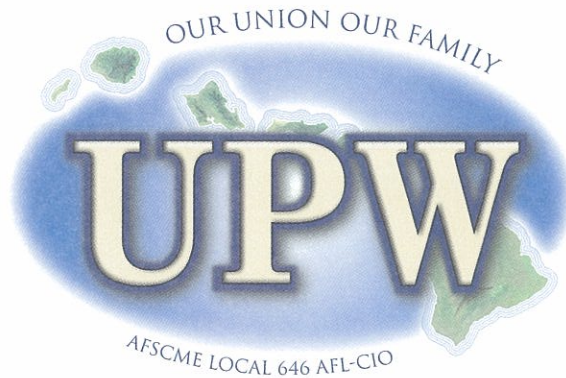

LATE TESTIMONY

The Hawaii State Senate
The Twenty-Sixth Legislature
Regular Session of 2012

COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

DATE OF HEARING: Thursday, January 26, 2012
TIME OF HEARING: 2:30 p.m.
PLACE OF HEARING: Conference Room 229

TESTIMONY ON S.B. 2068 RELATING TO COLLECTIVE BARGAINING

By DAYTON M. NAKANELUA,
State Director of the United Public Workers,
AFSCME, Local 646, AFL-CIO ("UPW")

My name is Dayton M. Nakanelua, and I am the state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW is the exclusive representative for approximately 11,000 public employees, which include blue collar, non-supervisory employees in Bargaining Unit 01 and institutional, health and correctional employees in Bargaining Unit 10, in the State of Hawaii and various counties. The UPW also represents about 1,500 members of the private sector.

This proposed legislation restricts the right of a public employee to strike if the employees are designated as an "essential employee" by the Hawaii Labor Relations Board based on a petition filed by public employers purportedly to avoid "imminent or present danger to the health or safety of the public." The bill is a) contrary to the constitutional right to engage in collective bargaining, b) it ignores the measures already taken to protect health and safety since 1970 when chapter 89 was initially adopted, and c) interferes and undermines fundamental requirements to resolve labor disputes in bargaining units 1, 5, and 7.

As you know the framers of Hawaii's constitution in 1950 afforded to private and public sector employees "the right to organize for the purpose of collective bargaining." Hawaii became the fifth state in the nation after New York in 1939, Florida in 1944, Missouri in 1945, and New Jersey in 1947 to afford constitutional protection for collective bargaining. Hawaii's voters ratified that constitutional provision in 1959. By that time "collective bargaining" had a well

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1-866-454-4166 (Toll Free Molokai/Lanai only)

recognized meaning which included the right to strike. In 1968 the framers extended the basic rights enjoyed by private employees since 1935 (under the Wagner Act) to public employees. The voters ratified the 1968 amendment recognizing that collective bargaining meant that employees would be afforded the basic right to strike. Employees in bargaining units 1, 5, and 7 have exercised their right to strike (since 1972), and Senate Bill 2068 violates the constitutional right to engage in collective bargaining under Article XIII, Section 2 of the State Constitution.

Second, this bill ignores legislative actions taken to protect the public health and safety since 1970. When chapter 89 was enacted initially it extended the statutory right to strike to all public employees including registered professional nurses (unit 9), institutional, health, and correctional workers (unit 10), firefighters (unit 11), and police officers (unit 12) whose jobs were directly related to health and safety of the public. Interest arbitration was voluntary and concerns about public safety and health prompted lawmakers to adopt the essential worker limitation at first. However, since 1970 interest arbitration has become mandatory for all public employees whose jobs affect public health and safety directly. Over time employees represented by HGEA agreed to mandatory interest arbitration in units 2, 3, 4, 6 and 8 as the preferred strike right alternative to settle their labor disputes. UPW similarly agreed to interest arbitration for institutional, health, and correctional workers in bargaining unit 10. Accordingly, the essential worker provisions were eliminated effective May 3, 2001. See Hawaii Session. Laws Act 90, § 7, at 164 to 165.

Third, integral to the collective bargaining process is equal bargaining power between public employers and public employees. In bargaining unit 1 blue collar non-supervisory employees have successfully negotiated approximately sixteen successive agreements based on this principle. Only in 1979 was the right to strike actually exercised to resolve a major labor dispute. Restricting the right to strike for bargaining unit 1 employees through an essential worker statute would unduly tilt the balance of power in favor of public employers. We have gone through numerous hearings before the Hawaii Labor Relations Board based on the old statute and those hearings were time consuming, counter-productive and costly. Employers arbitrarily designated large segments of employees as "essential" even where those employees are not directly involved in providing health and safety services, and we were tied up in litigation before the labor board and courts over ambiguous criteria and standards and civil contempt of court cases. These proceedings interfered with the bargaining process at the critical stages of negotiations, consumed the limited resources of the labor board unduly because hearings are held even if strikes did not actually occur, and public employers filed petitions to weaken the union's position at the bargaining table.

For all of the foregoing reasons, we urge you not to violate the constitutional rights of public employees, or to restrict the right to strike in any way for bargaining units where public health and safety services are not directly impacted.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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

LATE TESTIMONY

The Twenty-Sixth Legislature, State of Hawaii
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association
January 26, 2012

S.B. 2068 – RELATING TO COLLECTIVE BARGAINING

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly opposes the purpose and intent of S.B. 2068, which defines an "essential employee" and "essential position," and prohibits these employees from striking.

The language contained in S.B. 2068 purposefully and willfully dilutes the effectiveness of units that are able to strike by exempting certain positions as determined by the Hawaii Labor Relations Board (HLRB). If a bargaining unit has the ability to strike over negotiable issues, then all members of the entire bargaining unit should be treated equally and fairly.

Further, the amended language in this legislation defines an essential employee as "any position designated by the board as necessary to be worked in order to avoid or remove any imminent or present danger to public health or safety." This broad definition provides the HLRB great latitude to interpret and justify which employees would be considered "essential." The HLRB could extract a significant amount of positions, which, as stated earlier, will dilute the effectiveness of a strike.

Thank you for the opportunity to testify in strong opposition of this legislation.

Respectfully submitted,

Randy Perreira
Executive Director

888 MILILANI STREET, SUITE 601 HONOLULU, HAWAII 96813-2991

LATE TESTIMONY

Senate Committee on Judiciary and Labor
Thursday, January 26, 2012
2:30 p.m.

SB 2068, Relating to Collective Bargaining.

Dear Chairmen Hee and Committee Members:

On behalf of the University of Hawaii Professional Assembly (UHPA), our union strongly opposes the passage of this change to HRS Chapter 89. Under the terms of civil service reform the concept of "essential employees" was eliminated. The change, proposed in SB 2068, could be used to fundamentally undermine the impasse rights of Bargaining Unit 7, and all other units with the right to strike.

Clearly, if public employees were not essential to the purpose of State government, then the position should be vacant. It has been our experience that the public employers had taken an overly broad definition of essential workers in the past in order to prevent large portions of the bargaining units from participating in a legal strike. Collective bargaining across the United States has functioned effectively even when carried by emergency room physicians and nurses over disputes in hospitals that have led to strikes.

The right to strike has a consequence more severe for the public employees than the public employer. The step is never taken lightly and is only effective if all employees are withholding services along with fellow members in the bargaining unit. The "essential employee provision" could prolong a strike by giving the public employer the misguided belief that it is possible to continue to provide public services. Ultimately, I believe the right to strike, as a method of impasse resolution, is in the best interest of citizens of the State in resolving disputes, rather than the alternative process of interest arbitration. However, the use of essential employee designations would only render this impasses resolution mechanism meaningless and lead people to believe that all disputes should be settled by an impartial third party in interest arbitration. Let the elected executive leaders of the State, and County governments, negotiate with their respective employees; each party knowing the serious consequences that would result from a strike. Ultimately, this will actually encourage mutually acceptable settlements and a more timely resolution of disputes. Weaken the right to strike and the result will be longer interruptions of public service.

Respectively submitted,

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

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

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From: mailinglist@capitol.hawaii.gov
Sent: Thursday, January 26, 2012 8:44 AM
To: JDLTestimony
Cc: martti@upwhawaii.org
Subject: Testimony for SB2068 on 1/26/2012 2:30:00 PM
Attachments: sb 2068 testimony 1-26-12-1.doc

Follow Up Flag: Follow up
Flag Status: Flagged

LATE TESTIMONY

Testimony for JDL 1/26/2012 2:30:00 PM SB2068

Conference room: 229
Testifier position: Oppose
Testifier will be present: Yes
Submitted by: Dayton Nakanelua
Organization: United Public Workers, AFSCME Local 646, AFL-CIO
E-mail: martti@upwhawaii.org
Submitted on: 1/26/2012

Comments:

LATE TESTIMONY

The Hawaii State Senate
The Twenty-Sixth Legislature
Regular Session of 2012

COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

DATE OF HEARING: Thursday, January 26, 2012
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State Director of the United Public Workers,
AFSCME, Local 646, AFL-CIO ("UPW")

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JAN-25-2012 17:48 FROM:HOUSE SGT AT ARMS 5866501 TO:66659 P.1/6
01-25-'12 17:18 FROM-Charles Khim, Esq. 808-599-6218 T-530 P001/006 F-440

CHARLES K.Y. KHIM
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LATE TESTIMONY

January 25, 2012

THE HAWAII STATE SENATE
The Twenty-Sixth Legislature
Regular Session of 2012

COMMITTEE ON JUDICIARY & LABOR
The Honorable Clayton Hee, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair

DATE OF HEARING: Thursday, January 26, 2012
TIME OF HEARING: 2:30 p.m.
PLACE OF HEARING: Conference Room 229

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SERGEANT-AT-ARMS
HOUSE OF
REPRESENTATIVES

SB No. 2068

TESTIMONY IN OPPOSITION

By CHARLES K.Y. KHIM, ESQ.
Labor Law Attorney

My name is Charles K. Y. Khim, Esq. and I am an attorney who is licensed to practice law in the State of Hawaii, and the Courts of the State of Hawaii, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court.

I have been actively practicing law for over the past thirty-one years and have concentrated my law practice almost exclusively in the area of labor law, with an emphasis on union and management labor law. I almost exclusively represent labor organizations both in public sector (employees of the State of Hawaii and the political subdivisions thereof), Federal Employee public

sector (Pearl Harbor Naval Shipyard employees) as well as private sector employees.

I will probably be one of the few, if not the only, attorney in this State Senate hearing room who has actually litigated an essential worker hearing. In the forty-two year history of Hawaii State and County public sector union and management labor relations, there have been only four sets of essential worker hearings.

In my capacity as a union and management labor law expert, I wish to state my strong OPPOSITION to **this proposed legislation, which seeks to reenact a statutory provision which was repealed by Act 90 of the 2001 Session Laws of Hawaii.**

The collective and unified withholding of work by public workers to show their public employer that its employees and the work they perform are valuable to the public employer, without which said public employer cannot perform its governmental function, is a "core" right of collective bargaining under Article XIII, Section 2 of the Hawaii State Constitution.

This collective and unified withholding of work is the primary way that these public workers are able to get their employers' attention, and to get their employers to appreciate the work they perform.

This is very important because oftentimes public workers and the work they perform are taken for granted. Sadly, it is only when this public work ceases, *en masse*, does the public appreciate public workers. This collective and unified withholding of work is known as "striking."

This Constitutional right to strike is currently afforded to all State and County public workers in bargaining units one, five and seven because the public workers therein are outside of the bargaining units that are prohibited by law from striking.

The public workers in the bargaining units that are prohibited from striking have their collective bargaining issues determined via arbitration.

All of the job positions in the State and County governments which would cause an **imminent or present danger to the health or safety of the public** if those jobs were not performed, *en masse*, are contained in the bargaining units that are prohibited from striking.[1]

Prior to the year 2001, it was thought that in addition to the job positions contained in the bargaining units which were prohibited from striking, an imminent or present danger to the health or safety to the public might occur if job positions in the bargaining units which were afforded their constitutional right to strike were not performed, *en masse*.

Because of this belief, a statutory procedure was enacted whereby the Hawaii Labor Relations Board ("HLRB") would conduct hearings to determine whether or not there were actually such health or safety essential job positions in the bargaining units which could strike.

This procedure, when it was actually engaged in, was so expensive and cumbersome that in

[1] However, not all of the job positions that are contained in the bargaining units that are prohibited from striking are such that an imminent and present danger to the health or safety of the public would occur if said job positions were not performed *en masse*.

1994, the last time this essential worker hearing procedure was effectuated, the HLRB ran out of money in conducting such hearings, and could not pay for such minor as: (1) the overtime wages which were incurred by the HLRB personnel who were facilitating the hearings; and (2) the transcription of the testimony taken in these essential worker hearings.

The failure to transcribe the testimony given in these hearings due to the lack of money to pay for the transcripts, would have delayed the enforcement of the HLRB's orders had the strike not ended before the end of the hearings.

The HLRB was lucky it was not sued by the court reporting company who wrote, via shorthand machine, the transcripts, for breach of its contract for the transcription of the testimony. The HLRB was also lucky its employees did not sue it for a violation of the Wage and Hour Law for its failure to pay them their overtime wages in a timely manner.

In 2001, the Legislature determined that these essential worker hearings were unnecessary because history had shown that all of the job positions which were truly essential to the imminent health or safety of the public were all in the bargaining units which were already prohibited from striking.

The legislature further found that the delicate balance of collective bargaining would be disturbed if it enacted legislation which expanded the State and County governments' ability to sub-contract out government jobs while at the same time continuing to infringe on these non-essential workers' Constitutional right to strike.

In so finding, the Hawaii Legislature, in Conference Committee Report No. 159, concerning S.B. 1096, S.D. 1, H.D. 1, C.D. 1, 2001 Session Laws of Hawaii, stated as follows:

"However, your Committee on Conference is fully aware of the negative impact privatization and managed competition will have on public sector employees' ability to negotiate fair and adequate compensation packages, as the balance of negotiating power will be tipped in favor of public sector management. In order to ensure that the fragile balance between employer and employee negotiating leverage is maintained, your Committee on Conference believes that certain **public employees should have their right to strike reinstated and that the essential employee statutes should be repealed.**"

The current bill seeks to upset this fragile balance between employer and employee negotiating power, and **have this balance of negotiating power tipped in favor of public sector management**.

In short, now that public sector management has gained the negotiating power of privatization and managed competition by agreeing to the repeal of the essential worker restraint on the Constitutional right to strike, **public sector management seeks to renege on the legislative compromise that it agreed to in 2001**.

The foregoing tactics of the public sector management individuals who seek to "Welsh" on their 2001 agreement, is chicanery at its worst. Such an action is a violation of the legislative compromise reached in good faith by the stakeholders in the

Hawaii State and County public sector collective bargaining process.

Moreover, this bill, in its current form, constitutes an unfunded mandate, because its implementation requires a dramatic increase in the budget appropriation of the HLRB. This is obviously so, since currently the HLRB's budget is so razor thin that it cannot afford the cost of transcribing its hearing testimony in its regular cases, much less afford the tremendous cost of transcribing testimony from essential worker hearings.

From my past experience in litigating two of the four past essential worker hearings, I estimate that the Legislature will have to appropriate at least two and one half million dollars ($2,500,000.00) every year that ends in an odd number, because HRS, §89-10(c) mandates that Hawaii State and County public sector collective bargaining agreements expire at the end of the fiscal year in such odd numbered years, to cover the costs of conducting such essential worker hearings.

For all of these reasons, I contend that this bill should be held in committee.

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