

Charlotte A. Carter-Yamauchi
Acting Director

Research (808) 587-0666
Revisor (808) 587-0670
Fax (808) 587-0681



LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol, Room 446
415 S. Beretania Street
Honolulu, Hawaii 96813

Written Testimony

HCR154

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO EVALUATE THE ESTABLISHMENT OF SEPARATE MEDICAL AND PENSION BENEFIT PLANS FOR JUSTICES AND JUDGES

Testimony by the Legislative Reference Bureau
Charlotte A. Carter-Yamauchi, Acting Director

Presented to the House Committee on Finance

Tuesday, March 22, 2016, 2:00 p.m.
Conference Room 308

Chair Luke and Members of the Committee:

Good afternoon Chair Luke and members of the Committee, my name is Charlotte Carter-Yamauchi and I am the Acting Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written comments on H.C.R. No. 184, Requesting the Legislative Reference Bureau to Evaluate the Establishment of Separate Medical and Pension Benefit Plans for Justices and Judges.

The purpose of this measure, is to request that, as a part of its evaluation, the Legislature Reference Bureau include:

- (1) If separate medical and pension plans can be established; and
- (2) If such plans can be established, what types of plans can be established.

The measure also requests that the Bureau submit a report of its findings and recommendations, including any proposed legislation, to the Legislature not later than twenty days prior to the convening of the Regular Session of 2017.

While the Legislative Reference Bureau takes no position on the measure, we submit the following comments for your consideration.

According to the measure, the issue of potentially establishing separate medical and pension benefits plans for state justices and judges stems from the fact that state justices and judges are currently members of the Employees' Retirement System and the Hawaii Employer-Union Health Benefits Trust Fund, and as such, face potential conflicts of interest

when a case is brought to them that deals with the rights and benefits of members of the Employees' Retirement System and the Hawaii Employer-Union Health Benefits Trust Fund, especially with regard to the rights and benefits of the members in class A of the Employees' Retirement System, which includes justices and judges.

In fact, on January 13, 2016, the Hawaii State Supreme Court issued an order assigning substitutes for all five justices of the Supreme Court in the matter of Dannenberg v. State of Hawaii, Supreme Court, No. SCAP-15-0000084, a court case regarding the scope of constitutionally mandated health benefits for state and county retirees. It appears that the justices recused themselves in the Dannenberg case because of the justices' membership in the Employees' Retirement System and the Hawaii Employer-Union Health Benefits Trust Fund.

The measure infers that the exclusion of justices and judges from membership in the Employee's Retirement System and the Hawaii Employer-Union Health Benefits Trust Fund may allow justices and judges to impartially hear cases involving the rights and benefits of members of those pension and medical benefit plans.

Based on a cursory review of the Hawaii State Constitution and the Hawaii Revised Statutes, it seems that establishing separate medical and pension benefits plans for state justices and judges would not be constitutionally or statutorily barred for persons who first enter service as a justice or judge after the establishment of such new plans. However, as currently in force, article XVI, section 2 of the Hawaii State Constitution would probably not allow current or past justices or judges to be transferred to such new plans.

Furthermore, regardless of whether new plans are established for prospective justices or judges, if the need arises to adjudicate any claim regarding the new plans, it seems the potential conflict of interest issue would not be cured by the new plans' establishment, since, after all justices and judges transition to the new plans, the same justices and judges would still be called upon to preside over such cases.

With regard to the issue of what types of plans can be established, the Bureau lacks specific expertise in determining what would be deemed appropriate or commensurate medical or pension benefits plans that would attract qualified individuals to serve as justices or judges. However, if the Legislature feels that an evaluation of how other states provide medical and pension benefits for justices and judges within their own jurisdiction would be beneficial, then the Bureau may be able to complete such an evaluation in the timeframe provided if it is authorized to contract the services of a knowledgeable entity or person to conduct this survey; provided that adequate funds are appropriated for this purpose through an appropriate legislative vehicle and that the contract for such services is exempted from the State's Procurement Code.

Thank you again for your consideration.



The Judiciary, State of Hawaii

Testimony to the House Committee on Finance

Representative Sylvia Luke, Chair

Representative Scott Y. Nishimoto, Vice Chair

Tuesday, March 22, 2016, 2:00 p.m.
State Capitol, Conference Room 308

by

Rodney A. Maile

Administrative Director of the Courts

Bill No. and Title: House Concurrent Resolution No. 154 / House Resolution No. 106,
Requesting the Legislative Reference Bureau to Evaluate the Establishment of Separate Medical
and Pension Benefit Plans for Justices and Judges.

Judiciary's Position:

The Judiciary strongly opposes House Concurrent Resolution No. 154 and House Resolution No. 106.

The resolutions seek to have an evaluation completed on the feasibility of establishing separate pension and health benefit plans for justices and judges. The basis for seeking a study is the perception that justices or judges may have to recuse themselves from cases involving the Employees' Retirement System (ERS) and the Hawai'i Employer-Union Health Benefits Trust Fund (EUTF) by virtue of their membership in the ERS and EUTF.

The resolutions cite the recusals in *Dannenberg v. State of Hawaii*, Supreme Court, No. SCAP-15-0000084, as evidence that the exclusion of justices and judges from the ERS and EUTF may allow them to impartially hear cases involving members of those pension and health benefit plans. Pursuant to the Code of Judicial Conduct, justices and judges are precluded from discussing their respective reasons for recusing themselves from the *Dannenberg* case. However, the process followed in that case—having the Chief Justice appoint a judge of the intermediate court of appeals or the circuit court in place of the recused justice—worked well, and is no different than the process followed in any other case where a notice of recusal is filed



by a justice or judge. This process is set forth in article VI, section 2 of the Hawai'i Constitution and Hawai'i Revised Statutes section 602-10. In the unlikely circumstance that conflicts of interest prevent a full panel, the "rule of necessity" allows interested justices that would otherwise be disqualified to participate in the case. See Schwab v. Ariyoshi, 57 Hawai'i 348, 555 P.2d 1329 (1976). Consequently, there would never be a case where an appellate panel could not be constituted.

To establish new pension and health benefit plans that are separate from the general population of State and County government employees is neither cost effective nor economically feasible:

1. To establish separate plans for such a small number of employees (approximately 82 justices and judges) would undoubtedly result in exorbitant costs to both employees and the State.

The State would have to negotiate medical, prescription drug, dental, and vision plans with different carriers for a very small group of employees which may not result in having plans of equal value. It is questionable whether services offered under the various carriers would be the same or comparable to what is currently available to all employees under current health benefit plans. For example, the current health benefit plans offer a multitude of services including but not limited to: Physician Services (e.g., primary care office visit, screening, immunizations, Emergency Room care, ambulance services); Inpatient Hospital Services (hospital room and board, physician service, surgery, anesthesia, ancillary services); Outpatient Services (e.g., chemotherapy, radiation therapy, surgery, diagnostic lab, ex-ray, anesthesia); Mental Health Services (e.g., inpatient and outpatient care); and other Services (e.g., medical equipment, home health care, Hospice care, skilled nursing facility care, Physical and Occupational Therapy).

Prescription drug, vision and dental plans will also have to be established separately from other general employees.

2. The ERS and EUTF are experienced administrators of the State's pension and health benefits plan. To assign a separate entity to administer pension and health benefits for approximately 82 employees is not an efficient use of the State's resources.
3. If the administration of separate pension and health benefits plans will remain with the ERS and EUTF, expenditures will be required to modify operations to accommodate this separate group of employees. As ERS previously testified on HB2006, HD1, the proposed amendments to judges' retirement benefits will require costly modifications to



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its systems for such a small group of members. Similarly here, the proposed modifications would not be cost effective from a business perspective.

4. Having different groups of employees with different pension and health benefits plans is contrary to what EUTF has tried to accomplish, i.e., having all members in regular EUTF plans and not in separate health benefits plans. For EUTF, we surmise that having separate plans will not be cost effective for it to administer, similar to ERS' concerns.

Thank you for the opportunity to testify on House Concurrent Resolution No. 154 / House Resolution No. 106.