

A BILL FOR AN ACT

RELATING TO PUBLIC SERVICE.

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

1 SECTION 1. The legislature finds that the critical purpose
2 of this Act is to exercise austerity with respect to all state
3 executive budget expenditures, by imposing an absolute hiring
4 freeze on permanent civil service position holders for the
5 relatively short duration of nine months or less. Hiring
6 freezes are commonly used by federal government agencies to
7 immediately reduce expenditures, and thereby conserve limited
8 federal funds. Given the Hawaii state government's current
9 revenue shortfalls, the legislature finds that immediate
10 conservation of state funds can be implemented through the
11 hiring freeze required under this Act.

12 In determining the exact breadth of the civil service
13 positions that will be subject to this temporary hiring freeze,
14 in *Konno v. County of Hawaii*, 85 Hawaii 61 (1997), the Hawaii
15 supreme court stated that it is the legislature's duty to make
16 such a determination. In holding that the legislature had great

1 leeway in determining which job positions were civil service job
2 positions, the Hawaii supreme court held in *Konno* that the civil
3 service system cannot be read as "only including those employees
4 who are paid regular salaries by the government [because] such
5 an interpretation would allow the state [administration] . . .
6 to avoid civil service coverage simply by reducing the size of .
7 . . [the state's] official payroll." The Hawaii supreme court
8 in *Konno* further construed the then existing statutory term
9 "civil service" to mean "those services that have been
10 customarily and historically provided by civil servants."

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

1 Against this backdrop of fiscal uncertainty, it is the
2 legislature's intent to halt further deterioration of the core
3 of the state government fisc (treasury) by implementing this
4 temporary hiring freeze system.

5 The legislature also finds that in the employer-public
6 service employee relationship it is imperative for the employee
7 to have an initial probation period that allows the employer and
8 employee to develop a complete and clear understanding of what
9 the employee's daily job requirements will consist of over the
10 course of one year and to also give the employer sufficient time
11 to assess the employee's ability to meet the fundamental
12 expectations of their job position. In some cases, certain
13 civil service positions that have only a six-month initial
14 probation period can create an inherent risk for inefficiencies,
15 ineffectiveness, or ineptness.

16 In the wake of the current revenue shortfalls of this State
17 there have been numerous layoffs of civil service position
18 employees. Later this year, the governor has announced a second
19 wave of layoffs is likely for civil service employees and for
20 those working in civil service-like positions. To prevent the
21 potential for overloading the hiring of permanent civil service

1 employees and thus further deteriorating the State's fiscal and
2 human resources that are dedicated to providing core government
3 functions, the legislature finds that the initial probation
4 period for civil service positions needs to be extended.

5 The legislature further finds that providing periodic
6 reports to the legislature about the hiring practices of civil
7 service employees will enhance the transparency and
8 accountability of state government operations. In addition,
9 periodic reporting will assist the legislature in identifying
10 potential pitfalls to providing for the efficient and timely
11 delivery of critical services and functions of state government.

12 SECTION 2. Chapter 78, Hawaii Revised Statutes, is amended
13 by adding a new section to be appropriately designated and to
14 read as follows:

15 **"§78- Non-civil service, temporary employees; report by**
16 **state agencies.** Every state agency shall report to the
17 legislature all non-civil service, temporary employees employed
18 by the agency for each quarterly period of the fiscal year, not
19 later than the fifteenth day following the end of each quarterly
20 period, as follows:

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

4 (2) How long the position has been filled by a non-civil
5 service, temporary employee, and the reason the
6 position has not been filled by a permanent civil
7 service or exempt employee; and

8 (3) In the case of any position that has been filled by
9 the rehiring of a person for at least three contract
10 periods in one fiscal year, the reasons for the
11 rehiring and why the position should or should not be
12 made permanent.

13 For the purpose of this section, "non-civil service,
14 temporary employee" means any person employed for a contract
15 period of less than ninety days."

16 SECTION 3. Section 76-11, Hawaii Revised Statutes, is
17 amended by adding a new definition to be appropriately inserted
18 and to read as follows:

19 "Initial probation period" means a period of not less than
20 six months nor more than one year from the beginning of an
21 employee's service in civil service."

1 SECTION 4. Section 76-27, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) All employees appointed to civil service positions
4 shall constitute the membership of the civil service, but no
5 employee shall be entitled to membership in civil service until
6 the employee has:

7 (1) Successfully completed the initial probation period
8 required as part of the examination process to
9 determine the employee's fitness and ability for the
10 position; provided that, notwithstanding the minimum
11 time period of probation established under this
12 section, the definition of initial probation period in
13 section 76-11, or any rule adopted pursuant to this
14 chapter, a person occupying a position exempt from
15 civil service pursuant to section 76-16, and who
16 either:

17 (A) Transfers into a civil service position between
18 the effective date of Act , and 11:59 a.m. on
19 the third Wednesday in January 2011;

20 (B) Voluntarily or involuntarily terminates
21 employment from a position that is exempt from

1 civil service pursuant to section 76-16 and,
 2 within ninety days of that termination, is
 3 subsequently hired in a civil service position
 4 between the effective date of Act , and 11:59
 5 a.m. on the third Wednesday in January 2011;
 6 shall have an initial probation period of not less
 7 than twelve months commencing from the person's
 8 initial appointment to the civil service position that
 9 the person is transferring or being hired into; and

10 (2) Satisfied all requirements for employment prescribed
 11 by this chapter and the qualifications prescribed by
 12 section 78-1."

13 SECTION 5. Chapter 76, Hawaii Revised Statutes, is amended
 14 by adding a new section to be appropriately designated and to
 15 read as follows:

16 "**§76 Positions insulated from partiality; appointment**
 17 **prohibited practices; Hawaii enforcement board established.** (a)

18 It shall be prohibited for any person, directly or indirectly,
 19 to:

20 (1) Fill, attempt to fill, accept, or attempt to accept
 21 any and all positions insulated from partiality, from

1 the effective date of Act , Session Laws of Hawaii
2 2010, until 10 a.m. on the third Wednesday in January
3 2011, including but not limited to issuing or causing
4 to be issued requests for proposals that call for
5 individuals who are not government employees to
6 perform work that is traditionally performed by civil
7 service employees, or contracts that fulfill such
8 requests for proposals;

9 (2) Retaliate against any person or entity participating
10 in any manner in the investigating of or bringing of
11 an appointment prohibited practice, including but not
12 limited to providing information regarding a possible
13 appointment prohibited practice either to a person or
14 entity who is authorized to bring an appointment
15 prohibited practice complaint, or in testimony in a
16 Hawaii enforcement board proceeding; or

17 (3) Compensate or cause to be compensated an attorney or
18 representative of a respondent to represent the
19 respondent in any matter that arose under this
20 section, including but not limited to an appeal of the
21 Hawaii enforcement board's finding of fact,

1 conclusions of law, and decision and order, where that
2 person is not the respondent or the spouse of the
3 respondent.

4 (b) This section shall be in full force and effect
5 notwithstanding any contrary provision in the Hawaii Revised
6 Statutes, the Hawaii Administrative Rules, or the provisions,
7 memoranda, documents, or writings of any part of the State,
8 including by not limited to any conflict of law in any of the
9 foregoing laws, rules, or documents.

10 (c) It shall be an appointment prohibited practice for any
11 person to cause or commit in any manner, directly or indirectly,
12 individually or in concert with other persons, a violation of
13 section (a).

14 A civil penalty is imposed on any person who commits an
15 appointment prohibited practice, with the doctrine of respondeat
16 superior being inapplicable thereto, thereby making no superior
17 person or entity, including by not limited to a government
18 entity liable for payment of that penalty. The civil penalty
19 shall not exceed \$500,000 per individual filling, or attempting
20 to fill a position in a manner that constitutes an appointment

1 prohibited practice. The civil penalty shall be deposited into
2 the general fund.

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

1 satisfied the following debts of the respondent that are bona
2 fide; payments of loans to financial institutions that are
3 registered with the state or federal government; utility
4 payments; and bona fide payments for food, clothing, and shelter
5 for the respondent.

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

12 The Hawaii enforcement board shall consist of five members
13 as follows:

- 14 (1) One member shall be appointed by the governor;
15 (2) One member shall be appointed by the president of the
16 senate;
17 (3) One member shall be appointed by the speaker of the
18 house of representatives;
19 (4) One member shall be appointed by agreement of the
20 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 per
6 capita of chapter 89 bargaining unit members vote with
7 their respective exclusive representative organizations
8 voting on their behalf in the respective bargaining units
9 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 appoint an attorney who is employed by the
3 legislature to represent the Hawaii enforcement board when it
4 conducts proceedings under this section. At the pleasure of the
5 Hawaii enforcement board, the following shall represent the
6 Hawaii enforcement board in any court proceeding to which the
7 Hawaii enforcement board is a party: the department of the
8 attorney general; any attorney who is an employee of the
9 legislature except for attorneys of the legislative reference
10 bureau; or a private attorney of the Hawaii enforcement board's
11 choice; provided that if a private attorney is appointed, the
12 attorney shall be paid from the funds appropriated to the
13 department of the attorney general for the payment of special
14 attorneys general. The Hawaii enforcement board is empowered
15 to, and shall award reasonable attorney's fees to be paid to the
16 complainant by the respondent in any case that is filed with the
17 Hawaii enforcement board and in which the complainant has
18 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
10 proving by a preponderance of the evidence that an
11 appointment prohibited practice has been committed by the
12 respondent named in the appointment prohibited practice
13 complaint.

14 (f) The department of the attorney general and any
15 attorney directly or indirectly affiliated with it, including
16 but not limited to the attorney general, any deputy attorney
17 general, and any special deputy attorney general, shall not
18 represent or cause another to represent, in any manner, any
19 person who is alleged to have directly or indirectly committed
20 an appointment prohibited practice, at any stage of an

1 appointment prohibited practice proceeding, including without
2 limitation at the appellate stage.

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

7 (1) Resign immediately from the position insulated from
8 partiality that the respondent filled;

9 (2) Execute a release of claims in favor of the State and
10 the complainant;

11 (3) Not to seek any position with the State for a period
12 of five years after the resignation becomes effective;

13 and

14 (4) Testify truthfully regarding transactions and
15 occurrences that led to that respondent obtaining a
16 position insulated from partiality in violation of
17 subsection (a).

18 All other respondents may resolve with the complainant the
19 allegations that they committed appointment prohibited practices
20 in an agreed upon manner; provided that one of the terms of the
21 resolution shall be that the respondents testify truthfully

1 regarding transactions and occurrences that led to the
2 commission of appointment prohibited practices.

3 All resolutions of allegations of appointment prohibited
4 practices shall be approved by the Hawaii enforcement board.

5 The foregoing resolution of a complaint that subsection (a) has
6 been violated shall not affect any other claim that any other
7 person violated any provision of subsection (a).

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

1 accordance with this subsection shall have the same force and
2 effect, in all respects as, and is subject to all the provisions
3 of law relating to, a judgment in an action, and it may be
4 enforced, as if it had been rendered in an action in the circuit
5 court in which it is entered.

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

10 (j) For the purposes of this section;

11 "Any and all positions in the civil service" means:

12 (i) Any and all positions in the State under section 76-16
13 which are compensated on the E.M. pay scale, as the
14 sections existed on December 31, 2009;

15 (ii) Any and all positions that would be held by civil
16 service employees or members of the civil service but
17 for the fact that the positions are vacant; and

18 (iii) Any and all positions that perform personal services
19 for the benefit of the State that have customarily and
20 historically been held by the civil servants, but are

1 within the employment system of a person or entity
2 that is not a government;
3 provided that, notwithstanding the foregoing, the
4 provisions that require the director of human resources
5 development to determine the applicability of the statute
6 to specific positions shall not apply."
7 "Fill" means a person performing work in a position
8 insulated from partiality or of a position insulated from
9 partiality, be it as an employee, an independent agent, an
10 employee of a person, or entity who has entered into a contract,
11 agreement, or understanding with the State, or an independent
12 agent of an entity that has entered into a contract, agreement,
13 or understanding with the State, or otherwise, for any length of
14 time; provided that it shall not mean an employee who, having
15 been continuously employed in a position insulated from
16 partiality prior to January 1, 2009, performing work in a
17 position insulated from partiality on a temporary assignment, as
18 that term is customarily utilized in the State civil service
19 system; provided further that it shall not mean a person who
20 performs work as an emergency hire for a duration of ninety
21 consecutive calendar days or less."

1 "Position" means a specific office or job, whether occupied
2 or vacant, requiring full- or part-time employment of one
3 person; provided that "position" also means a specific office or
4 job, whether occupied or vacant, which normally requires full-
5 or part-time employment of one person, but that is capable of
6 being shared by two or more people, or that is being shared by
7 two or more people.

8 "Positions insulated from partiality" means any and all
9 positions in the state civil service; any and all positions that
10 were held by state civil service employees who were compensated
11 on the E.M. pay scale or members of the state civil service who
12 were compensated on the E.M. pay scale, just prior to becoming
13 vacant; classified and non-classified positions of the
14 department of education; and faculty and non-faculty positions
15 of the University of Hawaii and the community college system.

16 "State" means any and all parts of the State of Hawaii
17 government, including but not limited to the state entities set
18 forth in the Hawaii state constitution; the state entities under
19 chapter 26; any and all state bodies corporate and state
20 corporations, including but not limited to the Hawaii health
21 systems corporation, the University of Hawaii and the research

1 corporation of the University of Hawaii; and all subdivisions,
2 employees, agents, servants, intermediaries, or offshoots of any
3 of the foregoing entities.

4 "To directly or indirectly" means any entity, including but
5 not limited to the State, or persons to take direct action or
6 inaction, such as, without limitation, hiring employees; or the
7 State to take indirect action or inaction, such as, without
8 limitation, making a written or verbal contract, agreement, or
9 understanding with a third party for the third party to cause an
10 action, transaction, or occurrence to transpire or not transpire
11 at any time."

12 SECTION 6. New statutory material is underscored.

13 SECTION 7. This Act shall take effect upon its approval;
14 provided that section 4 of this Act shall be repealed on
15 December 31, 2012, and section 76-27(a)(1), Hawaii Revised
16 Statutes, shall be reenacted in the form in which it read on the
17 day before the approval of this Act.

Report Title:

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

Description:

Creates a temporary freeze on the hiring of individuals who perform work which has traditionally been done by State civil service employees by prohibiting the permanent filling, directly or indirectly, any and all positions insulated from partiality from the effective date of this Act through January 2, 2011, which positions insulated from partiality being defined as civil service positions within the State employment system which are compensated at the E.M. pay scale, and all positions in the employment system of a non-governmental employer that require the position holder to perform work that has traditionally been done by State civil service employees. 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. Establishes a definition for initial probation period; amends section 76-27(a)(1), HRS, to provide that the initial probation period for a person transferring between a position exempt under section 76-16, HRS, to a civil service position from the effective date of the act until the commencement of the 2011 legislative session shall be 12 months.