

SB1066
TESTIMONY



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Wednesday, February 2, 2011 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Brian Aburano, Deputy Attorney General

Chair Hee 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 HRS chapter 103D; (2) impose duties, restrictions, and liabilities on fiduciaries of the trust; (3) permit the EUTF to employ or retain a private attorney; (4) change the number of trustees on the EUTF board, how they are appointed, their terms of office, and quorum and voting requirements; (5) provide for sub-boards to administer exclusive bargaining unit contributions and benefits; (6) require the EUTF to provide health and other benefit plans within certain contributions and appropriations; and (7) place the EUTF under the department of human resources development for administrative purposes.

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 8-12. Title 29 U.S.C. sections 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 spur future litigation. 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 12:

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 proceeds to list some, but not all, fiduciary provisions of ERISA. See page 1, line 13, to page 4, line 16. This might create an ambiguity as to whether ERISA provisions not stated in the bill apply. For example, page 3, line 15, to page 4, line 16, track the prohibited transactions wording of 29 U.S.C. section 1106(a) and (b), but the bill does not include the wording in 29 U.S.C. section 1108 that provides exemptions for what would otherwise be prohibited transactions. To clarify this matter, the current wording from page 1, line 8, 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" for any losses to it 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 people to serve as trustees of the EUTF. Also, 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 allows 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 wording from page 4, line 17, to page 6, line 2, 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;
- (3) A fiduciary from purchasing insurance to cover the fiduciary's own liability for breach of a fiduciary duty; or
- (4) An employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to the fund, the board, or any sub-board of the fund.

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 5-8. Again, it is unclear 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, the bill must be amended to make it clear that the State and counties shall have no liability whatsoever for any breach of fiduciary duty by the EUTF board, any EUTF trustee, or any sub-board, and shall have no obligation to defend or indemnify the EUTF board, any EUTF

trustee, or any sub-board. 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 insurance coverage available for such liability. This could be accomplished by adding the following subsections 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. 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 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 6, line 3, to page 8, line 12, and page 15, lines 1-8.

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 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 ERISA "employee benefits experience." See page 15, lines 5-8. 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 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 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; SUB-BOARDS

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 9, line 1, to page 11, line 21. All appointees serve at the pleasure of the appointing authorities. See page 10, lines 20-21 and page 12, lines 1-2.

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 9, to page 16, line 14.

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, 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 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.

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. 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, line 15, to page 17, line 7.

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 government 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 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.

It should be noted that there is currently a lawsuit pending against the State and counties claiming that it is unconstitutional and a breach of contract for the State and counties to provide health benefits to retirees that are not the same or substantially equivalent to the health benefits provided to active employees. If plaintiffs succeed in their claim, this could make it difficult, if not impossible, to fully implement this part of the bill.

Finally, even with the wording changes that we have suggested above, we believe that this bill still contains several flaws that will create serious problems and issues if it is enacted. If the bill is enacted, a section should 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."

NEIL ABERCROMBIE
GOVERNOR



SUNSHINE P.W. TOPPING
INTERIM DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

January 31, 2011

TESTIMONY TO THE
SENATE COMMITTEE ON JUDICIARY AND LABOR
For Hearing on Wednesday, February 2, 2011
10:00 a.m., Conference Room 016

BY

SUNSHINE P. W. TOPPING
INTERIM DIRECTOR

Senate Bill No. 1066
Relating to the Hawaii Employer-Union Health Benefits Trust Fund

TO CHAIRPERSON CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

The purpose of S.B. 1066 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) **strongly 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 necessary to provide effective administrative oversight of the EUTF, especially since our staffing level is now even more severely diminished due to the layoffs and furloughs.

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.



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TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
SENATE COMMITTEE
ON
JUDICIARY AND LABOR

February 2, 2011

10:00 A.M.

SB No. 1066

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

Chair Hee, Vice-Chair Shimabukuro and committee members, thank you for the opportunity to testify on SB 1066. Our testimony is limited to SECTION 1, page 1, lines 4 to 7 of the bill.

The State Procurement Office (SPO) opposes the amendment in SECTION 1 which proposes to exempt the Hawaii Employer-Union Benefits Trust Fund from HRS chapter 103D, the Hawaii Public Procurement Code (Code).

Public procurement's primary objective is to give everyone equal opportunity to compete for Government contracts; to prevent favoritism, collusion or fraud in awarding of contracts. The true nature of competition gives government agencies the benefits of knowing that the acquiring of goods and services were conducted in a fair and objective manner. Meeting this objective requires a single set of statutes and rules that define and mandate the use of selection processes that are competitive, efficient, fair, transparent, open and impartial.

Statutory exemptions for specific agencies are contrary to the Hawaii Public Procurement Code, section 103D-102, HRS, on the applicability of the chapter that states in part "... shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, ..." Any governmental agency with the authority to expend funds should be in compliance with chapter 103D, which promotes the policy of fair and equitable treatment of all persons who deal with the procurement system; fosters effective broad-based competition and increases public confidence in public procurement.

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The SPO opposes statutorily exempting specific agencies from the Code, as it is not in the best interest of government, the business community, and the general public. The Code establishes a time-tested, fair, and reliable process for award of contracts. The competitive procurement processes of the Code are to insure that all potential providers are afforded the opportunity to compete for the required services. To the extent agencies may need specific purchases to be exempted from Code requirements, the Code provides an exemption process on a case by case basis as opposed to a total blanket statutory exemption.

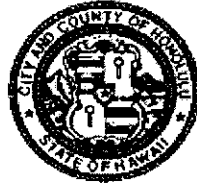
The Code should not be viewed as an obstacle to a purchasing agency's mission, but rather as the single source of public procurement policy to be applied equally and uniformly. It was the legislature's intent for the Code to be a single source of public procurement policy. If individual agencies are exempted and allowed to develop their own individual processes, it becomes problematic and confusing to vendors, contractors and service providers that must comply with a variety of different processes and standards. Fairness, open competition, a level playing field, and government disclosure and transparency in the procurement and contracting process are vital to good government. For this to be accomplished, we must participate in the process with one set of statutes and rules. To legislate that any one entity should be exempt from compliance with the procurement code conveys a sense of disproportionate equality in the law's application.

If the Legislature intends to exempt specific programs or funds from the Code, the exemption should include assurances that the agency's exempt process includes fair and open competition, disclosure, transparency, due process for aggrieved parties, a defined selection and awards process, and the various elements contained in the Code to ensure public confidence that the exempt procurement process is as fair as the Code.

We request that SECTION 1 page 1, lines 4 to 7 of the bill be deleted. Thank you.

DEPARTMENT OF HUMAN RESOURCES
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PETER B. CARLISLE
MAYOR



NOEL T. ONO
DIRECTOR

February 2, 2011

The Honorable Clayton Hee, Chair
and Members of the Committee on Judiciary and Labor
The Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chair Hee and Members of the Committees:

Subject: Senate Bill No: 1066
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 1066** 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.

The Honorable Clayton Hee, Chair
and Members of the Committee on Judiciary and Labor
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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 on S.B.1066.

Yours truly,



Noel T. Ono
Director



Senate Committee on Judiciary and Labor
Wednesday, February 2, 2011
10:00 a.m.

SB 1066, Relating to the Hawaii Employer-Union Health Benefits Trust Fund (EUTF)

Dear Chairmen Hee 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. 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 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 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.

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

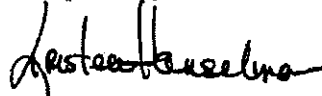
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- The respective public employer and unions would be allowed to negotiate different contributions to the trust for each bargaining unit based on the benefits and conditions of a mutually agreed upon set of health insurance offerings. Currently, the 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,



Kristeen Hanselman
Associate Executive Director

Senate

Committee on Judiciary and Labor
Senator Clayton Hee, Chair

Wednesday, February 2, 2011; 10:00 a.m.
Capitol Conf. Room 016
Testimony - SB 1066

Chairman Hee and members of the Committee on Judiciary and on Labor.

My name is Jim Williams and I am testifying in qualified support of Senate Bill 1066. The use of the term “qualified” is due to this bill containing several changes to the EUTF, some of which I fully support and other parts which I believe could be improved with amendments. Overall, I believe this bill is worthy of further consideration by this Legislature and should be moved forward by this committee.

I am testifying as an individual, representing no organization, business or other special interest. My background gives me a unique perspective on the EUTF and on this bill. This includes, over the years, service as a board member and chairman of the EUTF’s predecessor (Public Employees Health Fund), one of the original EUTF Trustees, administrator of the EUTF for five years, union (HSTA) president and executive director dealing with the PEHF, EUTF and VEBA, PEHF and EUTF active employee participant and (currently) EUTF retiree participant.

This bill makes a number of additions and changes to HRS 87A. These revisions are listed below with my comments:

- 1) Adds fiduciary duties to the public employees health fund board of trustees. These provisions require all Trustees at all times to act solely in the best interests of the beneficiaries. This is a much needed addition to the law, and I urge this committee to adopt these provisions. It should be noted that these provisions apply to ALL trustees, including the union Trustees. This bill also removes the phrase “at a cost affordable to both the public employers and the public employees” from 87A-15. Consideration of costs to employees are part of the aforementioned fiduciary responsibilities; while employer costs are more appropriately addressed through collective bargaining under chapter 89, and not through chapter 87A.
- 2) Amends the appointment and quorum requirements of the public employees health fund board of trustees. In my opinion, this part of the bill needs to be revised in order to really improve the decision-making process of the EUTF board. My reading of the bill is that the retiree representative is “counted” as an employer representative. I am confident that a retiree representative will most often align with the union trustees. If this means a fourteen member board (7 and 7), then so be it. In addition, the committee may want to consider having the

retiree representative elected from among and by the retiree participants. Also, this bill specifies representation for different employers. Without commenting on the entire lineup, I definitely believe the counties should have at least one representative on the board. Under the current setup, it is a virtual certainty that no Governor will appoint a county representative.

My biggest concern about these provisions is that the bill does not change the two vote (one employer vote and one union vote) methodology. During my last year as administrator and during most of 2010, the board was hopelessly deadlocked and therefore largely dysfunctional on major issues most of the time. Given the provisions for fiduciary responsibility, a one trustee one vote system, with majority rule, would be greatly preferable to the current two vote method. **I urge the committee to make amend this bill to change the voting method.**

- 3) Permits the EUTF board of trustees to retain an attorney independent of the attorney general's office to represent the Hawaii employer-union health benefits trust fund. I support this provision. The deputy attorney general assigned to the EUTF during my first four years as administrator was very dedicated, responsive and competent. However, that deputy was reassigned and there was a lengthy delay in getting a replacement. Also, over my entire 30+ years of experience with the PEHF and EUTF there were times when the boards would have preferred and benefited from outside counsel.
- 4) Requires health and other benefit plans to be provided for collective bargaining units, retirees and other eligible beneficiaries. It appears that this provision is intended to allow for flexibility and diversity in approaches for different bargaining units. My only caution would be that, in my opinion, benefit plans should not be negotiated.
- 5) Transfers the EUTF as an attached agency to DHRD. If the truth were told, I do not believe there would be a single agency that would want to be assigned to Budget and Finance. Every department is under B & F's thumb due to its dominance in the Governor's budgeting process and expenditure controls. For an attached agency, this dominance is doubled over to administrative and personnel matters. As EUTF administrator, I had the experience of middle level B & F analysts, questioning and sometimes over-riding decisions approved unanimously by our Board of Trustees. Anecdotal reports from other agencies informed me that other departments interfered in the operations of their attached agencies much less that B & F does. And this has been the case regardless of who was Governor (it started long before the last administration).

Thank you for this opportunity to testify with qualified support of SB 1066. I hope this committee will consider the amendments suggested herein.

Jim Williams
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