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# A BILL FOR AN ACT

RELATING TO PUBLIC SERVICE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

**1** **PART I**

**2** SECTION 1. The legislature finds that cronyism is defined  
**3** in the Merriam-Webster online dictionary as "partiality to  
**4** cronies especially as evidenced in the appointment of political  
**5** hangers-on to office without regard to their qualifications."

**6** Nationally, the assassination of United States President  
**7** James Garfield over the President's cronyism in appointments to  
**8** federal government positions led to adoption of the Pendleton  
**9** Civil Service Reform Act, which is the cornerstone of the modern  
**10** federal government civil service system.

**11** The evils of cronyism were obviously heavy on the minds of  
**12** the framers of the original Constitution of the State of Hawaii  
**13** when they drafted what is now enumerated article XVI, section 1  
**14** of the Constitution of the State of Hawaii. That provision  
**15** states, in pertinent part, that "employment of persons in the  
**16** civil service, as defined by law...shall be governed by the  
**17** merit principle."

1           Indeed, in *Konno v. County of Hawaii*, 85 Hawai'i 61 (1997),  
2 the Hawaii supreme court held that one obvious purpose and  
3 intent of this Hawaii constitutional provision is "the  
4 elimination of the 'spoils system' which awarded jobs based on  
5 political loyalty."

6           However, in determining the exact breadth of the positions  
7 that should be protected from cronyism via the civil service  
8 system, in *Konno* the Hawaii supreme court stated that it is the  
9 legislature's duty to do so. In fact, in *Konno*, the Hawaii  
10 supreme court stated that especially in situations where there  
11 are countervailing interests in making the determination as to  
12 which positions are protected by the civil service system,  
13 "clear guidance from the legislature is indispensable."

14           One of the purposes of this Act is for the legislature to  
15 provide clear guidance to protect the state civil service system  
16 from the evils of cronyism and to decide the scope of the  
17 positions to be protected from cronyism within civil service.

18           In construing the scope of the statutory civil service  
19 system that existed at the time, the Hawaii supreme court held  
20 in *Konno* that the civil service system cannot be read as "only  
21 including those employees who are paid regular salaries by the  
22 government [because] such an interpretation would allow the

1 state [administration]...to avoid civil service coverage simply  
2 by reducing the size of...[the state's] official payroll." The  
3 Hawaii supreme court in *Konno* further construed the then  
4 existing statutory term "civil service" to mean "those services  
5 that have been customarily and historically provided by civil  
6 servants."

7 While *Konno* dealt with the portion of chapter 76, Hawaii  
8 Revised Statutes, that addressed employment in the civil service  
9 system of the State's political subdivisions, and this Act  
10 concerns the civil service system of the State, the legislature  
11 finds that such a difference is immaterial. Through this Act,  
12 the legislature is exercising its authority, "as defined by law"  
13 as set forth in article XVI, section 1, of the Constitution of  
14 the State of Hawaii, to determine the scope of the state civil  
15 service. In doing so, the legislature adopts the approach set  
16 forth in *Konno*.

17 A more critical purpose of this Act is to exercise  
18 austerity with respect to all state executive budget  
19 expenditures, by imposing an absolute hiring freeze on permanent  
20 civil service position holders for the relatively short duration  
21 of nine months or less. Hiring freezes are commonly used by  
22 federal government agencies to immediately reduce expenditures,

1 and thereby conserve limited federal funds. Given the Hawaii  
2 state government's current revenue shortfalls, the legislature  
3 finds that immediate conservation of state funds can be  
4 implemented through the hiring freeze required under this Act.

5 The legislature further finds that implementation of the  
6 hiring freeze set forth by this Act is preferable to the  
7 permanent filling of civil service positions and other state  
8 positions that have civil service-like functions, particularly  
9 in the face of additional layoffs of civil service positions and  
10 positions with civil service-like functions that are projected  
11 to occur within a second wave of layoffs this year. The  
12 legislature has identified several instances in which the 2009  
13 practice of laying off permanent, state civil service positions  
14 with specialized expertise had no rational basis. (See the  
15 joint committee report released by the senate committee on  
16 economic development and technology and the house committee on  
17 economic revitalization, business, and military affairs, October  
18 15, 2009; senate ad hoc committee report no. 1, on the closure  
19 of Kulani correctional facility, October 14, 2009; and senate ad  
20 hoc committee report no. 2, investigating the impact of layoffs  
21 of agricultural inspectors, October 14, 2009.)

1           The state auditor's report no. 10-01 (Investigation of  
2 Specific Issues of the Department of Business, Economic  
3 Development and Tourism, January 2010) has found that at least  
4 one department has spent Hawaii taxpayer dollars imprudently,  
5 with that department failing to fully disclose to the  
6 legislature the full nature of federal reimbursement funds that  
7 it received, failing to accurately characterize the use of the  
8 funds spent, providing incomplete or misleading information to  
9 the state procurement office (that allowed the department to  
10 expend trade mission funds solicited from private sector  
11 participants outside the Hawaii public procurement code with no  
12 restrictions and without any effective internal controls), and  
13 creating opportunities for fraud and abuse through its  
14 ineffective oversight of expenditures and reporting requirements  
15 for out-of-state offices.

16           Against this backdrop of fiscal uncertainty, breakdowns in  
17 efficient, timely delivery of critical services, and disruption  
18 of normal governmental functions, it is the legislature's intent  
19 to halt further deterioration of core government functions.

20           SECTION 2. Chapter 76, Hawaii Revised Statutes, is amended  
21 by adding a new section to be appropriately designated and to  
22 read as follows:

SB2626 SD1 PROPOSED.DOC  
\*SB2626 SD1 PROPOSED.DOC\*  
\*SB2626 SD1 PROPOSED.DOC\*

1        "§76-        Positions insulated from partiality; appointment  
2 prohibited practices; penalties; Hawaii enforcement board  
3 established. (a) It shall be prohibited for any person,  
4 directly or indirectly, to:

5        (1) Fill, attempt to fill, accept, or attempt to accept  
6 any and all positions insulated from partiality, from  
7 the effective date of Act        , Session Laws of Hawaii  
8 2010, through midnight January 2, 2011, including but  
9 not limited to issuing or causing to be issued  
10 requests for proposals that call for individuals who  
11 are not government employees to perform work that is  
12 traditionally performed by civil service employees, or  
13 contracts that fulfill such requests for proposals;  
14        (2) Retaliate against any person or entity participating  
15 in any manner in the investigating of or bringing of  
16 an appointment prohibited practice, including but not  
17 limited to providing information regarding a possible  
18 appointment prohibited practice either to a person or  
19 entity who is authorized to bring an appointment  
20 prohibited practice complaint, or in testimony in a  
21 Hawaii enforcement board proceeding; or

1       (3) Compensate or cause to be compensated an attorney or  
2       representative of a respondent to represent the  
3       respondent in any matter that arose under this  
4       section, including but not limited to an appeal of the  
5       Hawaii enforcement board's findings of fact,  
6       conclusions of law, and decision and order, where that  
7       person is not the respondent or the spouse of the  
8       respondent.

9       (b) This section shall be in full force and effect  
10      notwithstanding any contrary provision in the Hawaii Revised  
11      Statutes; the Hawaii Administrative Rules; or the provisions,  
12      memoranda, documents, or writings of any part of the State,  
13      including but not limited to any conflict of law in any of the  
14      foregoing laws, rules, or documents.

15      (c) It shall be an appointment prohibited practice for any  
16      person to cause or commit in any manner, directly or indirectly,  
17      individually or in concert with other persons, a violation of  
18      subsection (a).

19      A civil penalty is imposed on any person who commits an  
20      appointment prohibited practice, with the doctrine of respondeat  
21      superior being inapplicable thereto, thereby making no superior  
22      person or entity, including but not limited to a government

1 entity liable for payment of that penalty. The civil penalty  
2 shall not exceed \$500,000 per individual filling, or attempting  
3 to fill a position in a manner that constitutes an appointment  
4 prohibited practice. The civil penalty shall be deposited into  
5 the general fund.

6 No form of immunity shall make any person, including  
7 without limitation the governor, exempt from payment of the  
8 penalty, with this clause constituting a waiver of sovereign  
9 immunity. In executing any order or judgment that imposes the  
10 penalty upon a person, any and all property of that person shall  
11 be subject to execution, including but not limited to any  
12 property upon which a limitation on execution of an order or  
13 judgment would normally apply, including but not limited to  
14 limitations as spendthrift provisions in a trust, and the  
15 limitation on the execution on property held as tenants by the  
16 entirety. Any property, including but not limited to money,  
17 which was transferred from the respondent in an appointment  
18 prohibited practice proceeding to any person or entity six  
19 months prior to, or one day after the effective date of Act  
20 , Session Laws of Hawaii 2010, but prior to the filing of an  
21 appointment prohibited practice complaint, whichever is shorter  
22 in duration, shall be void and subject to execution even though



1 the property is in the possession of the transferee; provided  
2 that this voiding of transfers shall not apply to transfers that  
3 satisfied the following debts of the respondent that are bona  
4 fide: payments of loans to financial institutions that are  
5 registered with the state or federal government; utility  
6 payments; and bona fide payments for food, clothing, and shelter  
7 for the respondent.

8 (d) There is established the Hawaii enforcement board  
9 within the department labor and industrial relations for  
10 administrative purposes only. The board shall adjudicate  
11 allegations that any person or entity has committed an  
12 appointment prohibited practice, pursuant to the contested case  
13 provisions in chapter 91.

14 The Hawaii enforcement board shall consist of five members  
15 as follows:

- 16 (1) One member shall be appointed by the governor;  
17 (2) One member shall be appointed by the president of the  
18 senate;  
19 (3) One member shall be appointed by the speaker of the  
20 house of representatives;  
21 (4) One member shall be appointed by agreement of the  
22 three chapter 89 exclusive representative

1           organizations that have the largest number of  
2           bargaining unit members; and  
3       (5) One member shall be appointed by agreement of all  
4           chapter 89 exclusive representative organizations;  
5           provided that if no agreement is reached, then by a  
6           per capita of chapter 89 bargaining unit members vote  
7           with their respective exclusive representative  
8           organizations voting on their behalf in the respective  
9           bargaining units that they represent.

10       The Hawaii enforcement board shall use the Hawaii labor  
11 relations board facilities, statutory and administrative rules  
12 for the adjudication of prohibited practices within the meaning  
13 of chapter 89, in the adjudication of claims of commissions of  
14 appointment prohibited practices, and in doing so shall  
15 substitute in these chapter 89 statutory and administrative  
16 rules, appropriate statutory and administrative terms from this  
17 section for the adjudication of appointment prohibited  
18 practices; provided that notwithstanding any law to the  
19 contrary, there shall be a two-year statute of limitations in  
20 which to file a complaint with the Hawaii enforcement board that  
21 a person has committed an appointment prohibited practice.

1       The president of the senate and the speaker of the house of  
2 representatives shall each appoint an attorney who is employed  
3 by the legislature to represent the Hawaii enforcement board  
4 when it conducts proceedings under this section. At the  
5 pleasure of the Hawaii enforcement board, the following shall  
6 represent the Hawaii enforcement board in any court proceeding  
7 to which the Hawaii enforcement board is a party: the  
8 department of the attorney general; any attorney who is an  
9 employee of the legislature except for attorneys of the  
10 legislative reference bureau; or a private attorney of the  
11 Hawaii enforcement board's choice; provided that if a private  
12 attorney is appointed, the attorney shall be paid from the funds  
13 appropriated to the department of the attorney general for the  
14 payment of special attorneys general. The Hawaii enforcement  
15 board is empowered to, and shall award reasonable attorney's  
16 fees to be paid to the complainant by the respondent in any case  
17 that is filed with the Hawaii enforcement board and in which the  
18 complainant has prevailed.

19       (e) The following entities and persons may bring a  
20 complaint against any person alleged to have committed an  
21 appointment prohibited practice:

1       (1) Any exclusive representative within the meaning of  
2       chapter 89 who represents the members of a bargaining  
3       unit that contains at least one position insulated  
4       from partiality, and that has suffered the adverse  
5       affects of an appointment prohibited practice; or

6       (2) Any entity or person who has been directly or  
7       indirectly displaced or otherwise adversely affected  
8       by an appointment prohibited practice;

9       provided that the complainant shall have the burden of proving  
10      by a preponderance of the evidence that an appointment  
11      prohibited practice has been committed by the respondent named  
12      in the appointment prohibited practice complaint.

13      (f) The department of the attorney general and any  
14      attorney directly or indirectly affiliated with it, including  
15      but not limited to the attorney general, any deputy attorney  
16      general, and any special deputy attorney general, shall not  
17      represent or cause another to represent, in any manner, any  
18      person who is alleged to have directly or indirectly committed  
19      an appointment prohibited practice, at any stage of an  
20      appointment prohibited practice proceeding, including without  
21      limitation at the appellate stage.

1       (g) The complainant and the respondent to an allegation  
2 that the respondent violated an attempt to accept under  
3 subsection (a) (1) may resolve that allegation if the respondent  
4 agrees to:

- 5       (1) Resign immediately from the position insulated from  
6 partiality that the respondent filled;  
7       (2) Execute a release of claims in favor of the State and  
8 the complainant;  
9       (3) Not to seek any position with the State for a period  
10 of five years after the resignation becomes effective;  
11 and  
12       (4) Testify truthfully regarding transactions and  
13 occurrences that led to that respondent obtaining a  
14 position insulated from partiality in violation of  
15 subsection (a).

16       All other respondents may resolve with the complainant the  
17 allegations that they committed appointment prohibited practices  
18 in any agreed upon manner; provided that one of the terms of the  
19 resolution shall be that the respondents testify truthfully  
20 regarding transactions and occurrences that led to the  
21 commission of appointment prohibited practices.

1 All resolutions of allegations of appointment prohibited  
2 practices shall be approved by the Hawaii enforcement board.  
3 The foregoing resolution of a complaint that subsection (a) has  
4 been violated shall not affect any other claim that any other  
5 person violated any provision of subsection (a).

6 (h) After a party to a contested case conducted under the  
7 provisions of this section receives notice of prevailing  
8 therein, the party may make a motion to the circuit court that  
9 has venue over the vanquished party for an order confirming the  
10 findings of fact, conclusions of law, and decision and order of  
11 the Hawaii enforcement board. There is no time limitation for  
12 making such a motion. Thereupon, the circuit court shall grant  
13 the motion and issue an order confirming the findings of fact,  
14 conclusions of law, and decision and order, unless an appeal of  
15 those findings of fact, conclusions of law, and decision and  
16 order is granted pursuant to section 91-14. Upon the granting  
17 of the motion and order of confirmation, the same shall be filed  
18 in the office of the clerk of the circuit court and this shall  
19 constitute the entry of judgment. The judgment entered in  
20 accordance with this subsection shall have the same force and  
21 effect, in all respects as, and is subject to all the provisions  
22 of law relating to, a judgment in an action, and it may be

1 enforced, as if it had been rendered in an action in the circuit  
2 court in which it is entered.

3 (i) For any and all appeals of the Hawaii enforcement  
4 board's decisions, the costs of the preparation of the record on  
5 appeal, including but not limited to the cost of transcribing  
6 the hearing proceedings shall be borne solely by the appellant.

7 (j) For the purposes of this section:

8 "Any and all positions in the civil service" means all  
9 positions in the State under section 76-16, as the section  
10 existed on December 31, 2009; provided that, notwithstanding the  
11 foregoing, the provision that requires the director of human  
12 resources and development to determine the applicability of the  
13 statute to specific positions shall not apply; provided further  
14 that, notwithstanding the foregoing, "any and all positions in  
15 the civil service" also means any and all positions that would  
16 be held by civil service employees or members of the civil  
17 service but for the fact that the positions are vacant, and any  
18 and all positions that perform personal services for the benefit  
19 of the State that have customarily and historically been held by  
20 civil servants, whether or not these positions are within the  
21 state employment system or within the employment system of a  
22 person or entity that is not a government.

1       "Fill" means a person performing work in a position  
2 insulated from partiality or of a position insulated from  
3 partiality, be it as an employee, an independent agent, an  
4 employee of a person, or entity who has entered into a contract,  
5 agreement, or understanding with the State, or an independent  
6 agent of an entity that has entered into a contract, agreement,  
7 or understanding with the State, or otherwise, for any length of  
8 time; provided that it shall not mean an employee who, having  
9 been continuously employed in a position insulated from  
10 partiality prior to January 1, 2009, performs work in a position  
11 insulated from partiality on a temporary assignment, as that  
12 term is customarily utilized in the state civil service system;  
13 provided further that it shall not mean a person who performs  
14 work as an emergency hire for a duration of ninety consecutive  
15 calendar days or less.

16       "Position" means a specific office or job, whether occupied  
17 or vacant, requiring full- or part-time employment of one  
18 person; provided that "position" also means a specific office or  
19 job, whether occupied or vacant, which normally requires full-  
20 or part-time employment of one person, but that is capable of  
21 being shared by two or more people, or that is being shared by  
22 two or more people.



1       "Positions insulated from partiality" means any and all  
2 positions in the state civil service; any and all positions that  
3 were held by state civil service employees or members of the  
4 state civil service just prior to becoming vacant; classified  
5 and non-classified positions of the department of education; and  
6 faculty and non-faculty positions of the University of Hawaii  
7 and the community college system.

8       "State" means any and all parts of the State of Hawaii  
9 government, including but not limited to the state entities set  
10 forth in the Hawaii state constitution; the state entities under  
11 chapter 26; any and all state bodies corporate and state  
12 corporations, including but not limited to the Hawaii health  
13 systems corporation, the University of Hawaii and the research  
14 corporation of the University of Hawaii; and all subdivisions,  
15 employees, agents, servants, intermediaries, or offshoots of any  
16 of the foregoing entities.

17       "To directly or indirectly" means any entity, including but  
18 not limited to the State, or person to take direct action or  
19 inaction, such as, without limitation, hiring employees; or the  
20 State to take indirect action or inaction, such as, without  
21 limitation, making a written or verbal contract, agreement, or  
22 understanding with a third party for the third party to cause an

1 action, transaction, or occurrence to transpire or not transpire  
2 at any time."

3 **PART II**

4 SECTION 3. Chapter 78, Hawaii Revised Statutes, is amended  
5 by adding a new section to be appropriately designated and to  
6 read as follows:

7 **"§78- Non-civil service, temporary employees; report by**  
8 **state agencies.** Every state agency shall report to the  
9 legislature all non-civil service, temporary employees employed  
10 by the agency for each quarterly period of the fiscal year, not  
11 later than the fifteenth day following the end of each quarterly  
12 period, as follows:

13 (1) Each position filled by a non-civil service, temporary  
14 employee, the purpose of the position, and the date  
15 that the position was established;

16 (2) How long the position has been filled by a non-civil  
17 service, temporary employee, and the reason the  
18 position has not been filled by a permanent civil  
19 service or exempt employee; and

20 (3) In the case of any position that has been filled by  
21 the rehiring of a person for at least three contract  
22 periods in one fiscal year, the reasons for the

1           rehiring and why the position should or should not be  
2           made permanent.

3           For the purposes of this section, "non-civil service,  
4 temporary employee" means any person employed for a contract  
5 period of less than ninety days."

6           SECTION 4. New statutory material is underscored.

7           SECTION 5. This Act shall take effect upon its approval.

8

**Report Title:**

Public Service; Positions Insulated from Partiality; Non-Civil Service, Temporary Employees; Reports

**Description:**

Part I prohibits permanently filling, directly or indirectly, any and all positions insulated from partiality from the effective date of the Act through January 2, 2011; part II requires every state agency to report to the legislature all non-civil service, temporary employees employed by the agency for each quarterly period of the fiscal year. (SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*