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March 11, 2019

Chair Taniguchi, Vice Chair Ihara, Jr., and Members of the Committee:

The Hawai'i Labor Relations Board (HLRB or Board) provides the following comments **in support of HB 1532 HD 1** for your consideration.

The HLRB is a quasi-judicial agency that oversees two areas of laws in the State of Hawai'i: (1) collective bargaining and unfair labor practices under Chapters 89 and 377 of the Hawai'i Revised Statutes (HRS), and (2) contests involving citations or orders of the Director of Labor and Industrial Relations involving occupational safety and health laws set forth in Chapter 396, HRS. As an administrative agency, the HLRB is also subject to the administrative procedures set forth in HRS Chapter 91.

HRS § 91-10(a) provides in relevant part:

Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

(Emphasis added.)

HRS § 377-9(c) provides in relevant part:

A full and complete record shall be kept of all proceedings had before the board and all testimony and proceedings shall be taken down by a reporter engaged for such purpose or by use of a mechanical recording device. It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

In the proceedings the board shall not be bound by technical rules of evidence. No hearsay evidence, however, shall be admitted or considered.

(Emphasis added.)

Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(8) states in relevant part:

(8) Rules of evidence:

(A) In any proceeding before the board, the board shall not be bound by technical rules of evidence.

(B) All irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(C) The board shall give effect to the rules of privilege recognized by law.

The HLRB believes the two HRS statutes conflict with one another in both intent and function and that HRS § 377-9(c) currently conflicts with itself. Further, the Board believes that HRS § 377-9(c) and HAR § 12-42-8(g)(8) are also in conflict.

The Board is conscious of concerns that hearsay evidence, if allowed, could lead to less than reliable evidence being considered. However, the Board considers all evidence presented in its deliberations and assigns the evidence the proper weight, striking that which is “irrelevant, immaterial, or unduly repetitious.”

Under the Hawai‘i Rules of Evidence, HRS Chapter 626, there are a myriad of exceptions (*see* Rules 802.1, 803, and 804) that allow certain types of hearsay evidence into the record. A strict reading of HRS § 377-9(c) could find that the HLRB cannot consider any hearsay evidence—which would mean evidence that correctly can be introduced into any other court or administrative proceeding under a hearsay exception, would not be permissible in a hearing before the HLRB. The Board believes that this type of construction conflicts with HRS § 91-10(a) and conflicts with the general principles that proceedings before administrative boards are more relaxed and less “bound by the rules of technical evidence.”

Thank you for your time and consideration of the HLRB’s comments in **support** of HB 1532 HD 1.

HB-1532-HD-1

Submitted on: 3/11/2019 2:42:42 PM

Testimony for LCA on 3/12/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Robert Katz	Individual	Oppose	No

Comments:

Allowing hearsay testimony is fundamentally unfair because it deprives the opposing party of the basic right to confront and examine the person who is the source of the hearsay testimony. Hearsay testimony is generally disfavored in our judicial system and only permitted in exceptional circumstances under the direction of trained lawyers/judges. I am a licensed Hawaii attorney who has attended HLRB hearings. The HLRB members often are not lawyers/judges trained to apply the exceptions to barring hearsay testimony. Hearsay testimony permitted by the HLRB will become part of the record on which any judicial reviews will be based. Given the potential monetary and other remedies that the HLRB may award opposing parties should have the right to confront the source of any hearsay statements.