



EXECUTIVE CHAMBERS

HONOLULU

NEIL ABERCROMBIE
GOVERNOR

Testimony on Senate Bill No. 2750
Relating to the Employees' Retirement System

Governor Neil Abercrombie

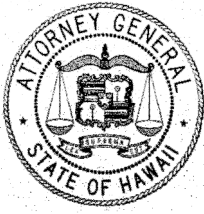
TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

February 8, 2012
9:30 am, Room 016

Dear Chair Hee, Vice-Chair Shimbukuro and members of the Committee:

The Office of the Governor strongly supports Senate Bill No. 2750 as a critical measure for the State to address the Employees' Retirement System (ERS)'s unfunded actuarial accrued liability, which is at \$8.164 billion (as of June 30, 2011). The bill proposes to revise certain employees' compensation calculation of retirement pension under specified conditions. The bill will only affect the calculation of overall compensation in an employee's final years of service if it is enhanced through means of "spiking." The bill specifies the circumstances for determining that "spiking" has occurred and establishes threshold limitations for calculating the effect on an employee's final compensation.

The Office of the Governor requests that the Senate Committee on Judiciary and Labor pass Senate Bill No. 2750.



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2750, RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Wednesday, February 8, 2012 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Diane S. Kishimoto, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General supports this bill.

This bill requires a public employee's last State or county employer to pay to the Employees' Retirement System the present value of additional benefits "resulting from spiking," i.e., late career spikes in the employee's compensation attributable to non-base pay compensation such as overtime. The bill also limits the amount of compensation included in the "average final compensation" of Employees' Retirement System members by excluding from the calculation of "average final compensation" late career spikes in an employee's compensation attributable to non-base pay compensation such as overtime. The exclusion applies to employees who become members of the Employees' Retirement System after June 30, 2012. The exclusion of spiked compensation also applies, effective July 1, 2015, to employees who became members of the Employees' Retirement System prior to July 1, 2012. Section 4 of the bill, on page 10, provides that the application of the exclusion to current members is subject to the provisos that:

(1) A member's average final compensation shall not be less than what the employee's average final compensation would have been if the member had retired on June 30, 2015; and

(2) Compensation, pay, or salary earned before July 1, 2015, is not subject to the limits imposed by the bill.

We believe that the foregoing provisos provide a defense to a potential legal challenge to the bill under article XVI, section 2, of the State Constitution, which provides that:

"Membership in any employees' retirement system of the State or any political subdivision

thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."

In Kaho‘ohanohano v. State, 114 Hawai‘i 302, 342, 162 P.3d 696, 736 (2007), the Hawai‘i Supreme Court recognized that, although article XVI, section 2 prohibits the reduction of benefits attributable to past services: "the intent of article XVI, section 2 was in part to provide the legislature with the flexibility to 'reduce benefits as to . . . persons already in the system in[]so[]far as their *future services* were concerned.'" (Emphasis and brackets in original.) For current members, this bill applies only to benefits as to future services. The benefits attributable to past services, i.e., the average final compensation based on past services and inclusion of the full amount of compensation for past services in the calculation of average final compensation, are protected by the provisos included in this bill.

Last session, we expressed concern about the impact of Everson v. State, 122 Hawai‘i 402, 228 P.3d 282 (2010), on S.B. No. 1268. Everson has no bearing on the constitutionality of this bill. In Everson, the issue was whether "health benefits" for state and county retirees are "accrued benefits" that are protected by article XVI, section 2. The Hawai‘i Supreme Court ruled in Everson that "health benefits" are "accrued benefits" and therefore cannot be diminished or impaired. The majority in Everson acknowledged that their decision expressed no opinion as to "what point in time" health benefits "accrue" and as a consequence are protected from diminution or impairment under the State Constitution. 122 Hawai‘i at 419, 228 P.3d at 299, fns. 14 and 15. The Court also did not identify what health benefits accrued.

This bill does not apply to health benefits. Furthermore, the bill protects the retirement benefits that will be accrued as of its July 1, 2015, effective date for current members.

We respectfully request that the Committee pass this bill.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
MAYOR

LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. MCCAULEY
DEPUTY CHIEFS

OUR REFERENCE JC-SEB

February 8, 2012

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

Dear Chair Hee and Members:

Subject: Senate Bill No. 2750, Relating to the Employees' Retirement System

I am Janet Crotteau, Major of the Legislative Liaison Office of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the intent of Senate Bill No. 2750 but has several concerns regarding the impact it may have on the department.

We acknowledge the problems that "Spiking" will have on the retirement system and the retirees it supports. However, the department was not involved in the previous discussions concerning this bill and, therefore, does not understand how the calculations were derived. This lack of understanding has led to some confusion, which we believe needs to be clarified.

The HPD recognizes overtime as an inherent part of police work that must be used wisely and managed by supervisors. Overtime use is currently managed by departmental policies and collective bargaining agreements. These management controls have been in existence for many years and have led to the HPD routinely giving money back to the City Council.

As a result, we are requesting the opportunity to meet with the representatives of the Employees' Retirement System and other city agencies to work out an equitable system that is sustainable and fair before this legislative body decides on this bill.

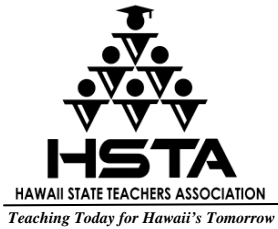
Thank you for the opportunity to testify.

APPROVED:

Sincerely,


LOUIS M. KEALOHA
Chief of Police


JANET CROTTEAU, Major
Legislative Liaison Office



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Wil Okabe
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Vice President

Joan Kamila Lewis
Secretary-Treasurer

Alvin Nagasako
Executive Director

TESTIMONY BEFORE THE SENATE COMMITTEE ON
JUDICIARY AND LABOR

RE: SB 2753 RELATING TO THE HAWAII EMPLOYER-UNION HEALTH
BENEFITS TRUST FUND

WIL OKABE, PRESIDENT
HAWAII STATE TEACHERS ASSOCIATION

Chair Hee and Members of the Committee:

The Hawaii State Teachers Association supports SB 2753 which allows the board of the EUTF to create a trust fund for the purpose of receiving employer contributions that will pre-fund post-employment health and other benefit costs for retirees and their beneficiaries.

Any additional financial support which can be provided to post employment benefits costs will help maintain and attract more teachers to the profession. Retirement benefits have been hard hit in this economy and any additional benefit will be welcomed by our members and others considering this profession. Health costs continue to rise and future financial indicators show they will not stop. We hope this fund will create a safety net for the future.

Thank you for the opportunity to testify.



Senate Committee on Judiciary and Labor
Wednesday, February 8, 2012
9:30 a.m.

SB 2750, Relating to the Employees' Retirement System.

Dear Chairman Hee and Committee Members:

On behalf of the University of Hawaii Professional Assembly (UHPA), our union is opposed to the passage of SB 2750 on the grounds that it is patently unfair and the bill violates the fundamental principles under which the define pension benefit is to be determined. It is indisputable that the anecdotal examples given of "spiking" by public employees to gain an advantage at retirement are a reflection of the available workforce rather than the manipulative efforts of any individual public employee. The decisions that lead to increases in the wages being paid any public employee are entirely in the hands of the public employer. If they do not wish to increase the pension of any individual, then they should not choose to allow them whatever additional work that leads to a higher average salary as a part of the formula. This bill would simply reduce the overall compensation being paid to an individual for work performed. This bill should be filed.

Respectively submitted,

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

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

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HAWAII FIRE FIGHTERS ASSOCIATION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 1463, AFL-CIO
2305 S. BERETANIA ST., RM. 202, HONOLULU, HAWAII 96826-1493
TELEPHONE (808) 949-1566 FAX: (808) 952-6003
WEBSITE: www.hawaiifirefighters.org

The Senate
The Twenty-Sixth Legislature
Regular Session of 2012
Committee on Judiciary and Labor
February 8, 2012

Testimony by
Hawaii Fire Fighters Association

S.B. No. 2750 RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM

My name is Robert H. Lee and I am the President of the Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO. HFFA represents the 2,800 active and retired professional fire fighters throughout the State. HFFA opposes S.B. No. 2750.

Employee contributions to the ERS and pension calculations are based on work performed inclusive of hours worked in addition to their normal scheduled work shifts as directed by management to meet appropriate staffing levels for the safety of the community and our members. This bill penalizes employees who fulfill work schedules assigned and unfairly impacts all public employees.

HFFA appreciates the efforts to ensure the fiscal stability of the Employees' Retirement System for all current and prospective members and strongly believe that engaging in meaningful discussions among the stakeholders, public employers and exclusive representatives, would best serve all beneficiaries. Thank you for the opportunity to testify.



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
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association
February 8, 2012

S.B. 2750 – RELATING TO THE
EMPLOYEES' RETIREMENT SYSTEM

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO opposes the purpose and intent of S.B. 2750, which attempts to prevent unexpected increases in pension benefits and the unfunded actuarial accrued liability of the Employees' Retirement System (ERS) by defining and limiting the amount of compensation included in the average final compensation calculation.

First and foremost, overtime, and therefore by default any definition of "spiking," is strictly an Employer issue, whereby the Employer has direct oversight and control of whom, how much and when overtime is granted. If the Employer perceives a situation in which an Employee is intentionally attempting to boost their average final compensation, then the Employer has the purview to cease authorizing the overtime. Within the Personal Rights and Representation article in our mutually agreed upon Collective Bargaining Agreements is language that states "the Employee shall have the right to refuse for good cause as determined by the Employer to work overtime" [emphasis added]. Per contract, it is the Employer's prerogative, not the Employee's, to determine if the refusal is for good cause. In some cases, our members are not afforded the option to refuse overtime, and are required to work half-shifts prior to or after their regular shift. In other cases, Employees are required to work back-to-back double shifts due to staff shortages, health and safety compliance, or to staff a 24/7 facility. Our members provide critical services to the community and should be adequately compensated; both immediately in compensatory time off or overtime pay, and also in retirement benefit calculations that accurately reflect the Employee's work. We find it incongruous to force an individual to work overtime and not count the overtime hours toward their final retirement calculation.

However, understanding that the ERS is a singular entity that collects contributions from each Employer and furnishes retirement benefits to all beneficiaries, we support the provision that the specific Employer who authorizes increased overtime also increase their contribution accordingly, in an effort to curb the unfunded liability. If the Employer authorizes the overtime, it is incumbent upon them to pay all additional costs. It is our utmost desire that the fund remain solvent and structurally in tact for all current and future beneficiaries.

Finally, while we realize and understand the need to address the Employees' Retirement System's unfunded liability, we respectfully request the Committee to consider the percentage of the unfunded actuarial accrued liability that is directly attributed to "spiking" and whether or not the Employer could implement cost-containment measures independent of the Legislature statutorily intervening. If it becomes law, S.B. 2750, in concert with the omnibus changes provided in Act 163, Session Laws of Hawaii 2011 will leave your government workforce with two separate and distinct tiers of employee benefits.

We respectfully urge the committee to defer this measure. Thank you for the opportunity to testify in strong opposition of S.B. 2750.

Respectfully submitted,

Randy Perreira
Executive Director

DEPARTMENT OF BUDGET & FISCAL SERVICES
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
MAYOR



MICHAEL R. HANSEN
DIRECTOR

February 8, 2012

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:

Subject: Senate Bill 2750
Relating to the Employee's Retirement System

The City and County of Honolulu supports the intent of Senate Bill 2750 to address the effects of spiking on the unfunded liability of the Employees' Retirement System; however, we have a number of questions on the method being used to determine "spiking" and the resultant impact to the employee and the employer. Accordingly, we suggest a cautious approach to the bill.

We recognize that some extreme situations involving City employees have come to light recently that may have played a part in creating an urgency to address spiking. We want to assure you that to the extent we are able, within the bounds of the collective bargaining agreements we are subject to and without affecting public safety, we are taking steps to address the situation. That being said, this is a complex issue and we have only recently become aware of the approach being endorsed by the ERS Board.

While we value the efforts of the Board, we have not had an opportunity to review in-depth the formula and its effects, nor have we had a chance to question the actuaries regarding the method that will be used to assess the employer. We believe that a thorough review and understanding is essential to ensuring the fair and equitable resolution (from both the employer's and employees' perspectives) that we understand the Board is seeking. Below are just three examples of situations we wish to explore further:

- To what extent are recurring differentials, paid for virtually all hours the employee is at work, resulting in a "spiking" determination—for example, the 25% hazard pay differential paid to solo bike officers?

The Honorable Clayton Hee, Chair
and Members of the Committee on
Judiciary and Labor

The Senate

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February 8, 2012

- To what extent has "spiking" been considered in the setting of the new employer contribution rates—which for police and fire go from 19.7% this year to 25% on July 1, 2015?
- The bill currently requires the last employer of the employee who retired in the previous year to pay the costs associated with that employee's spiking. However, the spiking may have occurred prior to the period during which the employee worked for that last employer. If the bill's intent is to charge the employer for the costs of their employees' spiking, this provision should be revised.

The City is committed to efforts to address the ERS unfunded liability. Last year we fully supported the measure that will increase substantially our employer contributions to the ERS. We have also supported measures to add a county representative to the ERS Board so that we may have input on, and a comprehensive understanding of, measures such as these. At this point, we do not believe we have the understanding necessary to support all the provisions in this measure.

Thank you for the opportunity to testify on Senate Bill 2750.

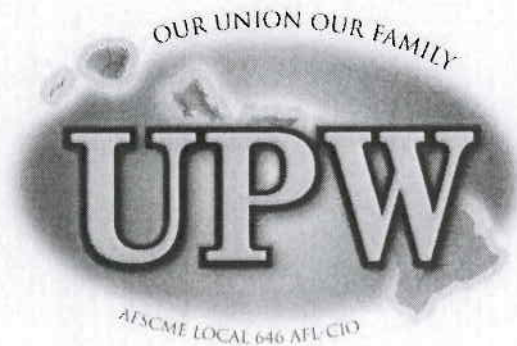
Yours truly,



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



Noel T. Ono, Director
Department of Human Resources



LATE TESTIMONY

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

COMMITTEE ON JUDICARY AND LABOR

The Honorable Sen. Clayton Hee, Chair
The Honorable Sen. Maile S. L. Shimabukuro, Vice Chair

DATE OF HEARING: Wednesday, February 8, 2012
TIME OF HEARING: 9:30 a.m.
PLACE OF HEARING: Conference Room 016

**TESTIMONY ON SB 2750 RELATING TO THE EMPLOYEES' RETIREMENT
SYSTEM**

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.

The UPW opposes SB 2750, which addresses "spiking" by public employees who intentionally increase their high three in an effort to grow their retirement benefits.

We find this bill to be quite disturbing. Our members are hard working citizens that provide critical services to the State of Hawaii. Historically the UPW, through the collective bargaining process, has worked with employers to keep overtime at a reasonable level. In an effort to save money, employers chose to increase overtime versus hiring more staff. Let me be clear that overtime is approved and scheduled by management and not our members. Recent

stories in the media regarding Emergency Medical Services (EMS) indicated that public workers were “spiking.” However, I have not seen any data or concluding information that supports these claims. Well in fact, overtime for EMS has decreased, according to the Department of Health.

While we acknowledge the unfunded liability and other problems facing the ERS, this bill is not the answer. Instead, we suggest that if there is a serious “spiking” problem, allow for the respective parties to address the situation through the collective bargaining process.

Accordingly, the UPW is strongly opposed to SB 2750.

Thank you for the opportunity to testify on this measure.

LATE TESTIMONY

Hawaii Employees' Retirement System

Example of Impact of Anti-Spiking Provision

Employee #1 (consistent non-base pay)

Last 10 years Salary History

	Base Pay	Non-base I	Total Pay
Last Year	40,000	8,000	48,000
Year - 1	39,000	7,800	46,800
Year - 2	38,000	7,600	45,600
Year - 3	37,000	7,400	44,400
Year - 4	36,000	7,200	43,200
Year - 5	35,000	7,000	42,000
Year - 6	34,000	6,800	40,800
Year - 7	33,000	6,600	39,600
Year - 8	32,000	6,400	38,400
Year - 9	31,000	6,200	37,200

Average Final Compensation Period

High 3	40,000	8,000	48,000
	39,000	7,800	46,800
	38,000	7,600	45,600
Average	39,000	7,800	46,800

Average During Comparison Period

	37,000	7,400	44,400
	36,000	7,200	43,200
	35,000	7,000	42,000
	34,000	6,800	40,800
	33,000	6,600	39,600
	32,000	6,400	38,400
	31,000	6,200	37,200
Average	34,000	6,800	40,800

Employee #2 (spiked non-base pay)

	Base Pay	Non-base I	Total Pay
	38,000	10,000	48,000
	37,000	9,800	46,800
	36,000	9,600	45,600
	35,000	1,750	36,750
	34,000	1,700	35,700
	33,000	1,650	34,650
	32,000	1,600	33,600
	31,000	1,550	32,550
	30,000	1,500	31,500
	29,000	1,450	30,450

	38,000	10,000	48,000
	37,000	9,800	46,800
	36,000	9,600	45,600
Average	37,000	9,800	46,800

	35,000	1,750	36,750
	34,000	1,700	35,700
	33,000	1,650	34,650
	32,000	1,600	33,600
	31,000	1,550	32,550
	30,000	1,500	31,500
	29,000	1,450	30,450
Average	32,000	1,600	33,600

Employee #3 (Teacher type)

	40,000	1,200	41,200
	39,000	1,200	40,200
	38,000	1,200	39,200
	37,000	0	37,000
	36,000	0	36,000
	35,000	0	35,000
	34,000	0	34,000
	33,000	0	33,000
	32,000	0	32,000
	31,000	0	31,000

	40,000	1,200	41,200
	39,000	1,200	40,200
	38,000	1,200	39,200
Average	39,000	1,200	40,200

	37,000	0	37,000
	36,000	0	36,000
	35,000	0	35,000
	34,000	0	34,000
	33,000	0	33,000
	32,000	0	32,000
	31,000	0	31,000
Average	34,000	0	34,000

Test #1 - Average Non-base Pay Divided by Base Pay (AFC Period)

Greater than 10% (Fail)

7,800 / 39,000 = 20%	Fail	9,800 / 37,000 = 26%	Fail	3%	Pass
Average Final Compensation Non-base Pay Ratio (AFCNBPR)					
7,800 / 39,000 = 20%		9,800 / 37,000 = 26%		3%	
Average Comparison Period Non-base Pay Ratio (ACPNBPR)					
6,800 / 34,000 = 20%		1,600 / 32,000 = 5%		0%	

Test #2 - AFCNBPR Divided by ACPNBPR

Less than 120% (Pass)

20% / 20% = 100%	Pass	26% / 5% = 520%	Fail	Infinite	Fail
If either Test #1 or Test #2 is Pass then no impact					
Pass		Fail		Pass	

Limited AFC

If "Pass" then use AFC otherwise use formula

(1+ ACPNBPR) * Average Final Compensation Base Pay

Pass - so use AFC

46,800

Fail - so use formula

(1 + 0.05) * 37,000 = 38,850

Pass - so use AFC

40,200

Impact on Police and Fire employee age 55 with 30 years of service

Maximum Annuity = 2.5% x 30 x AFC

Maximum Annuity using AFC

2.5% x 30 x \$46,800 = \$35,100

2.5% x 30 x \$46,800 = \$35,100

2.5% x 30 x \$40,200 = \$30,150

Maximum Annuity using limited AFC

2.5% x 30 x \$46,800 = \$35,100

2.5% x 30 x \$38,850 = \$29,138

2.5% x 30 x \$40,200 = \$30,150

Benefit Reduction or Amount of Benefit funded by additional employer contributions

\$35,100 - \$35,100 = \$0

\$35,100 - \$29,138 = \$5,962

\$30,150 - \$30,150 = \$0

Additional Employer Contributions

\$0

\$82,143

\$0

CHARLES K.Y. KHIM

Attorney-At-Law

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February 8, 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: Wednesday, February 8, 2012

TIME OF HEARING: 9:30 a.m.

PLACE OF HEARING: Conference Room 016

S.B. No. 2750

TESTIMONY IN OPPOSITION

By: CHARLES K.Y. KHIM, ESQ. 

Attorney at Law

Labor Law Expert and Pension

Law/Retirement Benefits Law Expert

I. Introduction

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 in the Courts of the State of Hawaii, and in the United States Court of Appeals for the Ninth Circuit, and in the Supreme Court of the United States of America. I have been actively practicing law for over thirty-one years. Attached hereto as Exhibit "1" is my curriculum vitae/resume ("C.V.).

As my C.V. indicates, I am an expert in labor and employment law and an expert in pension law and retirement benefits law. I am the only attorney who has prevailed against the Employees' Retirement System of the State of Hawaii ("ERS") in a class action lawsuit against the ERS. In that class action lawsuit, the ERS was found to have illegally deprived retired public school principals, vice principals and teachers their full retirement pay.

I, in conjunction with Paul Alston, Esq. and his law firm, are the only attorneys who have prevailed in a class action lawsuit against the State of Hawaii Employer and Union Health Benefits Trust Fund ("EUTF") wherein it was found that retirement health and welfare benefits provided for by the EUTF are protected from diminution by the Hawaii State Constitution. The titles of these lawsuits are stated in my C.V.

I set forth my foregoing credentials in order to demonstrate that I am competent to challenge the technical legal and pension law statements that will be made by the ERS personnel in support of their testimony in support of this proposed legislation, S.B. No. 2750.

For the reasons stated in detail below, I testify in strong opposition to S.B. No. 2750, for the following reasons:

1. It will cause the Hawaii State and County Legislatures to be double charged by the ERS for payments which must be made in order to support pensions which will be paid for overtime pay and other non-base pay hours worked by public employees;

2. It will unfairly reduce pension payments of public workers from the current levels which these workers contracted for when they began State and/or County employment;

3. It will unfairly require public workers who are required to make contributions to the ERS, *i.e.*, pre-1985

contributory employees, hybrid participants, fire fighters and police officers, to make contributions to the ERS on the full amount of overtime and other non-base pay wages they receive, without being able to use the full amount of that overtime pay, etc. that they paid contributions on to calculate their “high three”; and

4. It will not accomplish the purported reason for this legislation, because it will not reduce the ERS’s unfunded accrued liability.

II. Preliminary Legal Principles Which Apply to All ERS Pension Benefits

It appears that the ERS is proposing this legislation in order prevent supposed increases in the ERS’s the “unfunded actuarial accumulated liability.” The “**unfunded actuarial accrued liability**”¹ is the deficit between the amount of money¹ that the ERS has on hand to pay the pensions that are currently owed or will be owed in the future², and the amount of money that is needed to pay these pensions.

Thus, in order to understand the amount of pension payments that are owed currently and in the future by the ERS, one must understand how ERS pensions are calculated.

State and County employees’ pensions are calculated by multiplying the following multipliers, or what is known in arithmetic as “factors,” to determine what a retired State or County employee’s annual pension payment is:

(1) an average of the highest three years of “compensation” (base pay, a/k/a straight time pay, overtime pay, premium pay, bonuses, shift differentials, etc.) received by the employee; multiplied by

¹ In actuality this is the amount of assets that the ERS owns rather than only the money that the ERS has in its bank accounts. These assets include stocks, bonds, real estate holdings and other investments that the ERS holds.

² This amount is determined by an estimate that is made by the ERS’s actuary.

(2) the total amount of years a public worker was employed by the State and/or the Counties and for which contributions to the ERS were made; multiplied by

(3) 2 percent for contributory employees and current hybrid participants, 2.5 per cent for police officers and certain department heads, and investigators, 3.5 per cent for politicians, certain legislative employees and full time judges, and 1.25 percent for non-contributory members.

The ERS claims that an increase in the compensation of a State or County public worker who is about to retire, via a significant increase of overtime hours, causes a "spike" in the "high three" multiplier for those workers, which supposedly will result in an increase of the accrued unfunded liability of the ERS. The term "compensation," for the purposes of calculating ERS retirement benefits, is defined in HRS, §88-21.5.

This testimony discusses, in detail, the following topics:

- (1) pension benefits as being deferred compensation as opposed to being charity or a gift;
- (2) inclusion of overtime wages and other non-base pay wages in the average final compensation calculation as not causing an increase of the ERS's accrued unfunded liability, despite the alleged "spike" effect;
- (3) the unfairness which will be caused to contributory members by having to make contributions on overtime wages without being able to use that paid for overtime wages in the calculation of their "high three";
- (4) the real causes of the ERS's accrued unfunded liability according to the Hawaii Supreme Court

and the ERS's Annual Reports as being "legislative skimming," and reduced investment earnings, caused in a significant part by the imprudent actions of the ERS Trustees and top administrators;

(5) the real effect of the elimination of overtime wages from the calculation of the "high three" average final compensation; and

(6) the enactment of ERISA protections and limitations as being the best legislative action to eliminate the accrued unfunded liability.

II. ERS Pension Benefits is Deferred Compensation, Not Charity

It is important at the outset to clearly define exactly what the legal status is of an ERS pension. Like all retirement benefits, an ERS pension is "deferred compensation."

Just as that phrase indicates, ERS retirement benefits are wages for work that is currently performed by the employee, which are delayed or deferred from being paid in the present, but rather are paid in the future upon the retirement of the employee.

The following statement which is adapted from a colloquy between the cartoon characters "Popeye" and "Wimpy," illustrates this principle of deferred compensation:

"I will gladly pay you Tuesday, thirty years from now when you retire, for work you do for me today."

Put in legal terms, the Hawaii Intermediate Court of Appeals, in a case titled *Linson v. Linson*, 1 Haw. App. 272,

275, 618 P.2d 748, 750 (1980), described this legal concept of retirement benefits as being deferred compensation, by stating as follows:

“Retirement benefits are not gratuities flowing from the employer’s beneficence, but rather are part of the consideration earned by the employee, as a form of deferred compensation for services rendered. Therefore, the employee’s right to such benefits is a contractual right, derived from the terms of the employment contract.” (Emphasis added).

The fact that ERS retirement benefits are contractual rights derived from the employment contract between State and County public employers and public workers is buttressed by Article XVI, Section 2 of the Hawaii State Constitution, which states that:

“Membership in any employees’ retirement system of the State or any political subdivision thereof shall be a **contractual relationship.** . . .”

Thus, when analyzing the ERS’s legislative proposal that the overtime pay and other non-base pay wages of a public worker which currently shall be included in the HRS, §88-81 “high three” average final compensation of the public workers, shall no longer be included in said average final compensation, it must be kept in mind that the retirement benefits or pension which is being reduced by this exclusion are wages that have been earned by the public workers, and unlike a welfare check, is **not** charity or a gift being given to these public workers out of the goodness of the hearts of the State or County governments.

Sad to say, it appears that just as in the Popeye and Wimpy example, where Tuesday is rapidly approaching with Wimpy not having the money to pay full price for the

hamburger (pensions), retirement is rapidly approaching for the baby boomer State and County public workers (Popeye), with the Public Employers and the ERS (Wimpy) not having enough money to pay for the pensions because of inadequate funding of the ERS by the State and County governments and poor investments which were made by the ERS.

Wimpy's (the ERS and Employer's) proposed solution is to pay less than the agreed upon price of employees' pensions by lowering the "high three after the fact" when calculating the pensions of public workers, by excluding overtime pay from the calculation of their "high three," after these public workers were contractually entitled to include it in their "high three," and **after contributory employees such as pre-1985 employees, fire fighters and police officers paid their statutorily required share of contributions to the ERS on the whole amount of overtime and other non-base pay wages, for the years prior to this proposed legislation.**

As elaborated below, the it is my expert testimony that the appropriate solution is to enact the following basic safeguard principles in ERISA³ of: (1) minimum funding standards; (2) establishment of specific fiduciary standards and restrictions; and (3) personal civil and criminal liability for breaches of fiduciary duties of both the trustees as well as the ERS staff, including the administrator; rather than to short change these retirees the retirement pay which was contracted for, in the case of the aforesaid contributory members, **which was paid for by said contributory employees.**

III. Inclusion of Overtime Pay in the "High Three" Does Not Increase the Unfunded Accrued Liability

HRS, §88-123 sets forth the arithmetic formula by which the annual contributions to the ERS by the public employers

³ The Employee Retirement Income Security Act of 1974, as amended.

are made to the ERS's "**pension accumulation fund**," in order to adequately pay for the retirement benefits for their actively employed public workers when these workers retire.

Basically, this calculation constitutes adding up the total annual payroll paid to these public workers, and multiplying that total annual payroll by a multiplier stated in HRS, §88-122(a). Copies of HRS, §88-21.5 (definition of "compensation"); §88-122(a) (scale multipliers by which to determine annual employer contribution to ERS); and §88-123 (formula for calculating annual employer contribution to ERS) are collectively attached hereto as Exhibit "2."

Since the total annual payroll, **including overtime pay**, is used to calculate the amount of contributions to the ERS that employers must pay in order to adequately fund the retirement benefits that the ERS will pay to the active employees when they retire, an increase in overtime pay will not increase the accrued unfunded liability.

The foregoing is true because when a public worker receives overtime pay, that overtime pay is included in the total annual payroll which is calculated under HRS, §88-123. Since that overtime pay causes an increase in the foregoing total annual payroll, when the ERS calculates the amount of money it is owed by the employer of the worker who received the overtime pay, the amount the employer owes the ERS is increased by the amount the total annual payroll was expanded by the overtime pay that was added to it.

In other words, since the increased amount of retirement benefits the ERS must pay the worker who received overtime pay is covered by the increased amount that worker's employer had to pay the ERS, in an amount that is actuarially equivalent to the increased pension liability caused by the receipt of overtime pay, there is no increase in the accrued unfunded liability by employees receiving overtime pay.

Thus, contrary to the ERS's assertion, the accrued unfunded liability is not increased by overtime pay which is received by a public worker.

In fact, in many cases State and County employers save money by making employees work overtime instead of curtailing overtime pay hiring more employees and having the increased workforce work only at straight time pay. This is because employer payments to the EUTF⁴ are calculated on a per employee basis, not on a per hour worked basis.

Thus, the fewer employees a public employer has the lower that public employer's contributions to the EUTF are, even though those public workers all work one and one half times their normal shift. Such a situation results in a 33.34% savings in public employer contributions to the EUTF because two employees are doing the work of three employees.

IV. For Contributory Employees, S.B. No. 2750 Will Unfairly Require Them to Make Contributions to the ERS on the Full Amount of Their Overtime Pay Without Being Able to Use the Full Amount of Their Overtime Pay to Calculate Their "High Three"

HRS, §88-45 requires contributory members of the ERS to pay the ERS a percentage of their "compensation" to the ERS in order to receive a pension from the ERS. These contributory members include, but are not limited to, pre-1985 contributory members, hybrid members, prison guards, firemen, attorney general investigators, office of the prosecutor investigators, and police officers.

The rate of contributions is as high as one-seventh (14.20%) of their compensation.

⁴ State of Hawaii Employer and Union Health Benefits Trust Fund.

S.B. No. 2750 does **not** change the definition of “compensation” in HRS, §88-21.5 to exclude overtime wages from the definition of “compensation.”

This means that these contributory employees must pay the full percentage of their contributions on the overtime pay they receive.

Despite the fact that these contributory employees have to pay the full percentage on **all** of their overtime pay, under S.B. No. 2750, they are prevented from using the full amount of their overtime pay for the calculation of their “high three.”

In other words, these contributory employees are paying for something that they prevented from using. That’s like paying for a car, yet not being able to drive it.

The patent unfairness of paying for something that a person is prohibited from using is obvious.

What adds insult to injury, is that it is these very contributory employees who the public relies on to protect them from the biggest physical dangers they face: crime, fire and imprisoned criminals.

If S.B. No. 2750 is enacted, one could not blame a police officer from stopping his chase of an armed robber or burglar because his shift is completed since it will not be worth it for him or her to incur overtime, since he or she will have to pay one-seventh of his or her gross overtime wages to the ERS, which translates to about one-fifth (20%) of his or her take home pay, only for him or her not to be able to use it towards his or her “high three.”

An equally likely scenario is for a prison guard, fireman, or police officer to decline an overtime assignment because of the foregoing unfairness, thus leaving the public in danger because these vital safety services are understaffed.

IV. The Real Reasons Why The Unfunded Accrued Liability is Large

A. Hawaii Supreme Court Adopted ERS' Accusation that Hawaii Legislature' "Skimming" of ERS'S Money was the Primary Cause of ERS's Large Unfunded Accrued Liability. This Finding is Binding on the Legislature and the ERS.

In support of its proposal to eliminate overtime pay from the calculation of the "high three" average final compensation, the ERS Trustees stated that the so-called "spiking" of the "high three" which is allegedly caused by the earning of significant amounts of overtime in the year prior to retirement is the primary cause of the "large unfunded actuarial liability."

The foregoing assertion of the ERS Trustees is contrary to their statements to the Hawaii Supreme Court which were made in the case titled *Kahoohanohano v. State of Hawaii*, 114 Hawaii 302, 162 P.3d 696 (2007). In that case, the ERS Trustees stated in its 2005 Financial Report that despite "positive earnings, [in 2005] the actuarial funded ratio declined, . . . primarily [as a] result" of what the ERS Trustees referred to in their lawsuit against the State as "**legislative skimming.**"

In repeating the ERS Trustees' accusations against the Legislature and finding that those accusations were true, the Hawaii Supreme Court stated as follows:

"[ERS] Trustees refer to this practice of taking the 'peaks,' also known as, earnings in excess of specified yield rates, as '**skimming.**' As set forth in [ERS] Trustees' complaint, 'When the earnings of high-return years are skimmed, . . . the ERS loses the benefit of high yields that would offset market cycles in low-return years and is denied the benefit of full,

ongoing [e]mployer funding.’ ” 114 Hawaii, at 313.

* * *

“The injunctive relief sought is not to enjoin Act 100, which has already been implemented, but ‘to prohibit future skimming,’ and to prevent ‘[a] renewed pattern of **legislative skimming.**’ ” 114 Hawaii, at 337.

* * *

“Finally, the 2005 ERS Financial Report illustrates that despite ‘positive earnings, [in 2005,] the actuarial funded ratio declined[,] . . . **primarily [as a] result of the past diversion of excess investment earnings which prevented the ERS from establishing a rainy day fund for the years of poor investment earnings.**’ ”

* * *

“Therefore, it is ‘plain, clear, manifest, and unmistakable[,]’ (citation omitted) that the \$349.9 million reduction in employer contributions unconstitutionally impaired the pension system.” 114 Hawaii, at 352.

The phrases “diversion of excess income earnings” and the “reduction in employer contributions” which appear in the above quoted portions of the *Kahoohanohano* decision is the “legislative skimming” which the ERS Trustees specifically accused the Hawaii Legislature of in their legal briefs in that Hawaii Supreme Court case. A copy of the *Kahoohanohano* case is attached hereto as Exhibit “3.”

The Hawaii Supreme Court in the *Kahoohanohano* case adopted the ERS Trustees’ above quoted position and held that the foregoing “legislative skimming” was the cause of the ERS’s large unfunded actuarial liability. The Hawaii Supreme Court further held that this “legislative skimming” was unconstitutional.

Moreover, since this finding by the Hawaii Supreme Court that “legislative skimming” was the primary cause of the large unfunded actuarial accrued liability was made in a lawsuit by the ERS against the State government, the Legislature and the ERS are bound by this finding, under the doctrine of *collateral estoppel* and *res judicata*, see, *Exotics Hawaii-Kona v. E.I. DuPont*, 104 Hawaii 358, 365 (2004) (Demise of mutuality rule, a/k/a the ascension of non-mutual offensive doctrine, allows non-party to the *Kahoohanohano* case to enforce ruling in that case against a party to that case, i.e., the State of Hawaii, including both its executive and legislative branches).

Thus, it is clear that the ERS’s purported reason for this legislation is untrue. Contrary the assertion of the ERS, receipt of overtime pay is not the reason for the huge unfunded actuarial liability. This is especially so, since the finding the ERS sought and obtained in the *Kahoohanohano* case, namely that “legislative skimming” was the primary cause of the unfunded actuarial accrued liability, is binding on the ERS as well as the legislature.

B. ERS’s Annual Report Claimed that Poor Returns on Investments Caused Large Unfunded Liability. Irresponsible Investing Caused Some of the Poor Returns on Investments

In the *Kahoohanohano* case, the Hawaii Supreme Court quoted the ERS’s annual report in stating that in the early 2000s, poor investment returns as well as the recapturing or “legislative skimming” of \$346,900,000.00 of the ERS’s money by the Hawaii Legislature caused the ERS’s unfunded actuarial liability. In so quoting, the Hawaii Supreme Court stated as follows:

“The 2004 ERS Financial Report reiterated that the ERS’ large ‘unfunded actuarial accrued liability [was] primarily the result of unfavorable investment returns in

FY 2001 and FY 2002' and also because of 'the previous use of the ERS' excess investment earnings to reduce the State and county government contributions to the ERS.' ERS Financial Report for the Fiscal Year Ended June 30, 2004 at 9 (Dec. 13, 2004)."

While there is no doubt that poor investment results were also a significant factor in the making of the large unfunded actuarial accrued liability of the ERS during the early and middle 2000s, it is apparent that the ERS and its Trustees' grossly negligent, which, at times, bordered on an intentional breach of the fiduciary duty of loyalty to the ERS, was the cause of at a significant amount of the investment losses suffered by the ERS, both at that time as well as historically.

For example, it was front page, headline news in the Honolulu Advertiser in the early 2000s, that the ERS Trustees' renewed an investment contract with an investment company named Three Bridges despite the fact that the ERS's investment monitor or "watchdog" advised the ERS to cancel the investment contract instead, because Three Bridges lost large sums of the ERS's money in bad investments. At the time, the retired head of the ERS, Administrator-Executive Secretary Stanley Siu was an investment account executive of Three Bridges.

If memory serves me correctly, the ERS, in renewing the Three Bridges investment contract against the advice of its investment "watchdog," gave and/or allowed Three Bridges to continue to invest over \$150,000,000.00 of the ERS's money.

Another example of the ERS's grossly negligent, and possibly intentionally imprudent investment actions, was the purchase of the then newly built leasehold building in which ERS's current offices are in, for about fifty percent over the cost of constructing the building, without first obtaining an appraisal of the building. This resulted in an annual profit of

fifty percent for the sellers, with that profit constituting about \$20,000,000.00, if I remember correctly.

The sellers' profit would have been about one hundred percent, if I remember correctly, but for the fact that one of the union/employee Trustees complained about original purchase price being too high.

Retired Hawaii Supreme Court Justice Edward Nakamura, who was an ERS Trustee at the time, resigned from his position as Trustee over this imprudent transaction.

If memory serves me correctly, one of the ERS Trustees at the time was financially involved in the real estate transactions which resulted in this purchase of the ERS building, possibly as a real estate broker who earned either directly or indirectly a commission on the sale. Again, the Honolulu Advertiser covered this story.

While I have not had the time to research these news articles at the State Library, the now defunct Honolulu Advertiser's news files are currently inaccessible, I will research these articles and present them to you at a later date.

GECC Financial maintained a contract with the ERS to provide ERS participants-beneficiaries home mortgages at a time when GECC loan executive Kenneth Matsuura was a Trustee on the ERS's Board of Trustees.

I received anecdotal information from a former bank official that there was a bank executive who was a relative of a top ERS administrative employee received money from the ERS to invest, short term, in that bank.

The foregoing indicates that these poor investment decisions are a major factor in the ERS's large unfunded actuarial accrued liability.

None of the transactions described above outwardly violate any statute or regulatory law. This is because unlike private sector pensions which are protected by the Federal Law known as the Employee Retirement Income Security Act ("ERISA") against the foregoing insider trading, self dealing actions and imprudent decisions of the ERS Trustees and high level administrators, the ERS Trustees and high level administrators are exempt from ERISA. There is no statute or written rules or regulations which restrict their actions.

To the contrary, HRS, §26-35.5 almost assuredly gives the ERS Trustees immunity from lawsuits for their foregoing actions, notwithstanding the grossly negligent nature of their actions. This is because that statute gives these Trustees absolute immunity unless they acted in a malicious or improper purpose.

Moreover, the doctrine of sovereign immunity shields both the Trustees and the ERS high level administrators from liability, especially since the Hawaii Tort Claims Act, HRS, Chapter 662, has not waived sovereign immunity over these actions since said actions were engaged in as part of their discretionary functions and such discretionary functions may be abused without any consequences under HRS, §662-15 of the Hawaii Tort Claims Act.

V. The Real Effect of This Legislation is to Currently Make the State and County Legislatures Pay the ERS Twice for the Inclusion of the Same Overtime Pay in the "High Three, and" and to Cut the Retirement Pay of Employees, Thus Eventually Reducing Employment Costs for Public Employers

S.B. No. No. 2750, Section 1 increases the amount the State and County Legislatures must appropriate to pay the ERS for the inclusion of overtime pay into the "high three" of employees who began employment before July 1, 2012, who earn overtime in an amount that is more than approximately

ten percent of their base pay and who retired in the previous year.

However, as mentioned above, HRS, §88-123 already requires the State and County Legislatures to pay to the ERS the actuarial cost of including overtime into the “high three” of government workers.

Since S.B. No. 2750 does not provide an for a reduction in the contribution amount payable under HRS, §88-123 in order to offset the payment by the State and County Legislatures of the amount they owe the ERS under S.B. No. 2750, Section 1 for inclusion of overtime pay into these public workers’ “high three,” the net effect is that the **State and County Legislatures pay the ERS monetary contributions twice for the same hour of overtime pay earned by these public workers.**

The ERS may view this double payment as poetic justice for what it called the “legislative skimming” which was engaged in by the State and County Legislatures, since the ERS was precluded in the *Kahooohanohano* case from recovering monetary damages from the State and County Legislatures for the so-called “legislative skimming.” But as stated in that case, the ERS could not recover that money in a legitimate manner.

However, such double payment is being obtained in a deceitful way because S.B. No. 2750 fails to disclose that this double payment is occurring.

The other major effect of S.B. No. 2750 is that the retirement pay received by public workers will be reduced because: overtime pay; pay differentials such as those paid for working at remote or unpleasant locations (servicing remote locations that have no wooden dwellings, no toilet or no shower facilities), etc.; bonuses; and lump sum salary supplements are eliminated from the calculation of the “high three.”

Under S.B. No. 2750 when the foregoing double payment which is required by Section 1 thereof stops, the State and County Legislatures will reduce their payments to the ERS in an amount which is commensurate actuarially to the reduction in the "high three" which is caused by the exclusion of the overtime pay and other non-straight time pay from the public workers' "high three."

The foregoing constitutes the true effects of the enactment of S.B. No. 2750.

VI. The Enactment of the Restrictions and Protections Contained in ERISA is the Best Method by Which to Eliminate the Unfunded Accrued Liability of the ERS

The underfunding problems facing the ERS are not a unique situation. Human nature is such that: the excesses committed by the ERS and its Trustees in terms of its investments; as well as and the State and County's underfunding of the ERS; are not unique to the ERS. Prior to the enactment of ERISA, the foregoing financial problems facing the ERS existed in with many private sector pension funds.

These problems caused the U.S. Congress to enact ERISA in order to cure these under funding problems and breach of fiduciary problems. Many of the finest legal minds in the retirement pay field collaborated to enact ERISA.

Thus, I recommend that the enactment of ERISA restrictions and protections in order to eliminate the unfunded accumulated liability problem facing ERS.

In view of the foregoing, I suggest that the Legislature enact ERISA: "prohibited transactions" restrictions; "prudent man" standard of care; and ability to hold the ERS Trustees and top administrative employees of ERISA personally liable to pay from their personal funds and property for the damage caused by their breach of the "prudent man" be enacted to

eliminate the "self dealing" and the preferred treatment of "insiders" problem that has afflicted the ERS for many years; in order to remedy the above mentioned problems.

Also, when the State and County governments are in a better financial condition to fulfill the ERISA minimum funding requirements, said requirements should be enacted by the Hawaii Legislature.

VII. Conclusion

Thank you for this opportunity to present written testimony to this honorable committee and your collective attention to these matters. If any committee member has any questions, I will be more than glad to answer them at the appropriate time.



CKYK:rwd

Attachments

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PROFESSIONAL PROFILE:

- 2004 - Present *Attorney – Principal*
Law Offices of Charles K.Y. Khim
Clifford Center, Suite 502
810 Richards Street
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- 2000 - 2004 *Executive V.P. and Chief Legal Counsel*
Royal State Group (Insurance Conglomerate)
Royal State Center
819 S. Beretania Street, Suite 207
Honolulu, Hawaii 96813
- 1984 – 2000 *Attorney – Principal*
Law Offices of Charles K. Y. Khim
City Financial Tower, Suite 2390
201 Merchant Street
Honolulu, Hawaii 96813
- 1983 – 1984 *Attorney – Field*
National Labor Relations Board
PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96813
- 1980 – 1983 *Attorney – Associate*
Shim, Sigal, Tam & Naito
Melim Building, Suite 900
333 Queen Street
Honolulu, Hawaii 96813
- 1979 – 1980 *Attorney – Law Clerk*
National Labor Relations Board
Division of Advice
1099 Fourteenth Street, N.W.
Washington, D.C. 20570

EXHIBIT "1"

EDUCATIONAL PROFILE:

1977 – 1980

*Juris Doctor (Law Degree) May 1980
Georgetown University
Washington, D.C.*

*Law School Honors:
Dean's List 2nd and 3rd years (3 yr. curriculum)*

1972 – 1976

*Bachelor of Arts – Sociology
University of Hawaii – Manoa Campus
Honolulu, Hawaii*

*College Honors:
B.A. Degree Awarded with Distinction (Equivalent to
Summa Cum Laude)
Class Valedictorian/Representative (4.0 GPA/4.0 Scale)
Phi Beta Kappa – National Honor Society
Phi Kappa Phi – National Honor Society (Early Admin.)
Phi Eta Sigma – National Honor Society
Myrtle Clark English Dept. Writing Award*

1960 – 1972

*University Laboratory School
(Elementary and Secondary School Education)*

*High School Honors:
Editor-in-Chief, Ke Kupina'i Newspaper*

LABOR/EMPLOYMENT PROFILE:

- ◆ *Legal Counsel to international/national/local labor organizations;*
- ◆ *Legal Counsel to trustees of international/national/local joint Taft-Hartley Pension and Employee fringe benefits trust funds;*
- ◆ *Legal Counsel to international/national insurance corporations;*
- ◆ *Legal Counsel to educational, charitable and private trusts;*
- ◆ *Legal Counsel to individuals regarding federal employment and state employment matters;*
- ◆ *Legal Counsel to individual defendants and plaintiffs in employment discrimination cases;*
- ◆ *Arbitrator in tort cases appointed by the court annexed arbitration program.*

LEGAL PROFILE

A. Class Action Litigation

- *Successful litigation culminating before the Hawaii State Supreme Court Chun v. Employees' Retirement Sys. Cases { Chun, et al. v. Employees' Retirement System of the State of Hawaii ("ERS"), 828 P.2d 260 (Haw. 1992); Chun, et al. v. ERS, 952 P.2d 1215 (Haw. 1998); Chun, et al. v. ERS, 992 P.2d 127 (Haw. 2000); Chun, et al. v. ERS, 106 P.3d 339 (Haw. 2005) }. In the Chun cases, approximately 1100 class members consisting of retired public school principals, vice principals and teachers were successfully represented in obtaining full back pay and front pay compensation via a totally successful class action for: declaratory and injunctive relief; and money damages. (Pension Benefits/Administrative Law/Civil Law case)*
- *Successful litigation before the State of Hawaii First Circuit Court on behalf of the Hawaii Government Employees Association and its approximately 260 Bargaining Unit 03 members (men and women) who were underpaid because said members held job positions that were considered "women's work" vis-à-vis job positions that were considered "men's work." A successful settlement was entered into in this action for: declaratory and injunctive relief; and money damages - affording class members front pay via an upgrade in their pay scales to equivalent "men's work" job positions' pay scales. (Employment Discrimination/Civil Rights case)*

B. Conventional Litigation - Administrative Law Litigation

- *Successful litigation before U.S. Supreme Court (Washington, D.C.) (Employment discrimination/Civil Rights cases)*
- *Successful litigation before U.S. 9th Circuit Court of Appeals (San Francisco, CA) (Employment discrimination cases as well as other matters);*
- *Successful litigation before National Labor Relations Board (Washington, D.C. & Honolulu, HI);*
- *Successful litigation before U.S. Merit Systems Protection Board (Washington, D.C. & Honolulu, HI);*
- *Successful litigation before U.S. District Court for the District of Hawaii*
- *Successful litigation before State of Hawaii Supreme Court (Honolulu, HI);*
- *Successful litigation before State of Hawaii Intermediate Court of Appeals (Honolulu, HI);*

LEGAL PROFILE

B. Conventional Litigation – Administrative Law Litigation (Continued):

- Successful litigation before Hawaii State Circuit Courts (1st Cir.-Honolulu, 2nd Cir.-Kahului, 3rd Cir.-Hilo, 5th Cir.-Lihue);
- Successful litigation before Hawaii State District Courts (Honolulu, HI);
- Successful litigation before Hawaii Labor Relations Board (Honolulu, HI);
- Successful litigation before State & County Civil Service Commissions (Honolulu, HI and Hilo, HI);
- Successful resolutions before State & Federal Commissions, Departmental Boards and Panels (Civil Rights Commission, EEOC, DHHL, DOT, DOH, DPED, DLIR, DLNR).
- Successful litigation of cases (my clients prevailed) establishing **new law**:

Chun v. Employees' Retirement Sys., 952 P.2d 1215 (Haw. 1998) – Haw. Sup. Ct.;

Sussel v. City & County of Honolulu Civil Serv. Com., 784 P.2d 867 (Haw. 1989) – Haw. Sup. Ct.;

Caldeira v. County of Kauai, and the Hawaii Government Employees Assn. (HGEA), 866 F.2d 1175 (9th Cir. 1989), U.S. 9th Cir. Ct. of Appeals - cert. denied 493 U.S. 817 (1989), U.S. Sup. Ct.;

Everson, et al. v. State of Hawaii, et al., 228 P.3d 282 (2010) - Haw. Sup. Ct – Co-Counsel with Alston Hunt Floyd & Ing Attorneys at Law (Established that State & County retirees health insurance benefits are Constitutionally protected against being diminished)

Chun v. Employees' Retirement Sys., 992 P.2d 127 (Haw. 2000) – Haw. Sup. Ct.;

Doe v. Doe, 34 P.3d 1059 (Haw. App. 2001) – Haw. Intermediate Court of Appeals (Pro bono case affording divorced custodial parents – primarily single mothers – greater access to legal rights in collecting delinquent child support payments from so-called “deadbeat dads,” thus helping alleviate a nationwide problem).

Lingle v. Hawaii Government Employees Assn. (HGEA), 111 P.3d 587 (2005) – Haw. Sup. Ct.

C. Community Service – Legal Community

- *Successful service as member on judicial committee to appoint members to the Board of Hawaii Bar Examiners;*
- *Successful service as member on judicial committee to appoint members to the Office of Disciplinary Counsel Board.*
- *Successful service as seminar panelist of American Bar Association National Convention – Labor & Employment Section.*

LICENSES – PRACTICE OF LAW PROFILE:

Licensed to practice law before all State of Hawaii Courts.

Licensed to practice law before the U.S. District Court for the District of Hawaii.

Licensed to practice law before the U.S. Court of Appeals for the Ninth Circuit (San Francisco, CA).

Licensed to practice law before the U. S. Supreme Court (Washington, D.C.).

COMMUNITY SERVICE PROFILE:

- *Univ. of Haw. Lab Charter School – Founding Member of Local School Board*
- *Punahou School – Judge (volunteer) of Oxford Debate Program*
- *Wailuna Homeowners Assn. – President & Member of Board of Directors*
- *Ronald McDonald House – Attorney (volunteer) & Advisor of Non-Profit Org.*
- *American Diabetes Association of Hawaii – Attorney (volunteer) & Legislative Action Committee Member*

§88-21.5 Compensation. Unless a different meaning is plainly required by context, as used in this part, "compensation" means normal periodic payments of money for service the right to which accrues on a regular basis in proportion to the service performed; overtime, differentials, and supplementary payments; bonuses and lump sum salary supplements; and elective salary reduction contributions under sections 125, 403(b), and 457(b) of the Internal Revenue Code of 1986, as amended. Bonuses and lump sum salary supplements shall be deemed earned when payable; provided that bonuses or lump sum salary supplements in excess of one-twelfth of compensation for the twelve months prior to the month in which the bonus or lump sum salary supplement is payable, exclusive of overtime, bonuses, and lump sum salary supplements, shall be deemed earned:

- (1) During the period agreed-upon by the employer and employee, but in any event over a period of not less than twelve months; or
- (2) In the absence of an agreement between the employer and the employee, over the twelve months prior to the date on which the bonus or lump sum salary supplement is payable. [L 2004, c 182, §2]

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EXHIBIT "2"

§88-122 Determination of employer normal cost and accrued liability contributions. (a) Based on regular interest and such mortality and other tables as are adopted by the board of trustees, the actuary engaged by the board, on the basis of successive annual actuarial valuations, shall determine the employer's normal cost and accrued liability contributions for each fiscal year beginning July 1 separately for the following two groups of employees:

- (1) Police officers, firefighters, and corrections officers;
and
- (2) All other employees.

(b) The actuarial valuations shall be based on the contribution rates approved by the legislature, and the tables, assumptions, and factors adopted by the board for actuarial valuations of the system; provided that the investment yield rate assumption for the year ending June 30, 2011, shall be seven and three-quarters per cent.

(c) With respect to each of the two groups of employees in subsection (a), the normal cost for each year after June 30, 1994, shall be the percentage of the aggregate annual compensation of employees as of March 31 of the valuation year as determined by the actuary using the entry age normal cost funding method. On each June 30 the board shall determine the allocation of the assets of the pension accumulation fund between the two groups of employees in subsection (a); provided that the assets of the pension accumulation fund as of June 30, 1976, shall be allocated between the two groups in the same proportion as the aggregate annual compensation of each group as of March 31, 1976.

(d) Commencing with fiscal year 1994-1995 and each subsequent fiscal year, the actuary shall determine the total unfunded accrued liability using the entry age normal cost funding method separately for each of the two groups of employees in subsection (a). The accrued liability contribution for each of the two groups of employees shall be the annual payment required to liquidate the unfunded accrued liability over a period of twenty-nine years beginning July 1, 2000. Any increase or decrease in the total unfunded accrued liability resulting from legislative changes in the benefit provisions of the employees' retirement system shall be liquidated over a period of time to be determined by the actuary.

(e) Commencing with fiscal year 2005-2006 and each subsequent fiscal year, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on fifteen and three-fourths per cent of the member's compensation for police officers, firefighters, and corrections officers and thirteen and three-fourths per cent of the member's compensation for all other employees. Commencing with fiscal year 2008-2009 and each subsequent fiscal year until fiscal year 2011-2012, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on nineteen and seven-tenths per cent of the member's compensation for police officers, firefighters, and corrections officers and fifteen per cent of the member's compensation for all

other employees. In fiscal year 2012-2013, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on twenty-two per cent of the member's compensation for police officers, firefighters, and corrections officers and fifteen and one-half per cent of the member's compensation for all other employees. In fiscal year 2013-2014, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on twenty-three per cent of the member's compensation for police officers, firefighters, and corrections officers and sixteen per cent of the member's compensation for all other employees. In fiscal year 2014-2015, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on twenty-four per cent of the member's compensation for police officers, firefighters, and corrections officers and sixteen and one-half per cent of the member's compensation for all other employees. Commencing with fiscal year 2015-2016 and each subsequent fiscal year, the employer contributions for normal cost and accrued liability for each of the two groups of employees in subsection (a) shall be based on twenty-five per cent of the member's compensation for police officers, firefighters, and corrections officers and seventeen per cent of the member's compensation for all other employees. The contribution rates shall amortize the total unfunded accrued liability of the entire plan over a period not to exceed thirty years.

The contribution rates shall be subject to adjustment:

- (1) If the actual period required to amortize the unfunded accrued liability exceeds thirty years;
- (2) If there is no unfunded accrued liability; or
- (3) Based on the actuarial investigation conducted in accordance with section 88-105. [L 1925, c 55, pt of §8; am imp L 1927, c 251, §4; am L 1933, c 181, §3; am L Sp 1933, c 10, §§2, 3; RL 1935, pt of §7927; am L 1935, c 48, §§2, 4; RL 1945, pt of §712, subs 3; RL 1955, §6-89; am L 1964, c 62, §12; am L 1965, c 222, §15; HRS §88-113; am L 1969, c 110, pt of §1; am L 1973, c 19, §1; am L 1977, c 171, §2 and c 191, §2; am L 1981, c 201, §1; am L 1982, c 147, §6; am L 1983, c 190, §1; am L 1985, c 128, §1; gen ch 1985; am L 1987, c 291, §1; am L 1988, c 41, §7; am L 1989, c 184, §1; am L 1991, c 170, §1; am L 1993, c 144, §1; am L 1994, c 276, §9; am L 1996, c 79, §1; am L 1997, c 327, §3; am L 1998, c 151, §1; am L 2001, c 104, §1; am L 2002, c 147, §2; am L 2004, c 181, §2; am L 2007, c 256, §3; am L 2011, c 163, §§16, 22]

§88-123 Amount of annual contributions by the State and counties. The contribution payable in each year to the pension accumulation fund by the State and by each county shall be determined by allocating the sum of the normal cost and the accrued liability contribution for:

- (1) Police officers, firefighters, and corrections officers, the latter after the actual transfer of all county jails pursuant to executive order of the governor; and
- (2) All other employees

in the same proportion as the aggregate annual compensation of each group employed by the State and by each county, respectively, as of March 31 of the valuation year. Commencing with fiscal year 2005-2006, the contribution payable in each year to the pension accumulation fund by the State and each county, respectively, shall be determined by multiplying the contribution rates in section 88-122 (e) by the actual covered payroll in a given fiscal year for each of the two groups of employees in section 88-122(a). [L 1925, c 55, pt of §8; am imp L 1927, c 251, §4; am L 1933, c 181, §3; am L Sp 1933, c 10, §§2, 3; RL 1935, pt of §7927; am L 1935, c 48, §§2, 4; RL 1945, pt of §712, subs 3; RL 1955, §6-91; am L 1964, c 62, §13; HRS §88-114; am L 1969, c 110, pt of §1; am L 1977, c 171, §3; am L 1983, c 124, §15; am L 1997, c 327, §4; am L 2004, c 181, §3]

Cross References

Trustees to submit estimates of amount due from county, see §248-3.

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Judges and Attorneys

Supreme Court of Hawai'i.

George KAHO'OHANOHANO, Loren Andrade, State of Hawai'i Organization of Police Officers (SHOPO),
Pauline Efnan, and Norma Carvalho, Plaintiffs–Appellants/Cross–Appellees
and

Jackie Ferguson–Miyamoto, Henry F. Beerman, Odetta Fujimori, Darwin J. Hamamoto, Piliialoha E. Lee
Loy, Alton Kuiuoka, Colbert M. Matsumoto, and Georgina Kawamura in their official capacities as
Trustees of the Employees' Retirement System of the State of Hawai'i and not in their individual
capacities, ^{FN1} Intervenor Plaintiffs–Appellants/Cross–Appellees

FN1. Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(c)(1), Henry F.
Beerman, Alton Kuiuoka, and Georgina Kawamura, the current trustees of the Employees'
Retirement System, have been substituted for Richard L. Humphreys, Neal K. Kanda, and
Stanley T. Shiraki, respectively, the Trustees at the time this case was decided by the
first circuit court.

v.

STATE of Hawai'i, Defendant–Appellee/Cross–Appellee/Cross–Appellant
and

City and County of Honolulu, Intervenor Defendant–Appellee/Cross–Appellant/Cross–Appellee
and

County of Kaua'i, County of Maui, and County of Hawai'i, Additional Defendants–Appellees/Cross–
Appellees/Cross–Appellants.

No. 26178.

July 23, 2007.

Background: Members of Employees' Retirement System of State of Hawai'i (ERS), and State of
Hawai'i Organization of Police Officers (SHOPO), brought class action against state, seeking
declaratory and injunctive relief and damages, based on allegations that statutory amendment
diverted \$346.9 million from ERS, in violation of state Constitution and state's contractual obligations
to ERS members. Trustees of ERS intervened as plaintiffs, seeking declaratory and injunctive relief,
and counties intervened as defendants. The First Circuit Court, Gary W.B. Chang, J., granted
summary judgment to State. Cross-appeals were taken.

Holdings: The Supreme Court, Acoba, J., held that:

- (1) members of Employees' Retirement System did not allege sufficient actual or threatened injury,
as element for standing;
- (2) State of Hawai'i Organization of Police Officers did not allege sufficient actual or threatened injury,
as element for standing;
- (3) trustees alleged sufficient actual or threatened injury as result of state's allegedly wrongful
conduct, as element for standing;
- (4) the action was not moot;
- (5) action did not present a nonjusticiable political question;
- (6) state did not have sovereign immunity;
- (7) state constitutional provision prohibiting impairment of accrued benefits of members of ERS
protects not only accrued benefits of ERS members, but also, as a necessary implication, the sources
for those benefits; and
- (8) statutory amendment violated state constitutional provision prohibiting impairment of accrued
benefits of ERS members.