commission; develop and implement programs, objectives, policies and procedures; formulate short and long range plans and goals, and oversee the administrative functions of the department. On May 20, 2005, Randy Perreira, HGEA Deputy Director indicated his concurrence with the proposed exclusion.

Exhibit A.

6. The Board finds that Position No. OO-04442, Liquor Control Administrative Officer is the assistant to the Director of the Liquor Control Department and will be responsible for planning and directing the departmental employees in the licensing and enforcement functions. The position will exercise considerable discretion in developing and implementing the department's programs; formulating short and long range plans and goals; and overseeing the executive management of administrative, personnel and operations functions of the department.

## 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:
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> * * *
>
> (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.

6. The Liquor Control Administrative Officer is the assistant to the Director of the Department of Liquor Control. The position has significant authority, latitude for individual initiative and independent judgment in the overall administration and operations management of the department. Based on the position's duties and responsibilities, the Board concludes that the position is a top-level managerial position and should be excluded from bargaining unit 13 and coverage under HRS Chapter 89.

## ORDER

Position No. OO-04442, Liquor Control Administrative Officer, EM-03 is hereby excluded from collective bargaining unit 13 and coverage of HRS Chapter 89 as a top-level managerial employee.

DATED: Honolulu, Hawaii, June 9, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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