



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 1168, RELATING TO THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND.

BEFORE THE:

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Tuesday, February 07, 2012 **TIME:** 9:30 a.m.
LOCATION: State Capitol, Room 309
TESTIFIER(S): David M. Louie, Attorney General, or
Sarah Hirakami, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General 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, HRS; (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. §§ 1101-1191, as amended, and related regulations. See page 1, lines 9-13. Title 29 U.S.C. §§ 1101-1191 are part of 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 trustees who might not be fiduciaries of the EUTF fund but would appear to be fiduciaries of the EUTF plan, i.e., sub-boards of trustees. See page 11, line 18, to page 12, line 5. To define the fiduciaries who are to comply with section 1 of the bill, the following sentence should be added to section 87A-B(a) at page 1, line 13:

For purposes of this section, a fiduciary shall mean the trustees appointed under section 87A-5(a) and the trustees of any sub-board appointed under section 87A-5(b).

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 16, track the prohibited transactions wording of 29 U.S.C. § 1106, but the bill does not include the wording in 29 U.S.C. § 1108 that provides exemptions for what would otherwise be prohibited transactions. To clarify this matter, the current wording from page 1, line 9, to page 4, line 16, of the bill should be replaced with the following:

§87A-B Fiduciary duties; prohibited transactions. A fiduciary shall comply, with respect to the fund, with all fiduciary duties imposed on fiduciaries under Title 29 United States Code sections 1101-1191, as amended, and related regulations. For purposes of this section, a fiduciary shall mean the trustees appointed under section 87A-5(a) and the trustees of any sub-board appointed under section 87A-5(b).

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 3. 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 section 26-35.5(b), HRS. 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 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 does not make clear that the personal liability of EUTF trustees is limited, as the personal liability of ERISA fiduciaries is limited. For example, liability for breach of fiduciary duty under ERISA may allow recovery of monetary damages only for the plan itself, not for individuals. See Cline v. Industrial Maintenance Eng. & Contracting, 200 F.3d 1223, 1229 (9th Cir. 2000), citing Cinelli v. Security Pacific Corp., 61 F.3d 1437, 1445 (9th Cir. 1995). Similarly, under ERISA, there can be no breach of fiduciary duty liability regarding the design, amendment or termination of health benefits and other welfare benefits plans. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995), citing Adams v. Avondale Industries, Inc., 905 F.2d 943, 947 (6th Cir. 1990); Lockheed Corp. v. Spink, 517 U.S. 882, 889-91 (1996). To remedy the concerns raised in this and the preceding paragraph, the current language from page 4, line 17, to page 6, line 4, of the bill should be replaced with the following:

§87A-C Liability for breach of fiduciary duty. (a) Any person who is a fiduciary of the fund and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries under section 87A-B shall be personally liable to reimburse any losses to the fund resulting from each breach and to restore to the fund any profits of the fiduciary that have been made through the use of assets of the fund by the fiduciary, and may be subject to any other equitable and remedial relief as the court may deem appropriate, including removal of the fiduciary; provided that the liability created by this section is only to the fund and not to individual participants or beneficiaries of the fund and does not apply to the design, amendment, or termination of health or other benefit plans established by the board.

(b) No attorneys' fees or costs incurred in bringing a claim arising under this section, including under a private attorney general doctrine, may be recovered from the fund, the State, or any county.

(c) Any provision in any agreement or instrument that purports to relieve a fiduciary of responsibility or liability for any responsibility, obligation, or duty under section 87A-B shall be void as against public policy. However, nothing in this section shall preclude:

- (1) A fiduciary from claiming immunity under section 26-35.5(b);
- (2) The fund from purchasing insurance for its fiduciaries or for itself to cover

liability or losses occurring by reason of the act or omission of a fiduciary in the case of a breach of a fiduciary obligation by the fiduciary, if the insurance permits recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligation by the fiduciary; or

- (3) A fiduciary from purchasing insurance to cover the fiduciary's own liability for breach of a fiduciary duty.

Fourth, 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 7-10. 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). This can be addressed by amending the bill as stated above.

Finally, if the bill means to do away with the exemption from liability for EUTF trustees under section 26-35.5(b), and to have the EUTF board represented and advised by private attorneys rather than the Attorney General, then the bill must be amended to make clear that the State and counties shall have no liability whatsoever for any breach of fiduciary duty by the EUTF board or any EUTF trustee and shall have no obligation to defend or indemnify the EUTF board or any EUTF trustee. This is necessary to avoid the State and counties incurring major liability due to the bill waiving EUTF trustee immunity and delegating legal oversight of the EUTF board to private counsel. Further, the bill must be amended to limit the liability for breach of fiduciary duty to the amount of the EUTF board's insurance coverage available for such liability. This could be accomplished by adding the following language to the end of the proposed section 87A-C:

(d) If the fund purchases insurance for its fiduciaries or itself, the fund's and the fiduciaries' liability for any and all money damages, losses, costs, and expenses caused by any and all fiduciary breaches of the responsibilities, obligations, or duties imposed under section 87A-B shall be strictly limited to the extent of such insurance.

(e) In no event shall the State or any county be liable for any money damages, losses, costs or expenses caused by a fiduciary's breach of any of the responsibilities, obligations, or duties imposed on fiduciaries under section 87A-B. Notwithstanding any

other statute or law to the contrary, neither the State nor any county shall be obligated to defend or indemnify any fiduciary against a claim arising under this section.

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 5, to page 8, line 22, and page 14, lines 13-21.

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 19-21. 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 law, 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 Standing Committee Report 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 arise the Attorney General can authorize the EUTF to procure 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; SUB-BOARDS

The bill replaces the ten trustees on the EUTF board with twelve trustees: (a) six trustees representing employee-beneficiaries, each being nominated 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, two nominated by the mayors of four counties; and (c) one trustee appointed by the Governor to represent retirees. See page 9, line 1, to page 11, line 15. All appointees serve at the pleasure of the appointing authorities. See page 11, lines 16-17, and page 14, lines 4-5. 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 1, 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). While this bill provides for the Governor to appoint each trustee nominated by the bargaining unit or units, since the Governor is given only one nominee to choose from, the procedure really amounts to a delegation of the power of appointment to the bargaining unit or units.

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, 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.”

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 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 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 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.

Fifth, the 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. See page 11, line 18, to page 12, line 5. 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 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 6-19.

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.

Finally, we suggest that a section be added before section 10 of the bill to provide for the designation of the new sections added to chapter 87A, Hawaii Revised Statutes, to state, "In

codifying the new sections added to chapter 87A, Hawaii Revised Statutes, by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in the designations of, and references to, those new sections in this Act.”

We respectfully request that the committee hold the bill.

**TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON JUDICIARY
ON
HOUSE BILL NO. 1168**

February 7, 2012

RELATING TO THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND

House bill No. 1168, makes the following amendments to Chapter 87A, Hawaii Revised Statutes, which governs the Hawaii Employer-Union Health Benefits Trust Fund (EUTF):

- Exempts the EUTF from the procurement code in procuring plan carriers, third-party administrators, consultants, actuaries, auditors, or administrator.
- Adds two new sections regarding fiduciary duties and prohibited transactions, and liability for breach of fiduciary duties.
- Allows the EUTF to retain an attorney who is independent of the Attorney General as legal advisor.
- Increases the members of the EUTF Board of Trustees from 10 to 12, and changes the EUTF membership and terms.
- Allows the creation of sub-boards should a bargaining unit negotiate a specific contribution to apply only to that bargaining unit.
- Requires active employee benefit plans to be based on collectively bargained contributions and retiree benefit plans to be based on legislative appropriations.

The Department of Budget and Finance (B&F) is generally opposed to many of the aspects of this bill. We view this bill as seeking significant structural changes to

the EUTF. The Administration also agrees that the EUTF is facing significant long-term challenges that can best be addressed with major revisions to its authority, practices, and policy. The Department believes that some of the statutory revisions proposed in this bill will actually further complicate or minimize the effectiveness of the EUTF and are not in the best overall interest of the State. First, the Department has serious concerns with the modifications to the composition of the EUTF Board. Specifying that five of the six employer members represent five different jurisdictions severely dilutes – and disproportionately represents the State’s interest thereby resulting 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 mayors of the County of Hawaii, Kauai and Maui to appoint another employer board member is not reflective of the EUTF membership. Currently, State employees make up approximately 77% of the EUTF members. It is not clear what role the retiree beneficiary board member has in voting. 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.

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. Ideally, each trustee of the EUTF is supposed to honor a fiduciary responsibility to all beneficiaries and to the overall longevity of the trust. It seems that the bill implies that trustees, in

practice, are more focused on defending constituencies rather than looking out of the overall interest of the trust. However, if board members are to be added, we strongly suggest a neutral member. A neutral eleventh member would facilitate working through the EUTF Board deadlocks and balance the needs of both employer and employee interests.

Second, we believe the creation of the EUTF Board sub-boards will create administrative complexities and inefficiencies and result in substantially higher rates for employees who are not members of sub-groups with favorable demographics. We believe a uniform benefit package will promote fairness and consistency among employees in the workplace.

Third, on the issue of allowing EUTF to retain an attorney independent of the Attorney General is a bad policy. We strongly believe that the Department of 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 EUTF 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.

Fourth, requiring benefit plans to be based on collectively bargained amounts rather than determining collectively bargained amounts based on plan designs established by the EUTF is problematic. We should be aware that such an approach could result in material fluctuations in plan benefits from year to year and could make it difficult to design benefit plans that meet the needs of the beneficiaries. This change may also cause administrative difficulties such as

completing plan design – for example, collective bargaining negotiations have historically been completed very late in the 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 to open enrollment period.

Finally, B&F recognizes that there could be administrative advantages to reassigning EUTF to the Department of Human Resources Development. The advantage of having EUTF assigned within B&F is to ensure better alignment of the fiscal costs for providing this fringe benefit against the overall statewide budget. EUTF expenditures is one of the largest singular expenses in the State budget. The administration support provided to the EUTF includes financial background and support and from this perspective they may be better situated in the current B&F structure at this time given the significant long-term financial issues facing the EUTF.

On the issue of exempting the EUTF from sections of the procurement code, we are generally not opposed to the concept. Exempting the EUTF from Chapter 103D, Hawaii Revised Statutes, is similar to exemptions for other agencies. There could be potential efficiencies gained with the exemption, however, we defer to the Department of the Attorney General regarding provisions relating to fiduciary duties.

TESTIMONY BY BARBARA CORIELL
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST
FUND, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
ON
HOUSE BILL NO. 1168

February 7, 2012

RELATING TO RELATING TO THE HAWAII EMPLOYER-UNION HEALTH
BENEFITS TRUST FUND

Chairperson Rhoads, Vice Chairperson Yamashita and Members of the
Committee:

I am Barbara Coriell, Administrator of the Hawaii Employer-Union Health Benefits Trust Fund. The EUTF Board has not yet met to consider legislation and therefore takes no position at this time on House Bill 1168 which outlines several significant structural changes to the EUTF Board composition and procedures. However, based on my recent experiences with the procurement process, I would like to provide testimony in support of the exemption of the EUTF from Section 103D of the Procurement Code.

The EUTF issued Requests for Proposals for all coverages in April 2011 and awarded contracts in June and July. Our current pharmacy benefits manager, informed Rx filed a protest against the award of the contracts to CVS Caremark. This protest was made in July and is still ongoing at a minimum projected cost to the EUTF of \$10 million in addition to the cost of a significant number of personnel hours devoted to defending the Board's award. My concern is not with the RFP and evaluation process but rather with the protest and hearing process which can cause significant delay and cost in

procuring a product for which we have no flexibility in delivery date. Due to this, it puts the EUTF at the mercy of which ever vendor we can use to continue coverage while the protest process runs its course.

All of our health plan contracts have termination dates; however, we must have contracts in place for coverage to continue to be provided for our members. When the protest was filed a stay was placed on our ability to work with CVS Caremark, the awarded vendor. This meant we were required to extend our contracts with informed Rx at less favorable terms than the awarded contract – less favorable even than informed Rx’s own proposal - resulting in an estimated additional cost of \$2.5 million per month for every month the implementation of the CVS contract was delayed. With an effective date of May 1 we are currently at a cost of \$10 million.

The hearing officer affirmed the award to CVS Caremark for the active employees and early retirees and we have started the transition process with an expected May 1 effective date. However, the EUTF plan for Medicare retirees is still in the protest process so its effective date will be delayed at additional cost. Finally we are experiencing a significant reduction in service from informed Rx which greatly concerns us, especially with regard to our Medicare eligible members who are our most vulnerable population.

NEIL ABERCROMBIE
GOVERNOR



BARBARA A. KRIEG
INTERIM DIRECTOR

DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
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February 3, 2012

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
For Hearing on Tuesday, February 7, 2012
9:30 a.m., Conference Room 309

BY

BARBARA A. KRIEG
INTERIM DIRECTOR

House Bill No. 1168
Relating to the Hawaii Employer-Union Health Benefits Trust Fund

TO CHAIRPERSON KARL RHOADS AND MEMBERS OF THE COMMITTEE:

The purpose of H.B. 1168 is to amend Chapter 87A, Hawaii Revised Statutes, to:

- Exempt the Hawaii Employer-Union Health Benefits Trust Fund (EUTF) from the procurement code in procuring benefit plan carriers, consultants, actuaries, auditors and administrators;
- Impose duties, restrictions, and liabilities on fiduciaries of the trust;
- Allow the EUTF to retain an attorney who is independent of the Attorney General as legal advisor;
- Change the number of trustees on the EUTF, how they are appointed, their terms of office, and quorum and voting requirements;
- Provide for sub-boards to administer exclusive bargaining unit contributions and benefits;
- Require the EUTF to provide health and other benefit plans within certain contributions and appropriations; and
- Transfer the EUTF from the Department of Budget and Finance to the Department of Human Resources Development for administrative purposes.

The Department of Human Resources Development (DHRD) **respectfully opposes**

section 8 of this bill that would transfer the EUTF to DHRD for administrative purposes.

The breadth of EUTF's responsibilities is different and far greater than DHRD's in that DHRD mainly administers programs for State Executive Branch agencies; whereas, EUTF administers health benefits for ALL State agencies (i.e., Executive Branch, including DOE & UH; HHSC; OHA; Judicial Branch; Legislative Branch) and ALL the Counties. As such, given the enormity and fiscal complexities of the EUTF, DHRD does not have the resources and expertise necessary to provide effective administrative oversight of the EUTF.

We would also like to point out that the EUTF also administers health benefits for State and County retirees, whereas, DHRD administers programs for active State employees. As such, EUTF should remain housed together with the ERS which is under the Department of Budget & Finance (B&F).

Furthermore, transferring the EUTF to DHRD will not result in any cost savings that would warrant taking such action. In fact, the transfer could cause unforeseen problems which may even prove to be more costly. Therefore, it would not be in the State's best interest to transfer EUTF to DHRD. With regard to the other provisions of the bill, we defer to B&F and the Attorney General's Office.

Thank you for the opportunity to provide testimony on this measure.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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**TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE
HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT**

February 7, 2012

9:30 a.m.

HB 1168

RELATING TO THE HAWAII EMPLOYEE-UNION HEALTH BENEFITS TRUST FUND.

Chair Rhoads, Vice-Chair Yamashita, and committee members, thank you for the opportunity to testify on HB 1168. This bill allows an exemption from HRS chapter 103D, Hawaii Public Procurement Code, for services of a carrier, third-party administrator for any benefits plan, consultant, actuary, auditor, or administrator.

The State Procurement Office opposes this exemption. There is no compelling reason to statutorily exempt the awarding of the selection of benefit plan carriers, third-party administrators, consultants, actuaries, auditors, or administrator from the requirements of HRS chapter 103D.

Public procurement's primary objective is to provide everyone equal opportunity to compete for government contracts, to prevent favoritism, collusion or fraud in awarding of contracts. To legislate that any one agency should be exempt from compliance with HRS chapter 103D conveys a sense of disproportionate equality in the law's application.

The exemption language on page 1, line 4 to 8 of this bill should be deleted.

Thank you.

DEPARTMENT OF BUDGET & FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
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PETER B. CARLISLE
MAYOR



MICHAEL R. HANSEN
DIRECTOR

February 7, 2011

The Honorable Karl Rhoads, Chair
and Members of the Committee on Labor and
Public Employment
The House of Representative
State Capitol
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill 1168
Relating to the Hawaii Employer-Union Health Benefits Trust Fund

The City and County of Honolulu, Department of Human Resources **supports portions of House Bill 1168** 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.

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 is 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 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 Honorable Karl Rhoads, Chair
and Members of the Committee on Labor and
Public Employment
The House of Representative
February 7, 2011
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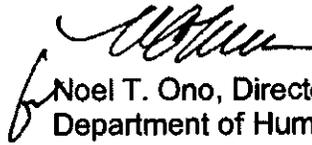
The City recognizes that past events have highlighted difficulties resulting from the current EUTF law. We want to emphasize that we want to be part of the solution and would be happy to further discuss our concerns.

Thank you for the opportunity to testify on House Bill 1168.

Yours truly,



Michael R. Hansen, Director
Department of Budget & Fiscal Services



Noel T. Ono, Director
Department of Human Resources



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Sixth Legislature, State of Hawaii
House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii Government Employees Association
February 7, 2012

H.B. 1168 - 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 H.B. 1168, 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, H.B. 1168 contains several significant reforms that will eliminate many of the problems that currently make the EUTF ineffective and expensive, including:

1. It changes the method of selecting benefit plan carriers, third party administrators, consultants and actuaries by exempting the process from Chapter 103-D, HRS. This amendment will provide the necessary flexibility to respond to problems quicker.
2. Board members must act as fiduciaries of the trust itself. As fiduciaries, board members are required to make decisions based solely on the interest of the participants and beneficiaries. Board members who willfully violate their fiduciary responsibilities may be liable for any loss suffered by the plan, which increases the accountability of the plan trustees.
3. The composition of the board and the method of selecting them are also changed. Six trustees representing employee-beneficiaries will be appointed by the various exclusive representatives instead of the Governor. The six trustees representing the employer will be better distributed among the different jurisdictions, with one trustee appointed by the Governor, representing the retirees. All trustees will serve at the pleasure of their appointing authority.

4. It allows individual unions and employers to establish a sub-trust and a sub-board of trustees to administer that bargaining unit's contributions and benefits if they negotiate a specific contribution to apply only to that unit.
5. The board can appoint or retain legal counsel who is independent of the Attorney General.
6. Health plans shall be provided based on the collectively bargained contributions from both the employers and employees, and not "at a cost affordable to both the public employers and employees."
7. For administrative purposes, the fund controlled by the board is placed under the Department of Human Resources and Development, not the Department of Budget and Finance.

We appreciate the opportunity to testify in strong support of H.B. 1168, as the amendments contained in this measure will make much needed reform to the EUTF Board and system as a whole.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Randy Perreira', written in a cursive style.

Randy Perreira
Executive Director



House Committee on Labor & Public Employment
Tuesday, February 7, 2012
9:30 a.m.

HB 1168, Relating to Hawaii Employer-Union Health Benefits Trust Fund.

Dear Chairman Rhoads and Committee Members:

On behalf of the University of Hawaii Professional Assembly (UHPA), our union is in support of the principles proposed in HB 1168. The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) has been a bad compromise between the historic public employees' health fund and the private sector model of the Taft Hartley Trust. The EUTF needs to be reconstructed from the bottom up and, if HB 1168 is not the answer, then it is incumbent upon the legislature to try and find a new answer.

Respectively submitted,

J.N. Musto, Ph.D.
Executive Director

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PROFESSIONAL ASSEMBLY

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