NEIL ABERCROMBIE
GOVERNOR

NEIL DIETZ
CHIEF NEGOTIATOR

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OFFICE OF COLLECTIVE BARGAINING
EXECUTIVE OFFICE OF THE GOVERNOR
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TESTIMONY TO THE
SENATE COMMITTEE ON THE JUDICIARY AND LABOR

For Hearing on Friday, February 1, 2013
10:30 a.m., Conference Room 016

BY

NEIL DIETZ
CHIEF NEGOTIATOR

Senate Bill No. 1247
RELATING TO COLLECTIVE BARGAINING

TO CHAIRPERSON CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on S.B. No.1 247.

S.B. No. 1247 proposes to make unilateral implementation of a collective bargaining proposal by an employer or exclusive representative a prohibited practice in accordance with Hawaii Revised Statutes §89.

The Office of Collective Bargaining respectfully **opposes** this bill to the extent that it interferes with the Employer's rights and obligations as currently outlined in Hawaii Revised Statutes §89. Hawaii Revised Statutes §89-11(d)(4) provides "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." The Office of Collective Bargaining maintains that the unilateral implementation of a collective bargaining proposal by an employer is permitted in accordance with those terms.

Further, and especially in the case when arbitration is not provided as a dispute

resolution, the unilateral implementation of a collective bargaining proposal by an employer is a recognized labor relations tool. Although applied infrequently, it is a tool used by employers to counter balance the employees' right to strike. To prohibit this generally accepted practice weighs the balance of labor relations clearly on the side of the exclusive representative. And in the specific case of public employment, S.B. No. 1247 as proposed could prevent the employer from maintaining public services required of the government.

Unilateral implementation is not explicit proof, in and of itself, of bad faith bargaining. In the private sector, unilateral implementation of collective bargaining terms is an accepted practice, if in short, an impasses exists in bargaining and the parties have engaged in good faith bargaining. S.B. No. 1247 as proposed would make the result (i.e. unilateral implementation) proof of bad faith bargaining in and of itself even if other generally accepted requirements are met prior to any unilateral implementation.

Although S.B. No. 1247 as proposed would apply to both the employer and the exclusive representative, the real world application would apply to the employer. Thus, even if the employer complied with all the commonly accepted requirements to unilaterally implement collective bargaining terms, S.B. No. 1247 would make that employer statutorily guilty of bad faith bargaining.

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. Hawaii Revised Statutes §89 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.

Therefore, Hawaii Revised Statutes §89 already adequately addresses the requirement that public employers and exclusive representatives bargain in good faith. S.B. No. 1247 does not further that requirement. The Office of Collective Bargaining respectfully recommends that you do not approve the terms of S.B. No.1247 .

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

ON THE FOLLOWING MEASURE:
S.B. NO. 1247, RELATING TO COLLECTIVE BARGAINING.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 1, 2013 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Room 016

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

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Chair Hee 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 Hawaii employer-union health benefit trust fund, 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 after good faith negotiation, section 89-11, HRS, specifically provides the mechanism for resolving impasses depending on the bargaining units. For many bargaining units the impasse mechanism procedure is the submission of disputes to interest arbitration. However, for bargaining units that do not have the right to interest arbitration but have the right to strike, section 89-11(d), HRS provides the method by which to resolve impasses. Section 89-11(d), HRS, provides that the parties for bargaining unit (1), nonsupervisory employees in blue collar positions; bargaining unit (5), teachers and other personnel of the Department of Education; or bargaining unit (7) faculty of the University of Hawaii and the community college system, 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 1, 5, and 7 have the right to strike as provided in section 89-12(b), HRS. On the other hand, the employer's recourse includes the implementation of its pre-impasse proposals. The unilateral implementation of last, best, and final offer that was reasonably comprehended in the employer's previous proposals to the union after impasse is lawful, because at that point the employer has exhausted its statutory duty to bargain. This remedy specifically serves as a counterweight to the unions' right to strike. 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. 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. In addition, legislation that includes labor savings such as the General Appropriations Act of 2011, Act 164 for fiscal biennium 2012-13, necessarily requires the Governor to implement such legislatively imposed labor savings through collective bargaining. However, if after good faith negotiation an impasse exists, the Governor has the authority to resort to lawful remedies, including the unilateral implementation of the pre-impasse proposals. Thus, this bill significantly undermines the obligation of the Governor to implement budget reduction legislation and to carry out the executive branch's functions and thereby possibly violate the separation of powers principle.

We respectfully ask this Committee to hold this bill.

IMUALLIANCE

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

TESTIMONY FOR SENATE BILL 1247, RELATING TO COLLECTIVE BARGAINING

Senate Committee on Judiciary and Labor
Hon. Clayton Hee, Chair
Hon. Maile S.L. Shimabukuro, Vice Chair

Friday February 1, 2013, 10:30 AM
State Capitol, Conference Room 016

Honorable Chair Hee 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 SB 1247, 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**

HSTA
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TESTIMONY BEFORE THE SENATE COMMITTEE ON JUDICIARY AND LABOR

RE: S.B. 1247 – RELATING TO COLLECTIVE BARGAINING

DATE: FRIDAY, FEBRUARY 1, 2013

Person Testifying: WIL OKABE, PRESIDENT
HAWAII STATE TEACHERS ASSOCIATION

Chair Hee and Members of the Committee:

The Hawaii State Teachers Association (HSTA) **supports SB 1247** 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(NEA), HSTA has been adversely affected by the Department of Education's (Department) Last, Best and Final Offer (LBFO) whereas the employer willfully implemented without any regard to Hawaii Revised Statute, Chapter §89-13, "Prohibited Practice and Evidence of Bad Faith" bargaining.

In 2011, the State of Hawaii (State) walked away from the table 10 days before the contract ended and implemented "its last, best, and final offer". Prior to the expiration of the 2009-2011 contract, it was the first time in Hawaii's history for the State to unilaterally impose the contract of a 1.5% salary cut, and a 10% increase in employer/employee contributions, in addition to slashing pay for some instructional days. 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. 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 SB 1247** 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 an LBFO to any employee without the mutual agreement from the employee organization.

Thank you for the opportunity to testify.