DAVID Y. IGE
GOVERNOR

RYKER WADA
CHIEF NEGOTIATOR

STATE OF HAWAII
OFFICE OF COLLECTIVE BARGAINING
EXECUTIVE OFFICE OF THE GOVERNOR
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TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND TOURISM

For Hearing on Tuesday, March 16, 2021 at 9:00 a.m.
Conference Room 312 (Via Video Conference)

By

RYKER WADA
CHIEF NEGOTIATOR

Senate Bill No. 678 SD1
Relating to Collective Bargaining

CHAIRPERSON ONISHI, VICE CHAIR SAYAMA AND MEMBERS OF THE COMMITTEE:

The Office of Collective Bargaining (OCB) respectfully **OPPOSES** Senate Bill No. 678 SD1, which establishes that the representative of labor on the Hawaii Labor Relations Board be a person selected by a majority of the exclusive representatives of the collective bargaining units. It also establishes procedures for removal of the representative of labor on the Hawaii Labor Relations Board.

OCB has grave concerns that this bill diminishes the Governor's authority by compelling him to appoint a single individual identified by the exclusive representatives as a labor representative to the Hawaii Labor Relations Board. Current practice is for the Governor to make an appointment from a list of three nominees submitted by mutual agreement from a majority of the exclusive representatives. We believe there is no compelling reason to limit the pool of nominees from three to one.

Based on the above, the OCB respectfully requests that this measure be **held**. Thank you for considering our concerns and for the opportunity to testify on this measure.

MARCUS R. OSHIRO
CHAIRPERSON

SESNITA A.D. MOEPONO
BOARD MEMBER

J N. MUSTO
BOARD MEMBER

March 16, 2021

To: The Honorable Richard H.K. Onishi, Chair,
The Honorable Jackson D. Sayama, Vice Chair, and
Members of the House Committee on Labor & Tourism

Place: *Via Videoconference*

From: Marcus R. Oshiro, Chairperson
Sesnita A.D. Moepono, Member
J N. Musto, Member

Re: S.B. No. 678 S.D. 1 RELATING TO COLLECTIVE BARGAINING

I. OVERVIEW OF PROPOSED LEGISLATION

SB 678 SD 1 proposes to amend HRS § 89-5 by 1) amending the method of appointment of one Board member, and 2) adding a new section to provide for the removal of that Board member during the term of the appointment. The appointment, confirmation, and term of office for the other two members of the Board would remain the same.

The Hawai'i Labor Relations Board has serious concerns about this measure.

II. CURRENT LAW

The Hawai'i Labor Relations Board consists of a Board chairperson, who is representative of the public, and two Board members, one of whom is representative of management and one of whom is representative of labor.

HRS § 89-5 specifies that all three members are appointed to six-year terms by the governor. For the representative of labor, the governor is given a list of three nominees submitted by mutual agreement from a majority of the exclusive representatives.

III. COMMENTS ON THE SENATE BILL

Change 1 – Appointment

The Hawai'i Labor Relations Board, as created by HRS § 89-5, is a quasi-judicial Board with original jurisdiction over two chapters of the HRS, HRS Chapter 89 (state public sector collective bargaining) and HRS Chapter 377 (state private sector collective bargaining), and *de novo* appellate review of a third HRS Chapter 396 (state occupational safety and health citation and whistleblower discrimination cases). In appointing the representative of labor under HRS § 89-5, the governor is given a list of three nominees submitted by mutual agreement from a majority of the exclusive representatives.

Although the HLRB has jurisdiction over three laws, only **one** of the three constituencies served under these laws, the state public employment collective bargaining sector, currently has a voice as to who sits on the HLRB.

Approximately **50%** of the cases before the HLRB in recent years have been appeals under HRS § 396 (HIOSH). Yet, HIOSH, private employers and the private sector unions whose members may bring discrimination or other types of protected activity appeals under HRS § 396 have no voice as to who sits on the Board.

Private sector employers and unions, whose areas of work do not fall under the National Labor Relations Board's (NLRB) jurisdiction, comprise a small number of HLRB cases, but they also have no say as to who sits on the Board.

The Board respectfully notes that, should the Legislature wish to alter the way that a member of the HLRB is nominated, the Legislature should take into account the Board's other constituencies, such as private sector unions and small businesses, as well.

Change 2 – Removal

The Senate Committee on Judiciary, in SSCR 932, questions whether this second change is constitutional and consistent with legal provisions related to other boards and commissions. The Board would submit that this provision clearly does not provide due process, and the proponents of this provision have not provided any evidence that any other member of a board or commission has to face a similar removal provision.

As an administrative agency, the Board is subject to the requirements of HRS Chapter 91, Administrative Procedure, and must make decisions and issue orders that include findings of facts and conclusions of law (HRS § 91-12). These findings of facts are the Board's ruling as to what happened in a case and the conclusions of law are the Board's analysis after applying those facts to the relevant statute(s).

The Board, therefore, must act as a neutral body that does not favor complainant, respondent, Appellant or Appellee.

According to the American Bar Association's Model Code of Judicial Conduct's second canon, "a judge shall perform the duties of judicial office impartially, competently, and diligently." Any judge, including administrative law judges such as HLRB's members, must be able to impartially apply the facts to the relevant law. This ethical code requires that the Board must not favor one party over another and must take actions based on the facts and the law, rather than their personal feelings or desires.

Certainly, this requirement of impartiality can lead to parties being upset with particular Board decisions. However, the Board members take an oath to uphold the Constitution of the State of Hawai'i. Article I, Section 5 of the Constitution requires that parties before the Board receive due process of law and equal protection under the law. Therefore, the Board has an obligation to apply the law equally to parties, regardless of their personal feelings or backgrounds or designated seat.

Similar to judicial appointments, the Board members are currently protected from being removed due to political reasons or because a party dislikes the outcome of a case. Rather, there must be actual cause for their removal. This allows the Board to act independently and maintain its neutrality. This also provides the Board with stability and an opportunity to develop experience and expertise regarding HRS Chapters 89, 377, and 396.

The current language of HRS § 89-5 lays out that "…one member shall be representative of management, one member shall be representative of labor, and the third member, the chairperson, shall be representative of the public." By using "representative of" rather than "representing," the Legislature made it clear that the three Board members should have different experiential backgrounds to ensure that the Board can fully understand and consider the arguments. Accordingly, each member's prior experience should qualify them for nomination by the Governor and confirmation by the Senate.

What the Legislature did not state is that each Board member must advocate for or represent a particular constituency in cases. Rather, all Board members must faithfully listen to the presentations and consider any written arguments of all advocates, those from labor, management, and the public. After listening to the presentations and considering the written arguments, the Board must then make their decision based on the facts and the law.

The Legislature never presumed that the Board members would decide a case solely based on their background or designated seat. If Board members did so, that would lead to an untenable situation where parties would know how the majority of the Board

would rule before the case even began or lead to a deadlock. This would undermine the due process that all parties must be given under the Constitution.

While there is no process specified in the law to remove any Board member, as every member is submitted to the Hawai'i State Senate for confirmation, HLRB submits that it would follow that the Legislature would have the power to hold something akin to an impeachment proceeding, should that member be found to be unable to perform their duties adequately. This allows the Legislature, as a neutral body who does not appear before the Board, to consider whether a Board member is actually unable to adequately perform their duties or if a party or parties are simply unhappy that cases are not being decided in their favor.

If the Legislature chooses to formally institute a process through which the member representative of Labor can be removed by the public sector unions with no oversight from a neutral party such as the Legislature, the Board submits that it may wish to clarify that each union would have one vote to remove the Board member of labor, regardless of the number of bargaining units that union represents. This would prevent a union that represents multiple bargaining units from having sole say over who sits on the HLRB. Without this type of precaution, any time the Board finds against a union who represents multiple bargaining units, the Board may find itself in a position where it is unable to continue with its duties and decide cases, due to the requirements of HRS § 91-11, while the aggrieved union forcibly removes a member.

The Board feels a responsibility to bring forth this perspective to the attention of this Committee in its deliberations over SB 678 SD 1 and is available for any questions.

The House Committee on Labor & Tourism
Tuesday, March 16, 2021
9:00 AM
Videoconference, Conference Room 312

RE: **SB 678, SD1 Relating to Collective Bargaining**

Chair Onishi, Vice Chair Sayama and members of the Committee on Labor and Tourism, thank you for the opportunity to testify in **support of SB 678, SD1,** Relating to Collective Bargaining.

SB 678, SD1, Relating to Collective Bargaining seeks to amend §89-6, HRS, to ensure that the exclusive representatives as defined in §89-2, HRS, clearly have a voice in determining the representative of labor to sit on the Hawai'i Labor Relations Board (HLRB) and to provide a process for the removal of the representative of labor when the member does not demonstrate the necessary ability to serve effectively.

Historically, the exclusive representatives have been offered input on the representative of labor, but the ultimate decision was always made by the Governor. This legislation would help ensure that the representative of labor on the HLRB is chosen by the exclusive representatives to represent labor's interests.

We appreciate the opportunity to submit testimony in **support of SB 678, SD1,** Relating to Collective Bargaining.

Respectfully submitted,

Christian L. Fern
Executive Director
University of Hawaii
Professional Assembly

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HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Thirty-First Legislature, State of Hawaii
House of Representatives
Committee on Labor and Tourism

Testimony by
Hawaii Government Employees Association

March 16, 2021

S.B. 678, S.D. 1 – RELATING TO COLLECTIVE BARGAINING

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of S.B. 678, S.D. 1 which establishes that the Labor Representative on the Hawaii Labor Relations Board (HLRB) be selected by a majority of the Exclusive Representatives and confirmed by the Senate, and establishes a procedure for the Labor Representative's removal.

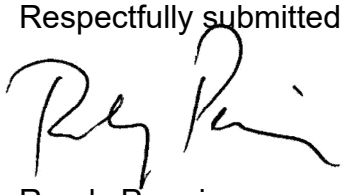
The mission of the HLRB is to fairly resolve labor disputes and enforce and protect the rights of unionized public employees and public unions to organize and bargain collectively in balance with the Employer's rights to manager operations. The HLRB is composed of three members – a representative of labor, a representative of management, and the chairperson who shall represent the public interest. The Labor Representative is appointed by the Governor from a list of three nominees submitted by a majority of the Exclusive Representatives and must be confirmed by the Senate, however the Governor also appoints both the Management Representative and the Chairperson of the Board, thus granting the Governor significant influence over all three seats. The current process grants the Governor too much authority over an adjudicatory board in which the Governor, serving as the Employer, is often party. Since decisions and rulings by the HLRB directly impact every unionized state and county government employee in Hawai'i, it is fair and reasonable to allow the Exclusive Representatives the right to collectively nominate our Labor Representative. Similarly, if the Labor Representative does not represent labor's best interests, there should be an established mechanism for removal and replacement.

Although a prior Committee raised concerns over the constitutionality of the proposed removal process, we find that the process is aligned with the Hawaii State Constitution, Article V, § 6 which states,

> "…Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and *removal of such members shall be as provided by law* [emphasis added]."

While this measure will not completely balance the scales of power between the Employer and the Exclusive Representatives, it will serve to ensure that the Exclusive Representatives' collective voice is strengthened. Thank you for the opportunity to testify in strong support of S.B. 678, S.D. 1.

Respectfully submitted,



Randy Perreira
Executive Director

HOUSE OF REPRESENTATIVES
THE THIRTY-FIRST LEGISLATURE
REGULAR SESSION OF 2021

COMMITTEE ON LABOR AND TOURISM
Representative Richard Onishi, Chair
Representative Jackson Sayama, Vice Chair

Tuesday, March 16, 2021, 9:00 AM
Conference Room 312 and via Videoconference

Re: Testimony in Support of SB678 SD1 - RELATING TO COLLECTIVE BARGAINING

Chair Onishi, Vice Chair Sayama, and Members of the Committee on Labor and Tourism:

The United Public Workers, AFSCME Local 646, AFL-CIO ("UPW") is the exclusive bargaining representative for approximately 14,000 public employees, which includes blue collar, non-supervisory employees in Bargaining Unit 1 and institutional, health, and correctional employees in Bargaining Unit 10, in the State of Hawaii and various counties. The UPW also represents 1,500 members in the private sector.

UPW **supports** of SB678 SD1, which establishes that the representative of labor on the Hawaii Labor Relations Board be a person selected by a simple majority of the exclusive representatives of the collective bargaining units. This bill would also establish procedures for removal of the representative of labor on the Hawaii Labor Relations Board during the member's term by a simple majority of the exclusive representation of the collective bargaining units. Under the current law, the exclusive representatives of labor have been able to provide input on the representative of labor on the Board, but the final decision is made by the Governor. This proposed legislation would help to establish that the exclusive representatives on labor's interest and voices are reinforced when it comes to the Board's labor representative.

Thank you for the opportunity to submit this testimony.

HAWAII STATE TEACHERS ASSOCIATION
Teaching Today for Hawaii's Tomorrow

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TESTIMONY BEFORE THE HOUSE COMMITTEE ON LABOR & TOURISM

RE: SB 678, SD1 - RELATING TO COLLECTIVE BARGAINING.

TUESDAY, MARCH 16, 2021

WILBERT HOLCK, EXECUTIVE DIRECTOR
HAWAII STATE TEACHERS ASSOCIATION

Chair Onishi and Members of the Committee:

The Hawaii State Teachers Association **supports SB 678, SD1**, relating to collective bargaining. This bill establishes that the representative of labor on the Hawaii Labor Relations Board be a person selected by a majority of the exclusive representatives of the collective bargaining units. It also stablishes procedures for removal of the representative of labor on the Hawaii Labor Relations Board.

As the representative of management for the Hawaii Labor Relations Board is appointed by the governor, who first considers any names submitted by the counties; provided that each county may submit no more than one name; **the process should be similar for the representative of labor in that a person who is appointed by the governor**, **but whose name has been submitted to the governor to serve as the representative of labor by the exclusive representatives certified pursuant to section 89-8. The process to determine the nominee whose name is to be submitted to the governor shall be determined by a simple majority of the exclusive representatives certified pursuant to section 89-8. The governor shall transmit the name of the person nominated to serve as the representative of labor to the senate for advice and consent not later than twenty days after submission of the nominee's name to the governor; provided that, if the governor fails to nominate the person whose name has been submitted by a simple majority of exclusive representatives in accordance with this paragraph, the simple majority of exclusive representatives who recommended the person shall transmit the person's name directly to the senate for confirmation.**

To be an exclusive representative of labor, shouldn't labor be included in the process for the selection? Therefore, to ensure labor is represented as they should be in HLRB, the Hawaii State Teachers Association asks your committee to **support** this bill.