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MARIE C. LADERTA
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DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

February 4, 2008

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
For Hearing on
Tuesday, February 5, 2008
8:30 a.m., Conference Room 309

BY

MARIE C. LADERTA, DIRECTOR

House Bill No. 2227
Relating to Public Employment

TO CHAIRPERSON SONSON AND MEMBERS OF THE COMMITTEE:

Chair Sonson, thank you for the opportunity to testify on House Bill No. 2227.

The stated purpose of the bill is to "provide equity and certainty in disciplinary actions relating to public employees." The bill also seeks to amend Section 89-9(d), HRS, to make an employee's probationary period a permissive subject of bargaining.

The Department of Human Resources Development **opposes** this bill for the following reasons:

(1) We believe that the bill unnecessarily infringes upon already-existing disciplinary provisions in the civil service law and the collective bargaining agreements. Each collectively-bargained labor agreement with the public unions provides a specified discipline and multi-step grievance process that culminates in arbitration. Whether a disciplinary action is ultimately upheld will depend largely upon the public employer's

consideration of the employee's due process rights such as notice, fair investigation, treatment of similarly situated employees, and degree of discipline for the proven offense. A fair process has already been negotiated between the public employers and the unions to address the concerns raised in this bill.

(2) In addition, the bill's amendment of Section 89-9(d) to make the initial probation period a permissible subject of bargaining controverts the Merit Principle pursuant to HRS 76-1, and infringes on an employer's management right to fully administer the initial probation period as the final test of the civil service examination process, prior to granting their employees temporary or permanent civil service memberships. To achieve maximum recruitment efficiencies in Hawaii's highly competitive labor market, initial probation periods are the most important civil service tests to ensure that all initial civil service hires demonstrate their fitness and ability for public employment for merit retention in their positions.

The taxpaying public expects the public employers to ensure that poorly performing employees are not retained in the workforce. Therefore, allowing the probation period to be a subject for negotiations is not in the best interests of the public. If 89-9(d) is amended as proposed, the termination of such employees during the probation period will likely result in a protracted discipline and grievance process at significant cost and time to the public employers.

Accordingly, we respectfully oppose this measure. Thank you for the opportunity to provide testimony.

Respectfully submitted,

Marie P. Laderta

MARIE C. LADERTA
Director

Testimony to the Twenty-Fourth Legislature, 2008 Session

House Committee on Labor & Public Employment
The Honorable Alex M. Sonson, Chair
The Honorable Bob Nakasone, Vice Chair

Tuesday, February 5, 2008, 8:30 a.m.
State Capitol, Conference Room 309

by
Sharen M. Tokura
Human Resources Department Head

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 2227, Relating to Public Employment

Purpose: Clarifies disciplinary actions against public employees by requiring evidence to support probable cause for serious offense and documentation showing progressive disciplinary actions. Authorizes suspension with pay pending investigation of charges.

Judiciary's Position:

The Judiciary strongly opposes the passage of House Bill No. 2227, Relating to Public Employees.

The proposed legislation is overly prescriptive and interferes with the employer's right to discipline based on basic principles of discipline. In addition, procedures for issuing discipline have already been negotiated and included in many collective bargaining agreements, including the principles of due process and just cause. The justification for and decision to discipline remains the prerogative of management and must remain in order to allow public employers to effectively manage their operations.

House Bill No. 2227 requires the employer to have evidence and documentation to show that progressive disciplinary actions were taken prior to suspending, demoting, or discharging an employee. This language does not take in to account situations where it is not appropriate to issue a lesser form of discipline for an egregious offense such as assaulting another person,

sexually assaulting a client, embezzlement of public funds, or fraudulent actions. The severity of the misconduct may warrant discharge despite a lack of prior disciplinary actions on record.

The employer and union have negotiated provisions whereby derogatory materials (i.e., letters of disciplinary actions), must be purged after a set period of time. Thus, although prior disciplinary actions may have been taken, there would no longer be a record of such. This proposed legislation would be contrary to negotiated provisions in the various collective bargaining agreements.

Moreover, prior to issuing disciplinary actions, good management practice requires that the appointing authority review employee personnel files which would contain prior disciplinary actions for related offenses and the employee's employment record including length of service. This would in turn assist with determining the degree of disciplinary action taken.

Additionally, House Bill No. 2227's language is vague and confusing, in that there are many terms that are unclear, including but not limited to "probable cause" and "serious offense." House Bill No. 2227 also labels investigations as being disciplinary in nature, when the primary reason for conducting an investigation in the first place is to determine the veracity of the allegations. On the contrary, investigations are fact-finding initiatives which determine whether an employee engaged in misconduct, after which time, discipline is issued, and not vice versa. Such fact finding also serve to support instances of no discipline, and may serve to exonerate the accused.

Finally, with respect to the proposed changes to Sections 76-45 and 76-46, Hawaii Revised Statutes, in 2007, the Legislature allowed the procedures and criteria for suspensions and discharges to become permissive subjects of bargaining. Since that is the case, it does not appear to be appropriate for these subjects to be legislated.

House Bill No. 2227 also seeks to include "probations" as a permissible subject of bargaining. The use of the term "probation" in the context of proposed changes to House Bill No. 2227, is unclear. However, as "probation" generally refers to probationary periods, we will comment as such. Probationary periods are recognized as part of the examination process to determine an employee's fitness for a new position and ability to perform the scope of responsibility, whether it be to a new appointment with the employer or a transfer or promotion to a new position. Currently, management has the right to determine an employee's fitness and ability for a position, and as such, takes full responsibility for its actions (i.e., unions do not share in any adverse consequences, should they occur, as a result of exercising these management rights, nor is there any language included which would indicate that they would be willing to do so). As such, "probations" should not be included as a permissible subject of bargaining.

Based on the foregoing, the language in House Bill No. 2227 is not acceptable and impacts the fundamental management decision-making process by interfering with the basic rights and obligations of public employers to responsibly manage government operations.

The Judiciary strongly opposes the passage of this bill, as the continued diminishment of management's rights is contrary to responsible and accountable management practice and sound public policy.

Thank you for the opportunity comment on House Bill No. 2227.

DEPARTMENT OF HUMAN RESOURCES

CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 10th Floor
HONOLULU, HAWAII 96813

MUFI HANNEMANN
MAYOR

KENNETH Y. NAKAMATSU
DIRECTOR

February 5, 2008

The Honorable Alex M. Sonson, Chair
and Members of the Committee
on Labor & Public Employment
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Sonson and Members of the Committee:

Subject: H.B. 2227, Relating to Public Employment

I am Ken Nakamatsu, Director of Human Resources, City and County of Honolulu. H.B. 2227 purports to provide equity and certainty in disciplinary actions by amending HRS §§76-45 and 76-46. The language proposed, however, would unnecessarily interfere with subjects that have already been negotiated to by the City and the public unions. Moreover, the Bill would also compromise the City's ability to respond in situations that may result in employee discipline. For these reasons, we **strongly oppose** this Bill.

The current collective bargaining agreements between the City and both UPW and HGEA already afford the equity and certainty H.B. 2227 seeks, as the agreements contain provisions that provides that proper cause must exist in order to discipline an employee. There are also checks in place to review actions taken—the grievance procedure and civil service commission appeals procedure are two such checks. Given these provisions, we believe it is not necessary to enact legislation to ensure equity.

The Bill also places into law matters which are best left to management. For example, the Bill requires evidence of progressive discipline before demoting or discharging an employee. This may not be appropriate in cases of severe misconduct. A one-time incident, if severe enough, could trigger an employer's duty to permanently remove the person from the workplace. The State Supreme Court's decision in Arquero v. Hilton Hawaiian Village, 104 Haw. 423 (2004), indicated a very low threshold for defining "severe" conduct. Labor may also agree with management that, at times, the conduct is so severe discharge is appropriate for a first offense. For example, the

Union and management may agree that for the safety of the public and fellow employees, a police officer who tests positive for crystal meth should be discharged immediately. This law would prohibit such immediate action and public safety will suffer. We also note that the theory of progressive discipline applies to increasing disciplinary actions for similar offenses. It would not apply to a series of acts of misconduct which are unrelated to each other.

In addition to interfering with the labor management process, the passage of H.B. 2227 would limit the City's ability to comply with state and federal law regarding the employer's duty to take effective disciplinary action to stop discriminatory harassment. (See Arquero) It may also impact our duty to prevent violence in the workplace, misuse of government property, and many other serious workplace issues.

The Bill would require the employer to have "recent" evidence before taking disciplinary action. In practice, it may take many months to complete an investigation due to organizational complexity, availability of witnesses, a delay with the employer becoming aware of the incident, etc. In addition, there are situations where an on-going criminal investigation hinders the City's ability to complete an investigation. The timing of the evidence becoming known should not prevent the employer's ability to address the misconduct if it is serious enough. Public employees must be held accountable for upholding the public trust within reason, and as provided for either in law or through negotiated agreements with employee representatives, the public expects that misconduct not be tolerated or excused simply because of the timing of evidence becoming known.

As a technical note, in Section 76-45, the Bill appears to be addressing two issues—suspensions, and leaves with or without pay pending investigation. For the same reasons given previously, we believe suspensions may be warranted without progressive discipline in certain situations. In addition, we do not believe the proposed language establishing requirements for a person to be placed on leave without pay pending investigation are necessary. Current collective bargaining agreements provide that whenever an investigation of charges against an employee is pending and the employee's presence at the work site is deemed by the employer to be detrimental to the proper conduct of the investigation or the operations of the workplace, the employee may be placed on leave of absence without pay pending investigation for a period not to exceed thirty (30) days.

Based on the foregoing reasons, the City strongly opposes H.B. 2227.

Sincerely,

Ken Nakamatsu

KEN Y. NAKAMATSU
Director of Human Resources

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
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The Twenty-Fourth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii Government Employees Association
February 5, 2008

H.B. 2227 – RELATING TO PUBLIC EMPLOYMENT

The Hawaii Government Employees Association sincerely appreciates the intent of H.B. 2227. However, in reviewing the bill, we feel the subject matter should be addressed for included employees, through collective bargaining, and for excluded employees, through an amendment to Chapter 89C, HRS.

Sections 76-45 and 76-46, HRS, stipulate that suspensions, leaves without pay pending an investigation, demotions and discharges shall be in accordance with procedures negotiated under Chapter 89, HRS, or established under Chapter 89C, HRS. We do not believe there is a need to amend Section 89-9(d), HRS.

Thank you for the opportunity to comment on H.B. 2227.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director

February 5, 2008

Representative Alex M. Sonson
Chair of Committee on Labor and Public Employment
2008 Legislative Regular Session
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Representative Sonson:

Please allow me to introduce myself. My name is Linda W.L. Starr. I have been employed by the State of Hawaii Executive Branch as a computer specialist since June 28, 1971.

The purpose for my letter to you is to ask and to encourage you to please favorably consider ***HB2227 "Relating To Public Employment."***

The HB2227 asks that the State legislature change the language of Section 76-45 (Suspension) which bluntly and simply states that *"An appointing authority may, for disciplinary purposes, suspend any employee without pay pending an investigation."*

I had asked Speaker Calvin Say to please introduce this bill-for-an-act that would change Section 76-45.

As Section 76-45 is currently worded, the employer:

a. Does not have to show "cause,"
b. Does not have to warn the employee of a suspension with or without pay is eminent,
c. Does not prohibit parceling-out the data to repeatedly suspend an employee, and
d. Does not have any time limit as to when the employer would discipline an employee after data supporting an alleged serious violation was collected.

The current language for suspending an employee does not state that the employer must have just cause or probable cause for investigating an employee for disciplinary purposes. In essence, State employees are "at-will" for any type of disciplinary action by the employer

The current Hawaii Revised Statute language for suspending, discharging, demoting an employee do not have any timeliness as to when the employer gathers their alleged documentation, when they investigate the authenticity of the data the apparently have on hand, or when the employer should suspend the employee as a result of the documentation they claim to possess as a result of an investigation.

As currently worded, there is the appearance of inconsistency in the language of Section 76-45 and Section 89-9 related to the procedures for the employer to follow when an employee is suspended. Section 76-45 uses the strong mandatory word "shall", but Section 89-9(d) uses the weak optional discretionary word "may."

Section 76-45 does not allow an employee to ever be suspended "with pay." When an employee is suspended from work "without pay", the employee is apparently assumed to be "guilty as charged" by the employer, forcing the employee to wait "without pay" while the employer investigates the matters of fact related to the evidence the employer has on hand to allegedly support the employer's claim of a serious employment violation.

Section 76-45 does not require the employer to have verifiable first-hand evidence.

Disciplinary action should be timely. The employer should not continue to gather data or evidence that an employee has apparently been violating an employer rule, law, policy, process or procedure for 3, 4, 5, 6, 7, 8, 9 months before confronting the employee. In other words a parent should not wait, say around 5-months in September, to ground his/her teenage son, because earlier that year, in April, the son violated the parent's curfew, and came home more than an hour late from a party.

A violation is an action or inaction that is willful, deliberate or spiteful. In other words, if there were a State park that was known to have rare endangered flowers in an area, and a person was running and looking up to catch a Frisbee, and he trampled and broke some of these rare flowers, very clearly he violated provisions of an endangered species act, but then should he automatically be found guilty of violating the endangered species act and severely penalized?

I ask you to please act favorably on HB2227 relating to public employment that proposes to change and strengthen the language of Section 76-45, Suspension, Section 76-46 Discharges; Demotions, and Section 89-9(d), so that it is clear as to when a public employee may be suspended, discharged, or demoted from public employment.

Thank you for taking your time to read about my eagerness to have HB2227 advance through this 2008 Legislative Regular Session.

Sincerely,

Linda W.L. Starr

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Honolulu, Hawaii 96824-0310
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Date of Hearing: February 5, 2008

Committee: House Labor & Public Employment

Department: Education

Person Testifying: Patricia Hamamoto, Superintendent

Title: H.B. 2227, Relating to public employment

Purpose: To clarify disciplinary actions against public employees by requiring evidence to support probable cause for serious offense and documentation showing progressive disciplinary actions. Authorizes suspension with pay pending investigation of charge.

Department's Position: The Department of Education (Department) opposes H.B. 2227 as written for the following reasons:

1) This bill requires the appointing authority to apply a "probable cause" standard for suspending an employee. "Just cause" is the well established and generally accepted principle that employers utilize to govern employee discipline. An employer must have "just cause" for imposing disciplinary action. "Just cause" should be the standard used in employee discipline as opposed to "probable cause".

2) This bill requires the appointing authority to show that there was progressive discipline for an employee before the appointing authority can suspend that employee. However, certain misconduct may be so egregious and severe that the employer should have the ability to impose suspension on a first offense than be expected to begin with a lighter disciplinary action.

Harry Kim
Mayor

Michael R. Ben, SPHR
Director of Human Resources

Ronald K. Takahashi
Deputy Director of Human Resources

County of Hawai'i
Department of Human Resources

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February 5, 2008

The Honorable Alex M. Sonson, Chair
And Members of the Committee on Labor & Public Employment
House of Representatives
State Capitol
Honolulu, HI 96813

Dear Chairman Sonson and Members of the Committee:

Re: HB 2227 RELATING TO PUBLIC EMPLOYEES

I am Michael R. Ben, Director of Human Resources for the County of Hawai`i. I am testifying against HB 2227 and ask that this bill be tabled.

As proposed, HB 2227 will prevent the County of Hawai`i from:

1. Discharging an employee who shows his penis to a young female, as we have done previously;

2. Discharging a supervisor who uses County equipment and materials to pave a friend's drive way, not to mention ordering his men to do the work, all on County time, as we have done previously;

3. Suspending an employee who calls in sick, and is seen participating in an outrigger canoe race on the other side of the island, as we have done previously; and

4. Taking any disciplinary action against any employee who has a "clean disciplinary record" who:

    a. Goes "postal" and physically assaults and possibly kills fellow employees;

    b. Rapes or otherwise sexually assaults another employee, a vendor, or someone from the public; or

c. Violates any discrimination and anti-harassment laws.

The bill does not accomplish its purpose of providing equity and certainty in disciplinary action. Instead, this bill creates:

1. Fear and anxiety among government employees when employees aren't terminated when committing heinous actions for the first time;

2. Confusion because it mandates progressive discipline, yet allows suspensions only for purposes of investigations; and

3. More bureaucracy than what is needed when it comes to disciplinary action. It requires that rules be put in place so that disciplinary action can be imposed for:

   a. sick leave abuse;

   b. sleeping on duty;

   c. being late to work;

   d. leaving work early;

   e. unauthorized use of government property;

   f. falsifying time sheets;

   g. falsifying travel and mileage records;

   h. horse play;

   i. etc.

Existing laws and our collective bargaining agreements with the unions concerning disciplinary actions have served the State and its political subdivisions well. These provisions have protected government employees from unjust and improper disciplinary actions. They have done so since 1939 when the first civil service laws were enacted, and since 1972 when the first collective bargaining agreements were negotiated.

Last, I know of no action taken by a public employer In Hawaii which would warrant a bill such as HB 2227.

Thus, I ask that HB 2227 be tabled.

Thank you.

Sincerely,

Michael R. Ben

Michael R. Ben, SPHR
Director of Human Resources

CHARMAINE TAVARES
Mayor

LYNN G. KRIEG
Director

LANCE T. HIROMOTO
Deputy Director

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February 4, 2008

Honorable Alex M. Sonson, Chair
and Members of the
Committee on Labor & Public Employment
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Sonson and Members of the Committee:

Subject: H.B. 2227, RELATING TO PUBLIC EMPLOYMENT

I am Lynn G. Krieg, Director of Personnel Services for the County of Maui. I am testifying against the passage of H.B. 2227.

While the stated purpose of this bill is to "provide equity and certainty in disciplinary actions relating to public employees," we believe that the proposed changes will unnecessarily infringe upon the current balance that exists between existing disciplinary provisions in the civil service laws and the various collective bargaining agreements. Furthermore, the bill proposes to amend Section 89-9(d), HRS, to make an employee's probationary period a permissive subject of bargaining. This change would remove a public employer's right to remove employees during their initial six-month probationary period who do not meet the employer's performance standards and would similarly affect operations by infringing upon management's ability to deal with an employee who is promoted only to find out the new job is beyond his or her capabilities.

Public employees, whether they are members of a collective bargaining unit or not, are afforded due process rights which include notice, fair investigation, internal complaint procedures, consistent treatment of similarly situated employees. Contested actions are either appealed to the Merit Appeals Board or work their way through the established grievance process as outlined in the various collective bargaining agreements. Both processes currently exist to provide the equity and certainty that this Act purports to provide.

The changes proposed for Section 76-45, and Section 76-46, HRS, appear to seek to tie the hands of the employer in that Section 76-45 would require that the employer have both "recently obtained evidence gathered to support probable cause for a serious offense" and "documentation to show progressive disciplinary actions" before suspending an employee. All of this would be needed before conducting an investigation.

Even more disturbing, are the changes to Section 76-46, HRS, which would require that "the employer shall have documentation to show progressive disciplinary actions" prior to demoting or discharging an employee. This would mean that an employer would not be able to discharge an employee for embezzling thousands of dollars, because the employee has an otherwise spotless record; or the employee whose gross negligence results in catastrophic injury to another employee and extreme financial loss to the employer, but it is the employee's first offense. Nor would an employer be able to discharge an employee with a clean record who is caught selling drugs on company property during work hours.

We believe that the existing provisions and processes suffice to provide the equity and certainty needed where disciplinary actions are concerned and that the changes proposed would do more to undermine the processes than enhance them.

In light of the foregoing, we respectfully oppose this measure. Thank you for the opportunity to testify.

Sincerely,

LYNN G. KRIEG
Director of Personnel Services