STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of COUNTY OF HAWAII, Petitioner, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Exclusive Representative.	)	CASE NO. RA-13-218 DECISION NO. 454 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 14, 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-04466, Risk Management Officer, EM-05, warrant its exclusion from collective bargaining as a top-level managerial position. The County contends that the position will serve as the division head for the new Department of Finance, Risk Management Division and will formulate the policies, guidelines, procedures, and objectives of the County's risk management program; and oversee the administrative functions, including fiscal and personnel matters for the division. 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 Risk Management Officer, the position is responsible for the County's risk management program and formulates and implements County policies, procedures, and programs for risk management and loss control. The position also serves as an advisor and technical resource to the County officials, managers, and employees on risk management, including exposure, prevention, avoidance, and the transfer of risk through purchase of insurance and other methods. The position will perform the following duties in the approximate percentage of worktime:

   a. Formulates the County's policies, procedures, and programs for risk management and loss control; collaborates with the Risk Management Committee and directs the development and administration of loss prevention programs, policies, and procedures; advises departments in implementing the policies, procedures, and controls, and develops internal procedures for compliance; conducts and/or coordinates risk management seminars and training sessions. 20%.

   b. Oversees and directs the identification of property and liability loss exposure activities, including employee safety and workers' compensation; analyzes and defines the extent of exposures; determines effective methods of avoidance, reduction, prevention, assumption, or transfer of risks to provide optimum coverage at minimal cost. Reviews purchasing/procurement practices and procedures to ensure that risk management concerns are addressed. Oversees the maintenance of records and statistics on risk management and loss control programs; analyzes data to identify areas of concern needing appropriate corrective actions. 20%.

   c. Develops and directs strategies and risk analyses for self-insurance options; monitors the insurance industry and develops risk financing strategies; obtains actuarial evaluations of County self-insurance programs; develops criteria for loss funding programs and staffing of loss reserves. Develops strategies and designs commercial insurance programs; processes, negotiates and oversees

the administration of the County's insurance contracts. 20%.

d. Provides information to elected and appointed officials and members of boards and commissions as to potential liabilities arising out of their official capacities; provides technical assistance to all departments in evaluating programs and activities to minimize risk exposure. 15%.

e. Oversees the division's fiscal, personnel, equipment, and inventory functions; prepares and justifies the annual program budget; sets appropriate reserves based on a review of pending claims; approves leaves; recommends personnel actions including hiring, promotion, disciplinary action, and termination. Plans, develops, and implements long-range plans for risk management. 15%.

f. Keeps abreast of and analyzes governmental regulations, laws, and rulings concerned with insurance and risk management to determine their impact on the County and its programs; implements appropriate action to stay in compliance; prepares ordinance amendments and legislation proposals on matters affecting the County's risk management programs. 5%.

g. Performs other related duties as assigned. 5%.

Exhibit B.

4. According to the class specifications, the Risk Management Officer, EM-05, plans, directs, and coordinates the County's risk management program and develops and implements policies, procedures and programs for risk management and loss control. The position also serves as advisor and technical resource for County officials, managers, and employees on risk management, including exposure, prevention, avoidance, and the transfer of risk through purchase of insurance and other methods; and performs other related duties. The class is distinguished by its responsibility to administer the County's risk management program.

Exhibit C.

5. By letter dated July 5, 2005, Deputy Director of Personnel Rodney T. Kaido notified HGEA Executive Director Russell Okata of the proposed exclusion of the Risk Management Officer from bargaining unit 13 as the position will serve as the division head for the new Department of Finance, Risk Management Division. The position will also plan, direct, and coordinate the County's risk management program; formulate and implement programs, objectives, policies and procedures; establish short and long range plans and goals, and oversee the administrative functions, including fiscal and personnel matters for the division. On July 7, 2005, HGEA Deputy Director Randy Perreira indicated his concurrence with the proposed exclusion.

Exhibit A.

6. The Board finds that Position No. OO-04466, Risk Management Officer, EM-05, as the division head for the new Department of Finance, Risk Management Division is responsible for planning and directing and coordinating the County's risk management program. The position will exercise considerable discretion in developing and implementing the division's programs; formulating short and long range plans and goals; and overseeing the administrative, including fiscal and personnel, functions of 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.

6. The Risk Management Officer is the head of a division of the Department of Finance and directs the work of the program with considerable discretion to determine the means, methods, and personnel by which the agency or program policy is to be carried out. The position has significant authority, latitude for individual initiative and independent judgment in the overall administration and operations management of the division. 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-04466, Risk Management Officer, EM-05, is hereby excluded from collective bargaining unit 13 and the coverage of HRS Chapter 89 as a top-level managerial employee.

DATED: Honolulu, Hawaii, August 23, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

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EMORY J. SPRINGER, Member

KATHLEEN RACUYA-MARKRICH, Member

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