

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

LATE

ON THE FOLLOWING MEASURE:

S.B. NO. 1066, S.D. 1, RELATING TO THE HAWAII EMPLOYER-UNION
HEALTH BENEFITS TRUST FUND.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, March 1, 2011 TIME: 9:20 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call
Brian Aburano, Deputy Attorney General at 586-0618

Chair Ige and Members of the Committee:

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

This 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 chapter 103D, HRS; (2) permit the EUTF to employ or retain a private attorney; (3) change the number of trustees on the EUTF board, how they are appointed, their terms of office, and quorum and voting requirements; (4) provide for sub-boards to administer exclusive bargaining unit contributions and benefits; (5) require the EUTF to provide health and other benefit plans within certain contributions and appropriations; and (6) place the EUTF under the department of human resources development for administrative purposes.

PRIVATE ATTORNEY

The bill permits the EUTF to employ or retain a private attorney who is independent of the Attorney General, without the approval of 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 1, line 8, to page 4, line 2 (amending section 28-8.3, HRS), and page 10, lines 10-19 (amending section 87A-9, HRS).

First, under existing law, sections 28-8 and 28-8.3, HRS, the EUTF may and has used private counsel with the approval of the Attorney General and Governor. 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 of the Attorney General that consistent advice can be given to the EUTF.

Third, the Department of the Attorney General 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 Employee Retirement Income Security Act ("ERISA") "employee benefits experience." See page 10, lines 16-19 (amending section 87A-9, HRS). 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.

Fourth, state agencies have generally only been allowed to procure their own counsel independent of the Attorney General where there is a conflict or a need for specialized expertise not available in the Department. See Stand. Comm. Rep. No. 1044-96, 1996 House Journal, p. 1441 (Ombudsman should be allowed to hire counsel in those matters where the Attorney General would be in conflict by representing the agency affected); Standing Committee Report No. 2825, 2000 Senate Journal, p. 1169 (Kahoolawe Island Reserve Commission allowed to utilize attorneys with specialized, highly technical, legal expertise beyond what the Attorney General may be able to provide to ensure that cleanup proceeds on schedule). Conflicts rarely arise in the Department's representation of the EUTF, and where they do arise, the Attorney General can authorize the EUTF to hire independent counsel. Since the EUTF is exempt from ERISA, there is no need for the EUTF to employ private counsel with expertise in ERISA law. It should be noted that the EUTF has always been advised by a benefits consulting firm that has broad experience and expertise in employee benefits matters, and that the EUTF's request for proposals have indicated that any such firm should have in-house or outside legal counsel with expertise in employee benefits.

BOARD OF TRUSTEES

The bill replaces the ten trustees on the EUTF board with twelve trustees: (a) six trustees representing employee-beneficiaries, each nominated by a specific bargaining unit or units; (b) five trustees representing public employers, one 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 mayors of the remaining counties; and (c) one trustee appointed by the Governor to represent retirees. See page 4, line 10, to page 7, line 11 (amending section 87A-5, HRS). All appointees serve at the pleasure of the appointing authorities. See page 6, lines 10-11, and page 7, lines 12-13. 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 11, line 1, to page 12, line 3 (amending section 87A-11, HRS).

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). The bill provides for the exclusive bargaining representatives of

the various bargaining units to appoint the six trustees to represent employee-beneficiaries. This amounts to the delegation of the power of appointment to private organizations, i.e., the exclusive bargaining representatives.

Second, by providing for 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, p. 1275, and Stand. Comm. Rep. No. 1097, 2001 House Journal, p. 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."

Third, 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. In the past, the EUTF has had problems getting a quorum of three trustees on each side to meet.

Fourth, the bill does nothing to solve a recurring 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 LMRA 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 must 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.

SUB-BOARDS

In one short paragraph, the bill provides that if an exclusive bargaining representative negotiates a specific contribution to apply only to that bargaining unit, the bargaining unit shall have a sub-board of trustees to administer that bargaining unit's contributions and benefits, including the determination of the type and level of benefits for that bargaining unit. See page 7, line 14, to page 8, line 2 (amending section 87A-5(b), HRS).

First, the bill's provision for the appointment of sub-boards to design benefits and 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, pp. 1097-1098; and Actuarial Audit and Operational Audit of the Public Employees Health Fund, Auditor's Report No. 99-21 (May 1999).

Second, the bill lacks provisions that establish how the sub-boards would operate and what requirements would apply to them. For example, the bill does not make clear: how or what employer(s) will appoint trustees to a sub-board; what voting or quorum requirements apply to the sub-boards; whether the sub-boards would be government agencies subject to requirements such as the public meeting and government records laws; whether the

sub-boards would have to comply with the duties imposed on the EUTF board such as in section 87A-25, HRS, including the procurement of fiduciary liability insurance and fidelity bonds; whether the sub-boards can hire their own employees, benefits consultants, and other professional staff; how the costs and expenses of the sub-boards would be paid; whether the sub-boards would have control of their own funds and where such funds would be deposited and held; what the sub-boards can or are to do with excess or surplus funds; and what responsibility the EUTF board would have regarding the sub-boards, if any.

Third, there is currently a lawsuit pending against the State and counties alleging that State and county retirees have a constitutional and contractual right to the same benefits that are provided or offered to State and county active employees. See Dannenberg v. State of Hawaii, First Circuit Court, Civ. No. 06-1-1141. If the plaintiffs' claims in that lawsuit are upheld, this bill could lead to an untenable situation in which State and county retirees have to be offered the same benefits or benefits plans provided by the EUTF board and all the different sub-boards.

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 the collectively bargained contributions; (b) for retirees, according to the appropriation by the legislature and the respective counties; and (c) for all other eligible beneficiaries, based on the contributions from both the employer and employees. See page 12, lines 4-17 (amending section 87A-15, HRS).

With respect to plans for collective bargaining units, 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 designs and procures 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 plans for retirees, this will require the State Legislature and county governments 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 prefaced, EUTF design and procurement of retiree plans. Again, if this bill were to pass and the State Legislature and county governments 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.

As noted above, there is currently a lawsuit pending against the State and counties claiming that State and county retirees have a constitutional and contractual right to a certain level of health benefits. If plaintiffs succeed in their claim, this could make it difficult, if not impossible, to fully implement this part of the bill.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
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**The Twenty-Sixth Legislature, State of Hawaii
Hawaii State Senate
Committee on Ways and Means**

**Testimony by
Hawaii Government Employees Association
March 1, 2011**

**S.B. 1066, S.D. 1 – RELATING TO THE
HAWAII EMPLOYER-UNION HEALTH
BENEFITS TRUST FUND**

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of S.B. 1066, S.D. 1, which makes fundamental changes to the structure and operating principles of the Hawaii Employer-Union Health Benefits Trust Fund (EUTF). There is widespread agreement that the EUTF is not operating as originally intended and has become a serious problem for state and county employees and employers. As written, S.B. 1066, S.D.1 in conjunction with S.B. 1078, S.D. 1 - which would permit the negotiation of health care benefits in addition to contributions, contains several significant reforms that will eliminate many of the problems that currently make the EUTF ineffective and expensive.

While we strongly support the original package of structural changes to the EUTF, we also recognize and acknowledge the Attorney General raises many legitimate questions and concerns. It is our desire that the EUTF Trustees' primary fiduciary responsibilities are to the plan participants, similar to language found in the federal Employee Retirement Income Security Act (ERISA). A critical component of reforming the EUTF must address and amend the Trustees' duties and we are willing to replace the fiduciary responsibility language in S.B. 1066, S.D. 1 with language from ERISA, found at 29 USC § 1104, Fiduciary duties, which reads: "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

- (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence, and diligence under the circumstances than prevailing that a prudent man acting in a like



capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

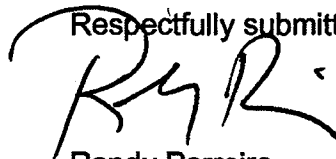
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.”

The ERISA language provided above ensures that the trustees are obligated to consider more than just the Employer’s interests, and clearly delineates the primary fiduciary responsibility of the EUTF trustees to the plan participants.

This language marks the start to addressing much needed change and reform to the EUTF Board and system as a whole. We appreciate the opportunity to testify in strong support of S.B. 1066, S.D. 1, with the suggested addition of the ERISA language.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Randy Perreira', with a large, stylized flourish above the first name.

Randy Perreira
Executive Director