

Testimony Presented Before the
House Committee on Labor and Public Employment
February 5, 2008, at 8:30 a.m.

by
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Vice President for Administration, University of Hawai'i System

HB 2227 – Relating to Public Employment

Chair Sonson, Vice Chair Nakasone, and Members of the Committee:

The University of Hawai'i strongly opposes the passage of HB 2227 because it would inappropriately restrict and hamper the University's ability to comply with other State and federal laws requiring corrective or disciplinary action; because it incorporates vague and improper terminology in the respective statutes; and because it unnecessarily infringes on the rights of civil service employees as negotiated through the collective bargaining process.

Specifically, State and federal laws regarding matters such as discrimination and sexual harassment require employers to investigate and take appropriate corrective action when they become aware of alleged incidents of misconduct. Since allegations of such misconduct may not be reported to supervisors and managers in a timely manner and investigation are often time consuming, this bill would improperly prevent employers from suspending or discharging an employee except when the evidence is "recently obtained." This is a vague and unreasonable standard given the dynamic, and often lengthy, nature of the investigative process.

This bill is also problematic because it introduces vague and inappropriate terminology and standards into a process that has, to date, worked well. For example:

1) The bill introduces "probable cause" as a standard for suspending employees. However, use of this standard is specific to violations of criminal law and is not appropriate in the employment setting, which generally follows the administrative standard of "just cause."

2) This bill would limit the employer's ability to suspend employees unless it is "for a serious offense." There are many types of offenses that, in and of themselves, may not be considered "serious" (e.g., tardiness, sleeping on duty, horse play, etc.); however, when administering progressive discipline, suspension or discharge may be warranted and appropriate for repeat violations.

3) This bill mandates progressive discipline without regard to the severity of the misconduct. Employers should continue to have the ability to discharge an employee for a first offense when the misconduct warrants the severest of penalties. To require progressive discipline in all cases of misconduct would condone improper conduct and send the wrong message to employees.

4) This bill proposes to amend Section 89-9(d) by permitting negotiations over “probations.” This amendment is inappropriate in light of §76-27, HRS, which provides that the probationary period is an extension of the examination process and, therefore, not subject to negotiation. The right of the employer to determine the method and means of determining a candidate’s fitness for duty should remain non-negotiable.

The University also submits that the various collective bargaining agreements covering civil service employees include provisions related to disciplinary actions and the standards for applying discipline. Therefore, this bill is unnecessary and does not promote the stated goal of providing equity and certainty for our civil service employees.

In summary, the University of Hawai’i strongly opposes all of the amendments proposed by HB 2227.

LATE TESTIMONY



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

H.B. NO. 2227, RELATING TO PUBLIC EMPLOYMENT.

LATE TESTIMONY

BEFORE THE:

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Tuesday, February 5, 2008 **TIME:** 8:30 AM

LOCATION: State Capitol, Room 309

Deliver to: , Room 424, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Jeffrey A. Keating, Deputy Attorney General

Chair Sonson and Members of the Committee:

The Attorney General opposes this bill Relating to Public Employment.

The bill seeks to amend section 76-45, Hawaii Revised Statutes, relating to suspensions, and section 76-46, Hawaii Revised Statutes, relating to discharges and demotions, by adding wording limiting suspensions, discharges, and demotions to be based on "recently obtained evidence gathered to support probable cause for a serious offense."

The bill further adds for suspensions that "before suspending an employee without pay, the employer shall have documentation to show progressive disciplinary actions." And, for demotions and discharges, "before demoting or discharging an employee, the employer shall have documentation to show progressive disciplinary actions."

The above changes would conflict with the collective bargaining agreements ("CBA") that state an employee shall be subject to discipline by the employer for "just and proper cause." There is no requirement in the CBAs that an employee may only be suspended or demoted or discharged if the employer provides documentation to show progressive disciplinary action. In fact, it is widely acknowledged

by public employment law arbitrators that a single incident of misconduct, if sufficiently egregious, is grounds for suspension, demotion, or even discharge.

For example, you could have a teacher or prison guard who is convicted of sexually assaulting a child or inmate. No one could seriously argue that a public employer should be prohibited from taking appropriate disciplinary action including suspension, demotion, or discharge, simply because there was no documentation of progressive disciplinary action. If the employee believes that the disciplinary action was inappropriate, the employee has available as a recourse to file a grievance under the CBA. The issues related to suspensions, discharges, and demotions are issues public employment arbitrators deal with on a case-by-case basis, and the issue of progressive discipline is already considered by arbitrators in appropriate cases to determine if a disciplinary action was supported by "just and proper cause".

Additionally, the wording in the bill is problematic and open to interpretation as to what constitutes, for example, "probable cause" and "serious offense."

We respectfully request that this measure be held.