

**TESTIMONY**

**SB 2849**

TESTIMONY BY **GEORGINA K. KAWAMURA**  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
STATE OF HAWAII  
TO THE SENATE COMMITTEES ON LABOR AND  
JUDICIARY AND GOVERNMENT OPERATIONS  
ON  
SENATE BILL NO. 2849

February 5, 2010

RELATING TO THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND

**Senate Bill No. 2849** makes the following amendments to Chapter 87A, Hawaii

Revised Statutes, which governs the Hawaii Employer-Union Health Benefits Trust Fund:

- Exempts the Hawaii Employer-Union Health Benefits Trust Fund from the procurement code in procuring benefit plan carriers, consultants, auditors and an administrator;
- Adds two new sections on fiduciary duties and prohibited transactions, and liability for breach of fiduciary duties;
- Allows the Hawaii Employer-Union Health Benefits Trust Fund to retain an attorney who is independent of the Attorney General as legal advisor;
- Increases the members of the Hawaii Employer-Union Health Benefits Trust Fund Board of Trustees from 10 to 12, and changes the Hawaii Employer-Union Health Benefits Trust Fund Board membership and terms;
- Requires active employee benefit plans to be based on collectively bargained contributions and retiree benefit plans to be based on legislative appropriations; and
- Transfers the Hawaii Employer-Union Health Benefits Trust Fund from the Department of Budget and Finance to the Department of Human Resources Development.

**We are opposed to this bill.** First, the Department has serious concerns with the modifications to the composition of the Hawaii Employer-Union Health Benefits Trust Fund Board. Placing the retiree beneficiary board member as part the employer group for voting is inappropriate as the retiree beneficiary member represents retiree interests and as such should be part of the employee group (as is currently the case), which represents beneficiaries, for voting. Specifying that the five other employer Board members represent five different jurisdictions severely dilutes the Governor's ability to look out for the State's interest and results in each employer trustee representing a disproportionate share of the employer group. While we are not specifically opposed to adding county representation to the board, allowing the Mayor of the City and County of Honolulu to appoint an employer Board member and the mayors of the County of Hawaii, Kauai and Maui to appoint another employer Board member is not reflective of the Hawaii Employer-Union Health Benefits Trust Fund membership. Currently, State employees make up approximately 72% of the Hawaii Employer-Union Health Benefits Trust Fund participants; this percentage would be significantly higher when teachers rejoin the Hawaii Employer-Union Health Benefits Trust Fund in Fiscal Year 2011 (the Hawaii State Teachers Association's Voluntary Employees Beneficiary Association Trust sunsets on June 30, 2010).

Given the Governor's overall responsibilities for managing State government and State finances, the Governor should appoint the majority of employer board members without regard to specific employer jurisdictions. However, if board members are to be added, we strongly suggest a neutral member. A neutral eleventh member would facilitate working through the Hawaii Employer-Union Health Benefits Trust Fund Board deadlocks and balance the needs of both employer and employee interests.

Second, we strongly believe that the Attorney General is better suited to ensure that long-term State interests are protected rather than an outside attorney. The staff of the Department of the Attorney General can bring a broad background of familiarity with the Hawaii Employer-Union Health Benefits Trust Fund and other State statutes at a lower cost than an outside legal firm. Cost of an outside attorney will have to be borne by the public employers and plan participants.

Third, requiring benefit plans to be based on collectively bargained amounts rather than determining collectively bargained amounts based on plan designs established by the Hawaii Employer-Union Health Benefits Trust Fund is problematic. Such an approach could result in material fluctuations in plan benefits from year to year and may make it difficult to design benefit plans that meet the needs of beneficiaries. This change may also cause administrative difficulties such as completing plan design and negotiating with vendors in sufficient time for open enrollment periods, especially given the history of completing negotiations very late in plan delivery cycle. Similarly, for retirees, requiring that the plans be based on approved appropriations may also cause difficulties in completing plan design and bidding/negotiating with vendors in sufficient time for open enrollment periods.

Fourth, given the fiscal complexities involved and the size of Hawaii Employer-Union Health Benefits Trust Fund expenditures in relation to the total State budget, transferring the Hawaii Employer-Union Health Benefits Trust Fund to the Department of Human Resources Development would not be in the best interests of State.

We are not opposed to exempting the Hawaii Employer-Union Health Benefits Trust Fund from Chapter 103D, Hawaii Revised Statutes. We defer to the Department of the Attorney General regarding provisions relating to fiduciary duties.

DEPARTMENT OF HUMAN RESOURCES  
**CITY AND COUNTY OF HONOLULU**

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MUFI HANNEMANN  
MAYOR



NOEL T. ONO  
ACTING DIRECTOR

February 5, 2010

The Honorable Dwight Y. Takamine, Chair  
and Members of the Committee on Labor  
The Honorable Brian T. Taniguchi, Chair  
and Members of the Committee on  
Judiciary and Government Operations  
The Senate  
State Capitol  
Honolulu, Hawaii 96813

Dear Chairs Takamine and Taniguchi and Members:

Subject: Senate Bill No. 2849  
Relating to the Hawaii Employer-Union Health Benefits  
Trust Fund

The City and County of Honolulu, **Department of Human Resources supports portions of Senate Bill 2849** which seeks to amend various sections of the Employer-Union Trust Fund (EUTF) law.

The City strongly supports the provisions of this bill that change the composition of the EUTF Board to include a City representative and a representatives for the neighbor island counties. The county governments and our employees are affected by the decisions of the Board and we have long sought to be part of the process so we are pleased with the inclusion of county representation in this measure. In addition, the Hawaii Council of Mayors has made county representation on the EUTF board one of its legislative priorities for this year.

Other provisions of this bill are less clear to the City and, accordingly, we seek a better understanding of these matters. One of these issues of concern is the basis for the switch of the retiree trustee from an employee trustee to an employer trustee. In addition, we would like more information on how employer cost concerns will be addressed. We note that language contained in the current law that requires the Board to provide benefits that are affordable to both the employees and employers is being

The Honorable Dwight Y. Takamine, Chair  
and Members of the Committee on Labor  
The Honorable Brian T. Taniguchi, Chair  
and Members of the Committee on  
Judiciary and Government Operations  
The Senate  
Page 2  
February 5, 2010

deleted under the bill. As health care costs are a significant concern to both employers and employees, we want to ensure that the concept of affordability is preserved.

We recognize that Section 7 of the bill may be intended to address the cost concerns by requiring the Board provide health and other plans based on the collectively bargained employer and employee contributions (for employees included in bargaining units) and on the appropriations adopted by the Legislature and the counties for the retirees. However, we have concerns about how this section will be implemented and whether timing issues may arise. We also have concerns about possible fragmentation of the group for which plans are purchased.

The City recognizes that recent events have highlighted difficulties resulting from the current EUTF law. We want to emphasize that we want to be part of the solution and would be happy to further discuss our concerns.

Thank you for the opportunity to testify.

Yours truly,



Noel T. Ono  
Acting Director



Senate Committee on Labor and Senate Committee  
on Judiciary and Government Relations  
Friday, February 5, 2010  
9:30 a.m.

**SB 2849, Relating to the Hawaii Employer-Union Health Benefits Trust Fund (EUTF)**

Dear Chairmen Takamine and Taniguchi and Committee Members:

On behalf of the University of Hawaii Professional Assembly (UHPA), our union strongly encourages the passage of this bill to reform and alter the Employer Union Trust Fund that provides various health insurance coverage to public employees, currently with the exception of the Department of Education (DOE) teachers in Bargaining Unit 5. After examining, evaluating, and considering numerous options, the unions representing public employees in the state of Hawaii have reached a consensus over the principles embodied in this Act. The decision to support fundamental changes in the EUTF is in response to the failure of the existing governance system; a system that was characterized as being equivalent to the private sector union-employer health and welfare trust but does not function in that manner.

This proposal addresses the key issues that must be changed, which can be summarized in the following.

- This bill would include all thirteen discrete bargaining units, and would not allow "opting out" provisions, but rather would allow for shared benefit plans for public employees under the same state or county employer.
- Like in a private sector Taft-Hartley Trust, the fiduciary responsibility of the trustees would be to the beneficiaries.
- The negotiated contributions placed in the trust would be permanently segregated from the employer and the union, and remain under the control of the trustees.
- The trust would appoint an independent legal counsel and plan consultants, who are not obligated to the employer. Legal services to the EUTF are currently provided by the attorney general of the state of Hawaii, appointed by the Governor, who is the employer.
- The EUTF trustees would be appointed by the respective unions and the employers, e.g., state of Hawaii and City & Counties, and would continue

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subject to the support of the appointing union or employer, unlike the current EUTF where all trustees are appointed by the employer, i.e., the Governor of the state of Hawaii. A situation like this would never occur in the private sector.

- The respective public employer and unions would be allowed to negotiate different contributions to the trust for each bargaining unit based on the benefits and conditions of a mutually agreed upon set of health insurance offerings. Currently, the right to negotiate only the fix dollar contributions to a plan without controlling such things as the plans' coverage, deductibles, or co-payments, prevents meaningful negotiations, especially when the parties are interested in the total cost of both salary and fringe benefits. As long as the federal government continues to provide employers, including the state of Hawaii, with substantially reduced employment taxes for contributions to health insurance, it makes sense for the parties to be able to fully negotiate these benefits in relationship to salary.

This bill would not discontinue the EUTF as an umbrella for providing health insurance to all active and retired public employees, including those excluded from bargaining units under H.R.S. Chapter 89 or elected legislators. It would, however, accommodate the reasonable expectation of the public employees that health care benefits should be a subject included in collective bargaining. In every other employment setting, it would be the generally accepted expectation that unions would negotiate with employers over both salary and *fringe benefits*. Having both parts in the equation is in the best interest of both the employers and their employees.

Respectively submitted,

A handwritten signature in black ink, appearing to read 'J. N. Musto'. The signature is fluid and cursive, with a prominent flourish at the end.

J. N. Musto, Executive Director



February 4, 2010



Senator Dwight Y. Takamine, Chair  
Senator Brian T. Taniguchi, Vice Chair  
Committee on Labor

Senator Brian Taniguchi, Chair  
Senator Dwight Y. Takamine, Vice Chair  
Committee on Judiciary and Government Operations

**RE: SB 2849, Relating to the Hawaii Employer-Union Health Benefits Trust Fund**

Dear Chair Takamine, Chair Taniguchi, Vice Chair Takamine and Members of the Committee:

My name is John Radcliffe and I strongly support SB 2849.

Having served thirteen years as Executive Director of the Hawaii State Teachers Association and another eighteen years as Associate Executive Director of the University of Hawaii Professional Assembly, thirty-one years in all, and having also served as a Trustee for both the Public Employee Health Fund and the Employer-Union Health Fund Trust for long terms, I know what I am talking about when I say that the EUTF governance system never worked very well and is now broken.

Fundamental and immediate changes are needed to the governance structure, and the system outlined by Dr. Musto in his testimony, which is to operate like a Taft-Hartley is the way to go.

The status quo is entirely one sided and controlled by the Executive Branch of State Government and it is not working. Permit me to hasten to explain that this is not a Democrat/Republican thing. It may be exacerbated by that, but the flaws in the system are fundamental.

There is zero doubt that the management trustees are under the thumb of the Governor and vote her will. There is no doubt that B&F controls the purse strings of the EUTF. There is no doubt that the Attorney General is controlled by the Governor. There is no independence or fairness in the status quo system.

Thank you for this opportunity to submit written comments.

Respectfully Submitted,

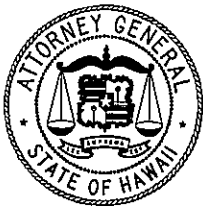
John H. Radcliffe  
President

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TESTIMONY

SB2849

LATE



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

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ON THE FOLLOWING MEASURE:

S.B. NO. 2849, RELATING TO THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND.

BEFORE THE:

SENATE COMMITTEES ON LABOR AND ON  
JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Friday, February 5, 2010 TIME: 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or  
Brian Aburano, Deputy Attorney General

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Chairs Takamine and Taniguchi and Members of the Committees:

The Department of the Attorney General (Department) opposes this bill in its current form.

The bill amends chapter 87A, Hawaii Revised Statutes (HRS), to: (1) allow the Hawaii Employer-Union Health Benefits Trust Fund (EUTF) to procure carriers, administrators, consultants, actuaries and auditors exempt from HRS chapter 103D; (2) imposes duties, restrictions, and liabilities on fiduciaries of the trust; (3) permits the EUTF to employ or retain a private attorney; (4) changes the number of trustees on the EUTF board, how they are appointed, their terms of office, and quorum and voting requirements; (5) provides for sub-boards to administer exclusive bargaining unit contributions and benefits; and (6) requires the EUTF to provide health and other benefit plans within certain contributions and appropriations.

FIDUCIARIES

The bill provides that a fiduciary of the trust shall comply, with respect to a plan, with all fiduciary duties imposed on fiduciaries under title 29 U.S.C. sections 1101-1191, as amended, and related regulations. See page 1, lines 9-13.

Title 29 U.S.C. sections 1101-1191 are the federal statutes commonly known as the Employee Retirement and Income Security Act (ERISA). As a governmental plan, the EUTF is exempt from the requirements of ERISA pertaining to fiduciaries. See 29 U.S.C. §§ 1002(32) (definition of "governmental plan") and 1003(b)(1) (ERISA provisions not applicable to governmental plans).

First, the bill does not define who is a "fiduciary" of the trust. The lack of a definition may create litigation issues in the future. Also, the EUTF statutes use the term "fund" not "trust" but it is unclear that fiduciaries should be limited to those who are fiduciaries of the fund. Other parts of this bill create fiduciaries of EUTF plans that might not be fiduciaries of the EUTF fund, i.e., sub-boards. See page 11, line 16, to page 12, line 3.

Second, while the bill provides that a fiduciary of the trust shall comply with all fiduciary duties imposed under ERISA, it goes on to state some but not all fiduciary provisions of ERISA. See page 1, line 14, to page 4, line 16. This might create an ambiguity as to whether ERISA provisions not stated in the bill apply or do not apply. For example, page 3, line 15, to page 4, line 4, track the prohibited transactions language of 29 U.S.C. section 1106, but the bill does not include the language in 29 U.S.C. section 1108 that provides exemptions for what would otherwise be prohibited transactions.

Third, the bill makes fiduciaries personally liable for breaches of fiduciary duty, including making good to the "plan" any losses to the plan from each breach. See page 4, line 17, to page 5, line 4. The EUTF statutes do not have a definition for "plan" so this may create an ambiguity. More importantly, under current law, the EUTF trustees have a general exemption

from personal liability under HRS section 26-35.5(b). See Awakuni v. Awana, 115 Haw. 126, 136-140 (2007). If the bill means to do away with this exemption, it may become difficult to get persons to serve as trustees of the EUTF and/or the premium costs for insuring EUTF trustees may rise to account for the greater potential risk. See HRS § 87A-25(4) (EUTF board required to procure fiduciary liability insurance).

Related to the foregoing, the bill provides that any provision in any agreement or instrument that purports to relieve a fiduciary of responsibility or liability for any duty shall be void as against public policy. See page 5, lines 5-9. Again, it is unclear as to whether this means to do away with the current exemption from liability for EUTF trustees under section 26-35.5(b).

Fourth, the bill provides that an employee organization may purchase insurance to cover the potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee welfare benefit plan. Neither this bill nor the EUTF statutes provide a definition for "employee welfare benefit plan".

#### PRIVATE ATTORNEY

The bill permits the EUTF to employ or retain a private attorney who is independent of the Attorney General without going through the Attorney General. The private counsel would be permitted to represent the EUTF, an agency of the State, in any litigation, render legal counsel and advice, and draft documents. See page 6, line 3, to page 8, line 17, and page 14, lines 14-21.

First, under existing law, the EUTF may and has used private counsel with the approval of the Attorney General and Governor. See HRS §§ 28-8 and 28-8.3. Such counsel may be

approved where there is a direct conflict or additional expertise is needed.

Second, the EUTF is a state agency and part of the Executive Branch. It is critical that the legal advice given to the EUTF be consistent with the advice given to other state agencies and with the interests of the Executive Branch. Otherwise, the EUTF could be given inconsistent advice that is unnecessarily damaging to the EUTF, the State, or the Executive Branch, or much time and effort will be unnecessarily spent resolving avoidable differences between the EUTF and the Governor or other state agencies. It is only through the Department that consistent advice can be given to the EUTF.

Third, the Department provides a broad range of experience and expertise to the EUTF that would not be available through a small group of contract hires, in-house lawyers or counsel with ERISA "employee benefits experience." See page 14, lines 18-21. While the Attorney General can hire private counsel for the EUTF to advise it on specific employee benefits matters (as noted above, the EUTF is exempt from ERISA), no such counsel is likely to have expertise on the variety of unique government laws that are applicable to the EUTF, i.e., open records laws, open meetings act, privacy and confidentiality laws, budget laws, legislative process, etc.

#### BOARD OF TRUSTEES; SUB-BOARDS

The bill replaces the ten trustees on the EUTF board with twelve trustees: (a) six trustees representing employee-beneficiaries, each being appointed by a specific bargaining unit or units; (b) five trustees representing public employers, one being appointed by the Governor to represent the State administration, one nominated by the UH Board of Regents, one nominated by the Board of Education, one appointed by the Mayor

of the City and County of Honolulu, and one appointed by at least two of the mayors of the remaining counties; and (c) one trustee appointed by the Governor to represent retirees. See page 8, line 20, to page 11, line 13. All appointees serve at the pleasure of the appointing authorities. See page 11, lines 14-15, and page 14, lines 2-3. Four trustees representing employee-beneficiaries and four trustees representing public employers must be present to constitute a quorum, and a vote of four trustees on each side is necessary to carry any measure. See page 15, line 3, to page 16, line 5.

First, while there is no Hawaii case law on the subject and case law from other jurisdictions is not uniform, there is an issue as to whether the power to appoint public officers can be constitutionally delegated to private organizations (in this case, to the exclusive bargaining representatives for bargaining units). Courts in several states have held that the power to appoint a public officer is a sovereign power of government granted by the people to elected officers and that delegating that power to a private organization accountable to no one but their own membership is unconstitutional. James v. Schorr, 65 A.2d 810 (Del. 1948); Rudman v. Rini, 356 N.E.2d 4 (Ill. 1976); Gamel v. Veterans Memorial Auditorium Commission, 272 N.W.2d 472 (Iowa 1978); Sedlak v. Dick, 887 P.2d 1119 (Kan. 1995); Opinion of the Justices, 150 N.E.2d 693 (Mass. 1958); and Hetherington v. McHale, 329 A.2d 250 (Pa. 1974); cf. Jones v. Chiles, 638 So. 2d 48 (Fla. 1994) (statute violated separation of powers by depriving governor of power to appoint executive officer).

Second, one of the employee-beneficiary trustees is to be appointed by the exclusive bargaining representative for bargaining unit 5. See page 10, lines 1-2. All bargaining unit 5 members are now in VEBA health benefits plans under chapter

87D and do not participate in the EUTF. Unless bargaining unit 5 members are to be transferred back to the EUTF, it would not make sense to permit bargaining unit 5 to appoint a trustee to administer the EUTF. For similar reasons, it may be questioned why the bill provides for the Board of Education to nominate one of the employer trustees.

Third, by appointing more employee-beneficiary trustees than public employer trustees, the bill strays from the equal representation on the EUTF board that was originally mandated by Act 88, Session Laws of Hawaii 2001. See Stand. Comm. Rep. No. 880, 2001 Senate Journal, page 1275, and Stand. Comm. Rep. No. 1097, 2001 House Journal, page 1548. In this respect, Act 88 was apparently based on provisions of the Labor-Management Relations Act (LMRA), specifically 29 U.S.C. section 186(c), which permits an employer (or employers) to make payments to a trust fund established for the sole and exclusive benefit of the employees of such employer (or employers) if such payments are held in trust and the employees and employer(s) are "equally represented in the administration of such fund."

Fourth, by increasing the quorum to four trustees on each side, the bill makes it more likely that the EUTF board will not be able to meet and take actions necessary for the efficient and continued operation of the EUTF health and other benefits plans. The EUTF has and is currently having problems getting a quorum of three trustees on each side to meet.

Fifth, the bill does nothing to solve a recurrent problem of the EUTF board, which is the lack of an effective tie-breaking mechanism. As with the current law, the bill provides that both employee-beneficiary trustees and public employer trustees must agree on any matter that must be voted upon. While the LRMA is not directly applicable to the EUTF, it should



be noted that under the LMRA where there is equal employee and employer representation on a trust fund board and no neutral person(s) empowered to break a deadlock, there is to be an agreement that provides for an impartial umpire to decide the dispute. See 29 U.S.C. § 186. The current EUTF statutes and rules do not provide for neutral persons or an impartial umpire to resolve board deadlocks.

Sixth, the provision for the appointment of sub-boards to administer particular bargaining unit contributions and benefits appears to resurrect the union health plans that were done away with under Act 88. Having a single health benefits system, rather than multiple union plans, was seen as a cost-saving feature of Act 88. See Conf. Comm. Rep. No. 124, 2001 House Journal, pages 1097-1098; and Actuarial Audit and Operational Audit of the Public Employees Health Fund, Auditor's Report No. 99-21 (May 1999). In addition, the statute does not make it clear how or what employer(s) will appoint trustees to a sub-board, how such sub-boards will operate, whether the sub-boards would have control of their own funds, where such funds would be deposited and held, whether fiduciary duties will apply to trustees of sub-boards, and what responsibility the EUTF board would have for such sub-boards, if any.

#### HEALTH AND OTHER BENEFITS PLANS

The bill provides that the EUTF board is to provide health and other benefits plans: (a) for collective bargaining units, based on collectively bargained contributions; (b) for retirees, within the appropriation adopted by the State and counties; and (c) for all others, based on the contributions from both the employers and employees. See page 16, lines 8-19.

With respect to (a), this would require the collective bargaining parties to agree to employer and employee

contributions well before the EUTF board must design the health and other benefits plans, procure carriers to provide or third-party administrators to administer the plans, and conduct an open-enrollment and informational campaign so that employees can select their plans. Historically, the collective bargaining parties have not agreed on contributions before the EUTF must design and procure its plans; they have only negotiated contributions after the EUTF plans have been designed and procured. If this bill were to pass and the collective bargaining parties continue their past practice, the EUTF board will be left in a difficult position and EUTF employee-participants may suffer as a result.

With respect to (b), this will require the State Legislature and counties to appropriate moneys well in advance of the EUTF design and procurement of retiree health and other benefits plans. Historically, such appropriations have followed, not been in advance of, EUTF design and procurement of retiree plans. Again, if this bill were to pass and the State Legislature and counties do not make appropriations in a timely manner, the EUTF board will be left in a difficult position and EUTF retiree-participants may suffer as a result.



# HAWAII FIRE FIGHTERS ASSOCIATION

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The Twenty-Fifth Legislature  
The Senate  
Committees on Labor  
February 5, 2010

Testimony by  
Hawaii Fire Fighters Association

**S.B. No. 2849                      Relating to the Hawaii Employer-Union Health Benefits Trust Fund**

My name is **Robert H. Lee** and I am the President of the Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO and also an active-duty fire captain with the Honolulu Fire Department. On behalf of the 1,800 active and 1,000 retired professional fire fighters throughout the State, the Hawaii Fire Fighters Association **strongly supports S.B. No. 2849.**

S.B. No. 2849 will improve the operations and accountability of EUTF and the HFFA believes it addresses the concerns of the unions while maintaining the EUTF for the purpose of administering health insurance for all active and retired public employees. These amendments to Chapter 87A will provide for earnest participation of both the unions and employers.

The Hawaii Fire Fighters Association urges the Committee to support S.B. No. 2849. It will improve the operations of the EUTF and ensure the interests of both the members and the employers are best represented.

**CHARLES K.Y. KHIM**  
*Attorney-At-Law*

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Letterhead Created & Printed In-house

January 5, 2010

**Testimony in Favor of SB 2849**  
(Relating to EUTF)

To: Chair: Sen. Dwight Y. Takamine (LBR); Sen. Brian T. Taniguchi (JGO)

Vice-Chair: Sen. Brian Taniguchi (LBR); Sen. Dwight Y. Takamine (JGO)

Members: Senate Committees on Labor, and Judiciary and Government Operations

From: **Charles K.Y. Khim, Esq. – Attorney at Law**



My name **is Charles K.Y. Khim, Esq.** and I am an attorney who is, and has been licensed to practice law in Hawaii for the last thirty years.

Thank you for this opportunity to present **testimony in favor of SB 2849**. This bill provides for the amendment of HRS, Chapter 87A, the enabling Act of the Hawaii Employer-Union Health Benefits Trust ("EUTF"), by adding three new sections.

One of these new sections exempts the EUTF Board of Trustees ("Board") from the requirement that they must be represented by the State Department of the Attorney General ("AG"),

and instead authorizes the Board to retain legal counsel to represent them that is wholly independent from the AG.

This amendment is especially important in order for the Board to afford all those who appear before them the constitutional right to due process of law. Indeed, in a recent case in which attorney Paul Alston and I represented retiree beneficiaries of the EUTF, the First Circuit Court of the State of Hawaii held that the EUTF Board violated our clients' Constitutional right to due process of law by having the AG represent the Board.

In so holding, the First Circuit Court cited the Hawaii Supreme Court's decision in *Sussel v. City & County of Honolulu Civil Service Commission*, 71 Hawai'i 101 (1989), a case in which I successfully proved that the City's Civil Service Commission had violated my client's Constitutional right to due process of law. A copy of this Circuit Court decision is attached hereto.

As the foregoing indicates, I am an attorney who is knowledgeable and has expertise in the legal area of the Constitutional right to due process of law. Applying my foregoing knowledge and expertise to SB 2849, I concur with SB 2849's conclusion that the Constitutional right to due process of law will continue to be violated unless the Board is freed from its obligation to use the AG as their legal counsel and the Board is authorized to retain legal counsel that is independent from the AG.

As mentioned above, my foregoing conclusion is supported by the First Circuit Court's ruling which is attached hereto. Thus, it is imperative that SB 2849 be enacted into law.

Thank you for this opportunity to present testimony before this honorable committee. If any of committee member has any questions, I will be more than glad to answer them at this time.

CKYK:rwd

Attachment

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2008 JUL 23 PM 3:18

F. OTAKE  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARION EVERSON, JAMES )  
DANNENBERG, BILLY SOUTHWOOD, )  
VALERIE YAMADA SOUTHWOOD, )  
DUANE PREBLE, SARAH PREBLE, )

Appellants, )

vs. )

BOARD OF TRUSTEES OF THE )  
HAWAII EMPLOYER-UNION HEALTH )  
BENEFITS TRUST FUND, STATE OF )  
HAWAII, JAMES WILLIAMS, as the )  
Administrator of the Hawaii Employer- )  
Union Health Benefits Trust Fund, )

Appellees. )

CIVIL NO. 07-1-1872  
(Agency Appeal)

DECISION AND ORDER REVERSING  
DECISION OF BOARD OF TRUSTEES  
OF THE HAWAII EMPLOYER-UNION  
HEALTH BENEFITS TRUST FUND

DECISION AND ORDER REVERSING DECISION OF BOARD OF  
TRUSTEES OF THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND

The Court, having considered the arguments of counsel, briefs, supplemental  
briefs and record on appeal pursuant to HRS Section 91-14(g) determines as follows:

1. It was error for the Appellee Board of Trustees of the Hawaii Employer-Union  
Health Benefits Trust Fund ("Board") to allow its administrator to intervene, particularly when  
the Board was a party in the class action which gave rise to the circuit court order interpreting  
primary jurisdiction to require the Defendant Board to determine at the agency level by

declaration and contested case hearing the same issues it was defending against in the circuit court. The fact that the same attorney representing the Board in the class action also represented the intervenor in this action only compounded the due process violation. Sussel v. City & County of Honolulu Civil Service Commission, 71 Hawai'i 101 (1989); White v. Board of Education, 54 Haw. 10, 16 & n.7 (1972); cf. RGIS Inventory Specialist v. Hawai'i Civil Rights Commission, 104 Hawai'i 158 (2004) (no standing for HCRC Executive Director to file a petition with HCRC for declaratory judgment action pursuant to HRS Section 91-8).

2. The Court should consider statutory violations before reaching constitutional issues, and statutes should be construed in a manner that makes them constitutional. Thus, the analysis begins with HRS Section 87A and where necessary continues in the context of Article XVI of the Hawaii Constitution, ratified in 1959. Article XVI, Section 2 reads as follows:

“Membership in any employees’ retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.”

3. Applicability of the Article XVI non-impairment clause to medical/health benefits as opposed to pension payments is the constitutional issue. The parties disagree whether interpretation of the Hawaii provision should be guided by New York or Alaska interpretations of their respective similar provisions. The Hawaii Supreme Court in Kaho'ohanohano v. State, 114 Hawai'i 312, 342-45 (2007) noted the New York provision was the basis for Hawaii's provision, but the majority also found Alaska's law instructive in interpreting our non-impairment clause, id. at 348 n.32. That is because Alaska's provision also was patterned after New York. Those states have reached different results when deciding whether their non-

impairment clause applied to medical/health benefits. Lippman v. Board of Education, 66 N.Y.2d 313 (N.Y. 1985) held it did not, influenced by the fact that the health benefits were governed by a separate statute from the retirement/pension benefits. Duncan v. Retired Public Employees, 71 P.3d 882 (AK 2003) relied in part on the integration of health and pension benefits under the same retirement chapter.

Appellants correctly point out that by 1959, when the Hawaii Constitution was ratified including the non-impairment clause, every recipient of a government pension “who is actually and solely dependent upon his pension for his maintenance and support . . . shall be entitled to free medical treatment . . . and free hospitalization” from any government physician or hospital, RLH Section 6-4 (1945). At the time of ratification this benefit was codified in the same chapter governing the retirement system, Chapter 6 “Pension and Retirement Systems” (1955 RLH). (The first government health benefits plan was enacted in 1961 including active employees and retirees. Medicare began in 1966, and thereafter legislation made Medicare primary for those eligible but required the retirees benefits be essentially equivalent to those for active workers and their dependents.) Appellees counter that the same free aid provision remains in the ERS chapter 88 today, distinct from chapter 87A health benefits at issue here, and thus it is of no consequence.

Appellants further note the non-impairment clause in both Hawaii and Alaska Constitutions use the term “accrued benefits” without limitation and do not confine them to financial benefits; i.e. pension payments as in Michigan, Studier v. MPSERB, 698 N.W.2d 350 (Mich. 2005). Moreover the Appellants cited numerous examples of government publications identifying health benefits as retirement benefits, ROA 240, 243, 248, 256, and such publications



are entitled to consideration, see Chun v. Employees' Retirement System, 61 Haw. 596, 601-02 (1980). This Court is persuaded that the analysis of the Alaska Supreme Court in Duncan is closer to the plain language, intent and correct interpretation of our non-impairment clause. By interpreting "accrued benefits" to include health benefits which had been part of the employees' total compensation package and viewing them as deferred compensation to be provided in retirement the Duncan court determined retirees' health benefits were contractual rights which once accrued could not be impaired. Hawaii's non-impairment provision similarly protects the accrued benefits but by so doing does not and has not prohibited the State legislature from changing the benefits for prospective employees. Hence, retirement benefits including those health benefits that became established by enactment of Chapters 87 and 87A and amendments thereto are protected or vested once accrued.

4. Turning to the statute, the Court finds that "similarly situated beneficiary" in section 87A-23 of Hawaii Revised Statutes invokes comparison between retirees and active employees, not Medicare eligible retirees and early retirees who by age do not yet qualify for Medicare. Appellants appear to concede however that the plans need not be identical, so long as they are reasonably approximate; i.e. near or close. (Opening Brief at 33) The plans also must be affordable and within the limits of the retirees' health benefits contribution cap. Because the Board's interpretation of HRS Section 87A-23 permitted substantially different benefits, the issue of affordability in the context of reasonably approximate benefits was primarily addressed in testimony that rating active workers and retirees would eliminate the foreseeable discrepancy and had been done in connection with Kaiser as the provider since the health plan's inception.

5. Having rejected the Board's legal analysis, this Court is left to consider

whether the differences in retiree benefits nonetheless reasonably approximate those of active workers. The following exemplify benefits that are not reasonably approximate in violation of state law:

- \$2,000 maximum dental benefit versus \$1,000
- 80% versus 60% coverage for endodontic treatment
- 90% radiation therapy coverage versus 80% outpatient radiation therapy after paying annual deductible

6. The Court notes Appellants' request for attorneys fees and costs but is not aware of any underlying authority to make such an award, and none is cited by Appellants. The request is denied.

For the aforesaid reasons, this Court reverses the Board's decision. Ms. Calvert to prepare the judgment.

DATED: Honolulu, Hawaii, July 23, 2008.

  
 EDEN ELIZABETH HIFO  
 Judge of the Above-Entitled Court

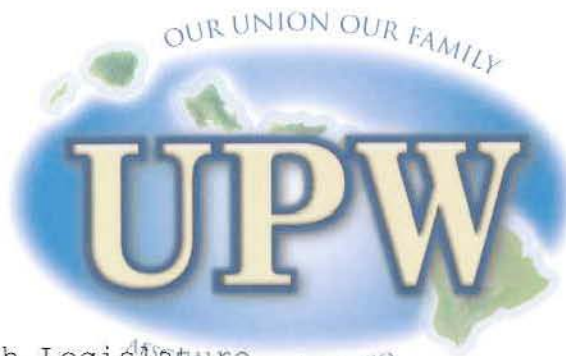
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BOARD OF TRUSTEES OF THE HAWAII  
EMPLOYER-UNION HEALTH BENEFITS TRUST FUND



The Senate  
The Twenty-Fifth Legislature  
Regular Session of 2010

Committee on Labor

Senator Dwight Y. Takamine, Chair  
Senator Brian T. Taniguchi, Vice Chair

Committee on Judiciary and Government Operations

Senator Brian T. Taniguchi, Chair  
Senator Dwight Y. Takamine, Vice Chair

DATE: Friday February 5, 2010  
TIME: 9:30 a.m.  
PLACE: Conference Room 016

**TESTIMONY OF THE UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,  
AFL-CIO ON S.B. 2849 RELATING TO THE HAWAII  
EMPLOYER-UNION HEALTH BENEFITS TRUST FUND**

My name is Dayton M. Nakanelua, state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW represents approximately 8,800 blue collar non-supervisory employees in bargaining unit 1 and 2,900 institutional, health and correctional workers in bargaining unit 10 under chapter 89. UPW's members are also beneficiaries of the Employer-Union Health Benefits Trust Fund (EUTF).

**We are in favor of Senate Bill No. 2849 which holds accountable the trustees of the EUTF both to their fiduciary duty and to their appointing representatives and gives those trustees access to attorneys specialized in a highly technical, legal expertise field.**

The continued well-being and security of the thousands of employees and their dependents who are directly affected by this plan is paramount as the trust fund and the benefits it provides have become an important factor affecting the stability of employment and the successful development of industrial relations. As Congress noted in passing the Employee Retirement Income Security Act,

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minimum standards are needed for the soundness and stability of the plan with respect to both the adequacy of the funds to pay the promised benefits and the accountability of those administering the funds (29 U.S.C. § 1001).

Sections 1, 3, 4, and 6 of the measure creates the right balance between the trustees accountability to their appointing exclusive bargaining representative or employer and the fiduciary duty owed by the trustees to beneficiaries of the EUTF. The proposed composition of the EUTF board is consistent with labor management benefit trust funds in the private sector with representatives from both labor and management, appointed by their respective interests. The sections of the bill on fiduciary duties recognize that the trustee is a fiduciary whose duty to trust beneficiaries must overcome any loyalty to the interest of the representative that appointed him or her. Yet the composition of the EUTF board as amended by the bill allows the exclusive bargaining representatives and the employer representatives to appoint trustees to the board who serve at the pleasure of the appointing representative and will bring the interest of their respective representatives to the board.

Sections 2 and 5 of the measure allow the trustees to retain legal counsel other than the attorney general. This will provide for greater stability in the legal workforce representing the trustees and greater protection for the beneficiaries of the EUTF. The field of labor-management trust funds grows more complex, carries more liability concerns, and exposes the beneficiaries to greater risks warranting the specialized legal resource. Allowing the trustees to retain legal counsel other than the attorney general assures the autonomy of the trust fund given the balance sought in the composition of the trust fund.

Section 7 of the measure clarifies that the cost to the employee and employer is a contribution amount negotiated by the exclusive representative and the employer pursuant to Chapter 89, Hawaii Revised Statutes.

Finally, Section 8 of the bill attaches the EUTF to the State department of human resources development for administrative purposes. The department already conducts significant administrative duties related to employee

benefits. Therefore, the department of human resources development is an ideal environment in which the EUTF may maintain its independence while still ensuring administrative accountability.

We believe this measure clarifies the composition and duties of the EUTF board that is consistent with the purpose of the enabling act and protects the interests of the beneficiaries. The bill assures that the trustees are able to meet their duties that arise in a complex, legal field. We urge your favorable action on S.B. 2849.