TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
ON
HOUSE BILL NO. 578

January 29, 2013

RELATING TO COLLECTIVE BARGAINING

House Bill No. 578 amends Section 89-13, HRS, to prohibit a public employer from implementing or attempting to implement any term of a collective bargaining proposal without the agreement of the exclusive representative and prohibits an employee or an employee organization or its designated agent from implementing or attempting to implement any term of a collective bargaining proposal without the agreement of the employer.

The Department of Budget and Finance opposes this bill. Unilateral implementation can be an important tool for the employer. As evidenced during the last economic down-cycle and period of recession when savings are critically necessary to maintain operations and the employee representative's tactics to stall negotiations thwarted realization of savings, implementing terms in such cases are preferable to other alternatives such as employee layoffs or shut-down of government operations.

If the Committee's concern is to continue to ensure the parties engage in good faith bargaining, the requirement to bargain in good faith is present long before any terms could be unilaterally implemented. Section 89-13, HRS, already requires the parties to engage in good faith bargaining. In a case of unilateral implementation, if the moving party does not engage in good faith bargaining, it is doubtful unilateral implementation would withstand legal challenge.

IMUALLIANCE

46-063 Emepela Pl. #U101 Kaneohe, HI 96744 · (808) 679-7454 · Kris Coffield · Co-founder/Legislative Director

TESTIMONY FOR HOUSE BILL 578, RELATING TO COLLECTIVE BARGAINING

House Committee on Labor
Hon. Mark M. Nakashima, Chair
Hon. Mark J. Hashem, Vice Chair

Tuesday, January 29, 2013, 9:00 AM
State Capitol, Conference Room 309

Honorable Chair Nakashima and committee members:

I am Kris Coffield, representing the IMUAlliance, a nonpartisan political advocacy organization that currently boasts over 150 local members. On behalf of our members, we offer this testimony in strong support of HB 578, relating to collective bargaining.

Since July 1, 2011, local teachers have been working under an imposed "last, best, final" offer. According to the terms of this "contract" (if one can call it that), teachers, like other bargaining units, have continued to take a 5 percent pay cut, as well as a 50/50 healthcare premium split. Problematically, teachers were notified of LBFO implementation as of June 29, 2011, several days prior to the negotiations deadline a deal covering the school years falling between fall of 2011, to spring of 2013. Not surprisingly, HSTA (bargaining unit 5) filed a complaint with the Hawaii Labor Relations Board, which subsequently vetted the case over a period of ten months. From the outset, the board's prospective decision was viewed as significant in that it will likely determine the legality of LBFO implementation, something that current collective bargaining statutes do not address and, therefore, tacitly permit.

Whether or not one believes the tenets of the state's imposed LBFO to be meritorious, the issue of whether or not unilateral imposition of contractual terms is legal has yet to be resolved. It has been approximately seven months since the final HLRB hearing on HSTA's complaint, yet no resolution appears imminent. Without question, the state's unilateral contractual gesture has clouded ongoing negotiations over BU-5's next contract and contributed to a culture of fear regarding state-sanctioned education initiatives, like the state's forthcoming "educator effectiveness system" (teacher evaluations)—the latter because evaluations remain a critical and controversial component of negotiations, since, to this day, no legal link exists to connect teacher evaluations to salary enhancements and reemployment rights. We believe that educators are at their best when their already stressful working environment—compounded by being overworked for less pay than their national peers, unruly students, and endless reform programs—is eased as

much as possible, allowing for comfortable interactions between teachers, students, administrators, and other education professionals. Teachers' working environment doubles as students' learning environment, after all, and both are concurrently improved by an emphasis on fostering trust and respect.

If lawmakers want to encourage teachers to "buy in" to the state's reform efforts, then they should amend Chapter 89's list of prohibited practices to preclude implementation of any part of a collective bargaining proposal without the consent of all parties involved in negotiations, as this bill does. In other words, policymakers should illegalize unilateral imposition of LBFOs. In this way, legislators can safeguard against the wholesale erosion of teachers' rights through imposed contract terms, like the elimination of tenure, institution of unfunded mandates, further wearing away of teacher pay relative to Hawaii's high cost-of-living, or deployment of an EES with limited recourse to grievance protocols for adverse or unfair evaluations. While these items may seem farfetched under an Abercrombie administration, we cannot predict who may help the ship of state in the future and, thus, must protect against abuses of power and sweeping acts of executive privilege.

On a philosophical note, what is the point of collective bargaining if, at the end of the day, the state can impose whatever terms it wishes? Answer: There would be no point, if that were to continue being the case. The state could, in theory, drag out negotiations with any labor group until the deadline for a new contract has nearly passed, then put in place whatever contractual terms it favors. Such a dictatorial system disincentivizes negotiating from the state's side of the table; bargaining units would face increased pressure to strike, sacrifice the right to strike for binding arbitration, or accept salary and medical premium reductions, as well as less favorable working conditions. Collective bargaining exists to protect the interests and quality of life of the state's employees from being slashed and burned at the whim of politicians. Single-party implementation of LBFOs, on the other hand, undermines collective bargaining protections by vesting the state with the power to make labor decisions without the consent of employees and, in theory, unravel employment protections for which state workers have struggled for decades to obtain.

Mahalo for the opportunity to testify <u>in strong support</u> of this bill.

Sincerely,
Kris Coffield
Legislative Director
IMUAlliance

Kris Coffield **(808) 679-7454** **imuaalliance@gmail.com**

HAWAII STATE TEACHERS ASSOCIATION
Teaching Today for Hawaii's Tomorrow

1200 Ala Kapuna Street • Honolulu, Hawaii 96819
Tel: (808) 833-2711 • Fax: (808) 839-7106 • Web: www.hsta.org

Wil Okabe
President
Joan Kamila Lewis
Vice President
Colleen Pasco
Secretary-Treasurer
Alvin Nagasako
Executive Director

TESTIMONY BEFORE THE HOUSE COMMITTEE ON
LABOR & PUBLIC EMPLOYMENT

RE: HB 578 -RELATING TO COLLECTIVE BARGAINING

Tuesday, January 29, 2013

WIL OKABE, PRESIDENT
HAWAII STATE TEACHERS ASSOCIATION

Chair Nakashima and Members of the Committee:

The Hawaii State Teachers Association (HSTA) **supports** H.B. 578 which prohibits: (1) a public employer from willfully implementing or attempting to implement any term of a collective bargaining proposal without the exclusive representative's agreement; and (2) a public employee or employee organization from willfully implementing or attempting to implement any term of a collective bargaining proposal without the employer's agreement.

HSTA is the exclusive representative of more than 13,500+ public and charter school teachers statewide. As the state affiliate, of the 2.2 million member National Education Association, HSTA has been adversely affected by the Department of Education's (Department) Last, Best and Final Offer (LBFO) whereas the employer had willfully and implemented without any regard to Hawaii Revised Statute, §Chapter 89-13, "Prohibited Practice and Evidence of Bad Faith" bargaining.

Students, learning, and education are the priority of every teacher. Union contract negotiations are not the most important subject to teachers. However, when the State of Hawaii (State) had walked away from the table 10 days before the contract ended and implemented "its last, best, and final offer" in June 2011, prior to the expiration of the 2009-2011 contract, it was the first time in Hawaii's history for the state to unilaterally imposed the contract of a 5 percent savings. It was also the first time a state department willfully and knowingly undervalued, disrespected, and lost the trust of good faith bargaining.

The HSTA believes that the LBFO is unlawful, however, since the Hawaii Labor Relations Board (HLRB) has taken years and it is unclear how much longer they will take to render its decision on this issue, the language in this bill will provide clarification that the employer will need to honor and maintain the existing terms of the

collective bargaining agreement, while it continues to negotiate, instead of walking away from the negotiating table.

HSTA believes in the collective bargaining process whereby the employer and the employee's organization works out an agreement and mutually agrees on a contract. As such, **HSTA strongly supports H.B. 578** to ensure that no other employee organization will be forced into an illegal and lengthy battle with its employer and that moving forward, the employer cannot implement a LBFO on any employee without a mutual agreement from the employee organization.

House Committee on Labor & Public Employment
Tuesday, January 29, 2013
9:00 a.m.

HB 578, Relating to Collective Bargaining.

Dear Chairman Nakashima and Committee Members:

The University of Hawaii Professional Assembly supports the intent of HB 578 believing that unilateral implementation of a collective bargaining agreement is incompatible with existing law, and UHPA has argued so to the Hawaii Labor Relations Board (HLRB). The use of unilateral implementation when a contract expires will undermine collective bargaining leading to its collapse. However, HB 578 raises concerns regarding its impact on existing law and the role of the exclusive representative in unilateral implementation.

It is unclear how passage of this bill would affect the pending, undecided case at the HLRB which is being decided under prior law. The passage of this bill would render illegal an employer's unilateral implementation in the future. What does HB 578 say about the prior law? Is the legislature clarifying that unilateral implementation was always rejected under prior law, or conceding that unilateral implementation was permissive or, is the intent of HB 578 to say nothing about the meaning of the current statute?

UHPA is also concerned about the reference to unilateral implementation by the exclusive representative. As commonly understood, an exclusive representative can't unilaterally implement anything. Generally, a public employer can act, but the exclusive representative can only react, short of refusing to work. If the legislature doesn't have an example in mind of how an exclusive representative can unilaterally implement some term of a collective bargaining proposal, then why create a prohibited practice for an exclusive representative? UHPA is perplexed as to real problem this language is addressing.

Respectively submitted,

Kristeen Hanselman

Kristeen Hanselman
Associate Executive Director

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

1017 Palm Drive · Honolulu, Hawaii 96814-1928
Telephone: (808) 593-2157 · Facsimile: (808) 593-2160
Web Page: http://www.uhpa.org

WRITTEN ONLY

NEIL ABERCROMBIE
GOVERNOR

KATHRYN S. MATAYOSHI
SUPERINTENDENT

STATE OF HAWAI`I
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAI`I 96804

Date: 01/29/2013

Committee: House Labor & Public Employment

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HB 0578 RELATING TO COLLECTIVE BARGAINING.

Purpose of Bill:

Prohibits: (1) a public employer from wilfully implementing or attempting to implement any term of a collective bargaining proposal without the exclusive representative's agreement; and (2) a public employee or employee organization from wilfully implementing or attempting to implement any term of a collective bargaining proposal without the employee's agreement.

Department's Position:

The Department of Education opposes H.B. No. 0578, which seeks to make unilateral implementation of a collective bargaining proposal a prohibited practice. Unilateral implementation is a process that is used throughout the nation when the parties reach impasse in bargaining. To remove it as an option would interfere with the rights available under HRS, Chapter 89.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013

ON THE FOLLOWING MEASURE:
H.B. NO. 578, RELATING TO COLLECTIVE BARGAINING.

BEFORE THE:
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

DATE: Tuesday, January 29, 2013 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): David M. Louie, Attorney General, or
Maria C. Cook, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

This bill proposes to make unilateral implementation of a collective bargaining proposal by an employer or exclusive representative a prohibited practice in accordance with chapter 89 of the Hawaii Revised Statutes (HRS).

Making unilateral implementation of the employer's last, best, and final offer a prohibited practice is contrary to the provisions of chapter 89. Chapter 89 governs the collective bargaining laws in Hawaii and requires the employer and the exclusive representative to negotiate in good faith with respect to wages, hours, the amounts of contributions to the EUTF, and other terms and conditions of employment. Section 89-9(a), HRS, does not, however, mandate that either party agree to a proposal or make a concession. Therefore, once the parties have reached an impasse in bargaining, section 89-11(d), HRS, specifically provides that the parties may use other legal remedies:

> After the fiftieth day of impasse***, the parties may resort to such other remedies*** that are not prohibited by any agreement pending between them, other provisions of this chapter, or any other law.

Section 89-11(d)(4), HRS (emphasis added). Thus, under the above provision, bargaining units that have the statutory right to strike can resort to a strike after impasse. On the other hand, the employer's recourse includes the implementation of its pre-impasse proposals. An employer's right to impose a last, best, and final offer after impasse is well-recognized in federal law. This specifically serves as a counterweight to the unions' right to strike. In the seminal case N.L.R.B.

v. Katz, 369 U.S. 736, 745 (1962), the U.S. Supreme Court held that, after impasse, the employer is free to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, because at that point the employer has exhausted its statutory duty to bargain. The Legislature clearly would have intended to provide the same remedy to Hawaii's public employers when it authorized the use of "other remedies" not prohibited by law in section 89-11(d)(4). See Sen. Stand. Comm. Rep. No. 2394, in 2002 Sen. Journal at 1194, 1195 (noting that addition of "other remedies" provision allows the "parties [to] resort to economic self-help or other tactics[.]").

Further, the practical impact of taking this counterweight option away from the employer is that the employer is left without any reasonable method of breaking the impasse, thereby encouraging the union to simply stall and require the employer to resort to drastic measures such as layoffs.

Finally, we have serious concerns regarding the constitutional impact this bill will have on expenditure controls and separation of powers. Specifically, this bill limits the ability of the Governor to implement cost-item proposals necessary to achieve a balanced budget. The budget process is governed by both the Hawaii Constitution and statutory law. "No public money shall be expended except pursuant to appropriations made by law." Haw. Const. Art. VII, § 5. Under the constitution, the Governor must submit annual budgets, including "proposed expenditures" and "anticipated receipts[.]" Haw. Const. Art VII, § 8. This includes identifying "any recommended additional revenues or borrowings by which the proposed expenditures are to be met." Id. Revenue estimates must be based on the projections provided by the Council on Revenues. Haw. Const. Art. VII, § 7 ("The estimates shall be considered by the governor in preparing the budget, recommending appropriations and revenues and controlling expenditures. The estimates shall be considered by the legislature in appropriating funds and enacting revenue measures."). The constitution further requires that "[g]eneral fund expenditures for any fiscal year *shall not exceed* the State's current general fund revenues and unencumbered cash balances, except when the governor publicly declares the public health, safety or welfare is threatened[.]" Haw. Const. Art VII, § 5 (emphasis added). These provisions require the Governor to balance the budget. Board of Educ. v. Waihee, 70 Haw. 253, 256, 768 P.2d 1279, 1281 (1989) ("general fund expenditures exceeding the State's current general fund revenues and unencumbered cash

balances are interdicted by the State Constitution[.]"). Thus, limiting the ability of the Governor to implement cost-item proposals necessary to balance the budget a prohibited practice appears to be contrary to the Hawaii constitution.

We respectfully ask this committee to hold this bill.