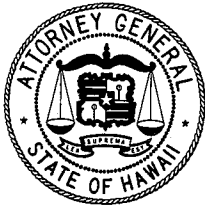


SB2211



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. 2211, RELATING TO HEALTHCARE.

BEFORE THE:

SENATE COMMITTEE ON HEALTH

DATE: Friday, January 29, 2010 **TIME:** 2:45 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Andrea J. Armitage, Deputy Attorney General

Chair Ige and Members of the Committee:

The Department of the Attorney General provides these comments regarding legal problems in this bill that could hinder, if not prevent, the accomplishment of its purpose.

The purpose of this measure is to reduce the Hawaii Health Systems Corporation's (HHSC) operating expenses as recommended by the audit conducted by Stroudwater and Associates. The changes include requiring HHSC to file for federal and state nonprofit status, exempt HHSC employees from chapter 76, Hawaii Revised Statutes (HRS), the civil service law, and authorize the Director of Finance to issue general obligation bonds for HHSC.

HHSC, as "a public body corporate and politic and an instrumentality and agency of the State" pursuant to section 323F-2(a), Hawaii Revised Statutes (HRS), is currently exempt from paying federal and state taxes (see section 323F-23). As a State entity it cannot file for federal and state tax exempt status. The two are mutually exclusive. If HHSC were to file to become a nonprofit organization exempt from federal income tax under section 501 of the Internal Revenue Code and a Hawaii nonprofit corporation under chapter 414D, HRS, HHSC would have

to privatize, and file articles of incorporation. This measure, as written, is wholly inadequate to accomplish that goal.

In *Konno v. County of Hawaii*, 85 Hawaii 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the County of Hawaii could not privatize the operation of a landfill without express statutory authority. In 2004, the Hawaii Supreme Court held that the privatization of community homes for the developmentally disabled pursuant to Act 189, 1995 Hawaii Session Laws, upon the closing of Waimano Home, was legal because Act 189 mandated it by implication. *Naito v. Miike*, 103 Hawaii 302, WL 65335 (2004)¹. The Court held:

The legislative power to create a civil service position includes the power to abolish the position, particularly where the purpose of the abolishment of such position is that of economy or improvement in the public service. The legislative history of Act 189 shows that the legislature made a policy determination that privatization of services for the developmentally disabled or mentally retarded would improve the public service.

The holding in Konno means that, if the Legislature wishes to privatize HHSC, it should be as explicit about that intent as possible. S.B. No. 2211 does not make it clear that HHSC is to be privatized.

Furthermore, if HHSC is to be privatized, then chapter 323F, HRS, must be amended accordingly. The bill does not address many important issues, such as:

- What will be the status of HHSC's various liabilities?
- Will HHSC's Medicare provider numbers and critical access hospital designations be transferred to the new entity?

¹ This is an unpublished disposition opinion.

- Will the employees be exempt from other laws governing public employees, such as chapter 89, HRS, the collective bargaining law?
- What will the State's role be in the operations of HHSC after the transfer? Currently, chapter 323F provides for various types of State involvement in HHSC matters, such as the Governor's power to appoint board members pursuant to section 323F-3.5, HRS, and the requirement that HHSC notify the governor and the legislature before it implements a reduction in services, as required by section 323F-31, HRS.
- Will section 323F-7(c)(11), which gives HHSC sovereign immunity, be repealed?
- Will section 323F-7(a), which allows HHSC to issue revenue bonds, be repealed? Section 39-51, HRS, states that only governmental agencies can issue revenue bonds.

If the Legislature wishes to proceed with the transition of HHSC to a private nonprofit corporation, it would need to address these issues and others, and amend chapter 323F accordingly, to make clear what existing provisions would apply to the new entity. Therefore, we respectfully ask the Committee to pass the bill only with significant amendments.