UNITED PUBLIC WORKERS

AFSCME Local 646, AFL-CIO

HOUSE OF REPRESENTATIVES
THE THIRTY-SECOND LEGISLATURE
REGULAR SESSION OF 2024

COMMITTEE ON LABOR & GOVERNMENT OPERATIONS
Rep. Scot Z. Matayoshi, Chair
Rep. Andrew Takuya Garrett, Vice Chair

Thursday, March 14, 2024, 9:15 AM
Conference Room 309 & Videoconference

Re: Testimony on SB2991, SD2 – RELATING TO COLLECTIVE BARGAINING UNIT CREATION

Chair Matayoshi, Vice Chair Garrett, and Members of the Committee:

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.

UPW provides **comments** on SB2991, SD2, which requires the Hawaii Labor Relations Board ("HLRB") to adopt rules establishing criteria for the creation of new bargaining units. This measure also requires any employee, employer, or exclusive representative proposing a new bargaining unit to submit an application to the Board. It also allows any employee, employer, or exclusive representative to petition the Board to determine the appropriateness of a new bargaining unit. Furthermore, this bill requires the Board to consider certain criteria in determining the appropriateness of a new bargaining unit, as well as requires the Board to, upon its approval of the application, submit a report to the Legislature, including proposed legislation for the Legislature to consider and enact to create the new bargaining unit, accompanied by a decision and order issued by the Board.

While UPW supports establishing a clear process that outlines procedures, justification, and requirements for the creation of a new bargaining unit, we believe that allowing any employee to petition the HLRB could prove problematic. Bargaining Units 1 and 10, which UPW is the exclusive representative for, are mixed bargaining units ("BU") that are comprised of dozens of classifications across nine employer jurisdictions. If this bill were to pass as written, HLRB, exclusive representatives, and employers may have to respond to numerous petitions from employees, who may or may not be union members, seeking a new BU.

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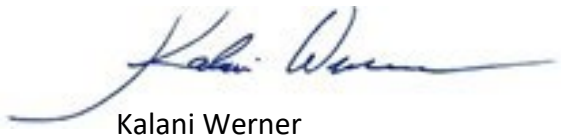
Mahalo for the opportunity to testify on this measure.

Sincerely,



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LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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The Thirty-Second Legislature, State of Hawaii
House of Representatives
Committee on Labor & Government Operations

Testimony by
Hawaii Government Employees Association

March 14, 2024

S.B. 2991, S.D. 2 – RELATING TO COLLECTIVE BARGAINING UNIT CREATION.

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO wishes to provide comments on the concept of S.B. 2991, S.D. 2 which requires the Hawai'i Labor Relations Board to adopt rules establishing criteria for the creation of new bargaining units. **We respectfully request a proposed amendment to only allow the exclusive representative or the employer to submit an application and petition the Hawaii Labor Relations Board to determine the appropriateness of a new Bargaining Unit.**

We have concerns about allowing any employee to apply and petition the Hawaii Labor Relations Board (HLRB) to determine the appropriateness of a new bargaining unit. We fear that granting any employee the opportunity to petition the HLRB may cause a slew of petitions – petitions that may be unwarranted or unjustifiable, which may require public sector unions to use resources on an argument that is moot. As Hawaii's largest public sector union, we represent nine (9) out of the fifteen (15) bargaining units. Should our members bring forth an issue and feel compelled to create a separate bargaining unit, we can work with the member(s) to determine the best avenue to address their issue, whether that be to petition the HLRB to create a new bargaining unit or through the grievance process, internal complaint process, or an attempt to negotiation in good faith with the employer on a separate agreement (MOU, MOA, Supplemental Agreement).

Thank you for the opportunity to provide comments on S.B. 2991, S.D. 2.

Respectfully submitted,

Randy Perreira
Executive Director

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WRITTEN ONLY

LATE

Testimony Presented Before the
House Committee on Labor & Government Operations
The Honorable Scot Z. Matayoshi, Chair
The Honorable Andrew Takuya Garrett, Vice Chair

Thursday, March 14, 2024 at 9:15 a.m.
Via Videoconference
Conference Room 309, State Capitol

by Marcus R. Oshiro
Chairperson, Hawaiʻi Labor Relations Board

S.B. No. 2991, S.D. 2, Relating to Collective Bargaining Unit Creation

Chair Matayoshi, Vice Chair Garrett, and Members of the Committee:

The Hawaiʻi Labor Relations Board (HLRB or Board) takes no position on S.B. No. 2991, S.D. 2, and defers to the Legislature to determine whether the authority to develop the criteria for and to assess requests for creating new bargaining units should be delegated to the HLRB.

The HLRB respectfully refers this Committee to the HLRB's Report to the Hawaiʻi State Legislature pursuant to House Concurrent Resolution No. 61, House Draft 1, Regular Session of 2023, Requesting the Hawaii Labor Relations Board to Establish Objective Standards and Criteria for Splitting Off a Group of State Workers into a New Bargaining Unit, found online at https://labor.hawaii.gov/hlrb/files/2023/12/HCR61-HD1-Rept-to-Leg-FINAL-12.28.2023.pdf, for guidance in its deliberations on this measure. Specifically, the HLRB refers this Committee to attached pages 1-7 and 57-58 of the report, which summarize the Hawaiʻi State Legislature's original intent to retain exclusive authority to determine standards and criteria and to statutorily designate appropriate bargaining units. This bill would relinquish the Legislature's power to the HLRB.

If it is the Legislature's intent to delegate its constitutional authority to the HLRB, then the HLRB respectfully requests that the delegation be complete and that HRS Chapter 89 be amended to make clear that except for bargaining units established under HRS § 89-6(a), the HLRB will determine all new bargaining units based on minimum standards and criteria set by the Legislature and by specific rules of practice and procedure drafted and promulgated by the HLRB and approved by the Governor.

Thank you for the opportunity to provide testimony on S.B. No. 2991, S.D. 2.

Hawai‘i Labor Relations Board
Ka Papa Limahana O Hawai‘i

Report to the Hawai‘i State Legislature
Pursuant to House Concurrent Resolution No. 61, House Draft 1
Regular Session of 2023

December 2023

1. Introduction

On April 24, 2023, the House of Representatives of the 32nd Legislature of the State of Hawai‘i, Regular Session of 2023, with the Senate concurring, adopted House Concurrent Resolution No. 61, House Draft 1 (H.C.R. 61, H.D. 1), requesting the Hawai‘i Labor Relations Board (HLRB) to establish objective standards and criteria for splitting off a group of state workers into a new bargaining unit to assist the Legislature in determining the appropriateness of requests that come before it.[1]

As requested, this report presents the HLRB's findings and recommendations to the Legislature no later than twenty days prior to the convening of the Regular Session of 2024. The HLRB respectfully declines to establish objective standards and criteria for splitting off a group of state workers into a new bargaining unit or to include any proposed legislation for the reasons explained below.

2. The Hawai‘i State Legislature Reserved for Itself the Authority to Determine and Designate Appropriate Bargaining Units

2.1 Background

In 1968, the Hawai‘i Constitution was amended to extend to public employees in the State of Hawai‘i the right to organize for the purpose of collective bargaining. Specifically, Article XII (Organization; Collective Bargaining), section 2 (Public Employees) of the Hawai‘i Constitution was amended to provide that:

> Persons in public employment shall have the right to organize for the purpose of collective bargaining *as prescribed by law* [emphasis added].[2]

The proviso "as prescribed by law" reflected the intent of the delegates to the 1968 Hawai‘i Constitutional Convention to entrust the Hawai‘i State Legislature (Legislature) with the discretion to determine the scope and extent of collective bargaining rights for public employees.[3]

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[1] H. Con. Res. 61, Haw. 32nd Leg. (2023), https://www.capitol.hawaii.gov/sessions/session2023/bills/HCR61_HD1_.PDF (last visited on December 18, 2023).

[2] In 1978, the constitutional provision pertaining to collective bargaining in public employment was renumbered and amended. Presently, Article XIII (Organization; Collective Bargaining), section 2 (Public Employees) of the Hawai‘i Constitution, provides that:

> Persons in public employment shall have the right to organize for the purpose of collective bargaining *as provided by law* [emphasis added].

[3] See, Proceedings of the Constitutional Convention of Hawaii of 1968, Vol. 1, pp. 104-05 (Dept. Com. No. 2) and pp. 206-07 (S.C. Rep. No. 4).

2.2 Act 171, Session Laws of Hawai‘i 1970

To implement the constitutional mandate of then Article XII, section 2, the Legislature, in 1970, passed Senate Bill No. 1696-70, Senate Draft 1, House Draft 3, Conference Draft 1 (S.B. 1696-70, S.D. 1, H.D. 3, C.D. 1), Relating to Collective Bargaining in Public Employment, which was signed into law by Governor John A. Burns and became Act 171, Session Laws of Hawai‘i (SLH) 1970.

During the process of enacting S.B. 1696-70, S.D. 1, H.D. 3, C.D. 1, the Legislature made clear its intent, in the public interest, to designate statutory bargaining units for public employees and to make those units applicable statewide. The Senate Committee on Public Employment explained:

> (1) **Appropriate bargaining units.** Your Committee realizes that the determination of appropriate bargaining units by the public employment relations board, according to criteria such as community of interest,[4] history of collective bargaining, etc., is the prevailing practice throughout the states which have enacted collective bargaining laws. A review of the effectiveness of such criteria and the inherent problems and disputes arising out of such determination, shows that the creation of many bargaining units as there are ways to interpret such criteria results and [sic] unnecessary fragmentation makes administration efficiency impossible. For the purposes of maintaining the merit principles and the principle of equal pay for equal work, avoiding multiplicity of bargaining units which would be administratively unmanageable, and minimizing jurisdictional disputes, your Committee has, in the public interest, designated those units which shall be appropriate for the purpose of collective bargaining. The designated units are occupational categories based on existing compensation plans, the nature of work involved, and the essentiality of services provided to the public. All designated units are applicable statewide to maintain uniformity among the several counties and to discourage "leap-frogging" tactics among employee organizations which may otherwise be representing employees within the same occupational category in different counties.[5]

[4] An overwhelming majority of states with statutory standards and criteria for determining appropriate bargaining units list "community of interest" as an essential criterion. See Section 3 of this report.

[5] S. Journal, 5th Leg., S.C. Rep. 715-70 (Haw. 1970).

The Committee on Conference incorporated this statement of intent into its report recommending final passage of the bill, as amended.[6] It is important to highlight that the Legislature did make several important findings or determinations.

First, the Legislature recognized the prevailing practice of most states to empower an agency to determine appropriate bargaining units according to criteria such as community of interest, history of collective bargaining, etc. but rejected this common practice finding it was ineffective, resulted in fragmentation, and made administration efficiency impossible. Second, the Legislature, for purposes of maintaining the merit principles and principle of equal pay for equal work, and to avoid multiplicity of bargaining units which would be administratively unmanageable, and to minimize jurisdictional disputes, retained to itself the discretion to designate bargaining units that would be appropriate for collective bargaining. Third, the Legislature determined that the bargaining units would be comprised of occupational categories based on existing compensation plans, that nature of work involved, and essentiality of services provided to the public. And fourth, the Legislature determined that the designated bargaining units would be applicable statewide to maintain uniformity among the several counties and to discourage "leap-frogging" tactics among employee organizations representing employees in different counties.

Clearly, the Legislature examined the prevailing practices of the day but rejected delegating that authority to an agency such as the Hawai‘i Public Employment Relations Board, predecessor to the Hawai‘i Labor Relations Board, and instead retained to itself the sole authority to: 1) set the standards and criteria; and 2) statutorily determine the appropriate bargaining units.

2.3 Chapter 89, Hawai‘i Revised Statutes

Act 171, SLH 1970, was codified as Chapter 89, Hawai‘i Revised Statutes (HRS), Collective Bargaining in Public Employment. At the time, the Legislature, in its discretion, designated 13 statutory public employee bargaining units. Since then, the Legislature has established two more bargaining units,[7] resulting in 15 public employee bargaining units today. For more than 50 years since the enactment of Chapter 89, HRS, the Legislature's prerogative to create new bargaining units, or to modify existing ones, has remained unchallenged.

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[6] H. Journal, 5th Leg., C.C. Rep. 24 (Haw. 1970).

[7] Act 137, SLH 2013 (S.B. 883, S.D. 2, H.D. 2) created bargaining unit 14, to be comprised of state law enforcement officers and state and county ocean safety and water safety officers. Prior to the enactment of S.B. 883, S.D. 2, H.D. 2 (2013), state law enforcement officers and state and county ocean safety and water safety officers were included in bargaining unit 03 (white collar nonsupervisory workers) and bargaining unit 04 (white collar supervisors).

Act 31, SLH 2020 (H.B. 1698, H.D. 1, S.D.1) established bargaining unit 15, to create a separate bargaining unit for state and county ocean safety and water safety officers, who were initially included in bargaining unit 03 (white collar nonsupervisory workers) and bargaining unit 04 (white collar supervisors), then moved to bargaining unit 14.

Presently, subsection 89-6(a), HRS, recognizes 15 public employee bargaining units, qualified by subsections (b) and (c), as follows:

> **§89-6 Appropriate bargaining units.** (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> (1) Nonsupervisory employees in blue collar positions;
> (2) Supervisory employees in blue collar positions;
> (3) Nonsupervisory employees in white collar positions;
> (4) Supervisory employees in white collar positions;
> (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent;[8]
> (6) Educational officers and other personnel of the department of education under the same pay schedule;
> (7) Faculty of the University of Hawaii and the community college system;
> (8) Personnel of the University of Hawaii and the community college system, other than faculty;
> (9) Registered professional nurses;
> (10) Institutional, health, and correctional workers;[9]
> (11) Firefighters;
> (12) Police officers;
> (13) Professional and scientific employees, who cannot be included in any of the other bargaining units;[10]
> (14) State law enforcement officers; and
> (15) State and county ocean safety and water safety officers.
>
> (b) Because of the nature of work involved and the essentiality of certain occupations that require specialized training,

[8] Act 394, SLH 1988 added part-time employees working less than twenty hours a week who are equal to one-half a full-time equivalent for inclusion in unit (5).

[9] Act 399, SLH 1988 redescribed unit (10) from nonprofessional hospital and institutional workers to institutional, health and correctional workers.

[10] Act 253, SLH 2000 redescribed unit (13) from professional and scientific employees, other than registered professional nurses to professional and scientific employees, who cannot be included in any other bargaining units.

> supervisory employees who are eligible for inclusion in units (9) through (15) shall be included in units (9) through (15), respectively, instead of unit (2) or (4).
>
> (c) The classification systems of each jurisdiction shall be the bases for differentiating blue collar from white collar employees, professional from institutional, health and correctional workers, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty. In differentiating supervisory from nonsupervisory employees, class titles alone shall not be the basis for determination. The nature of the work, including whether a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall be considered also.

Notably, subsection 89-6(a), as originally enacted, designated units (9) through (13) as optional appropriate bargaining units that allowed employees in any of the optional units, including supervisory employees by mutual agreement among supervisory and nonsupervisory employees within the unit, to vote for separate units or for inclusion in their respective units (1) through (4).[11] Today, that original provision of the law has evolved into subsection 89-6(b), HRS, which mandates that supervisory employees who are eligible for inclusion in units (9) through (15) shall be included in units (9) through (15) instead of unit (2) or (4).

Similarly, subsection 89-6(c), HRS, renumbered today as subsection 89-6(f), HRS, initially identified seven classes of individuals in public employment who are excluded from collective bargaining. As originally enacted by the Legislature in 1970, subsection 89-6(c), HRS, provided that:

> No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director, or chief of a state or county department or agency, or any major division thereof as well as his deputy, first assistant, and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations, part time employee working less than twenty hours per week, temporary employee of three months duration or less, or any commissioned and enlisted personnel of the Hawaii national guard, shall be included in any appropriate bargaining unit or entitled to coverage under this chapter.[12]

[11] See, Act 171, SLH 1970.

[12] Id.

Over the ensuing years, the Legislature expanded what is today known as subsection 89-6(f), HRS, to include eighteen classes of individuals in public employment who are excluded from collective bargaining,[13] as follows:

> **§89-6 Appropriate bargaining units.**
>
> * * *
>
> (f) The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:
>
> (1) Elected or appointed official;
>
> (2) Member of any board or commission; provided that nothing in this paragraph shall prohibit a member of a collective bargaining unit from serving on a governing board of a charter school, on the state public charter school commission, or as a charter school authorizer established under chapter 302D;
>
> (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a

[13] Act 36, SLH 1973 added employee of the executive office of the governor, household employee at Washington Place, employee of the executive office of the mayor, staff of the legislative branch of the State, city and county of Honolulu and counties of Hawaii, Maui and Kauai, employee of the executive office of the lieutenant governor, inmate, kokua, patient, ward or student of a state institution, and student help to the list of individuals excluded from collective bargaining.

Act 13, SLH 1976 added staff of the legislative branch of the city and county of Honolulu and counties of Hawaii, Maui and Kauai except employees of the clerks' offices of said city and county and counties to the list of individuals excluded from collective bargaining.

Act 184, SLH 1987 added legal counsel of a public employer to the list of individuals excluded from collective bargaining.

Act 311, SLH 1987 added secretary to top-level managerial and administrative personnel to the list of individuals excluded from collective bargaining.

Act 253, SLH 2000 created an enumerated list of individuals excluded from collective bargaining and added staff of the HLRB to the list.

Act 65, SLH 2002 added employee of the Hawaii national guard youth challenge academy to the list of individuals excluded from collective bargaining.

Act 202, SLH 2005 added employee of the office of elections to the list of individuals excluded from collective bargaining.

Act 298, SLH 2006, Act 115, SLH 2007, and Act 130, SLH 2012 qualified exclusion (2) member of any board or commission by adding and subsequently amending a proviso that allows a member of a collective bargaining unit to serve on a charter school board or the state public charter school commission, or as a charter school authorizer established under chapter 302D.

department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;

(4) Secretary to top-level managerial and administrative personnel under paragraph (3);

(5) Individual concerned with confidential matters affecting employee-employer relations;

(6) Part-time employee working less than twenty hours per week, except part-time employees included in unit (5);

(7) Temporary employee of three months' duration or less;

(8) Employee of the executive office of the governor or a household employee at Washington Place;

(9) Employee of the executive office of the lieutenant governor;

(10) Employee of the executive office of the mayor;

(11) Staff of the legislative branch of the State;

(12) Staff of the legislative branches of the counties, except employees of the clerks' offices of the counties;

(13) Any commissioned and enlisted personnel of the Hawaii national guard;

(14) Inmate, kokua, patient, ward, or student of a state institution;

(15) Student help;

(16) Staff of the Hawaii labor relations board;

(17) Employees of the Hawaii national guard youth challenge academy; or

(18) Employees of the office of elections.

Ultimately, the discretion to designate appropriate bargaining units and to determine whether certain individuals should be included or excluded from collective bargaining is in the hands of the Legislature. If the Legislature continues to follow the intent expressed by the original drafters of Chapter 89, HRS, it should remain "mindful of maintaining the merit principles and the principle of equal pay for equal work, avoiding multiplicity of bargaining units which would be administratively unmanageable, and minimizing jurisdictional disputes" when designating, in the public interest, appropriate bargaining units by "occupational categories based on existing compensation plans, the nature of work involved, and the essentiality of services provided to the public."[14]

[14] See, S. Journal, 5th Leg., S.C. Rep. 715-70 (Haw. 1970), *supra*.

4.18 West Virginia

Public employees in West Virginia have no right, statutory or otherwise, to engage in collective bargaining. See W.Va. Code § 18-5-45a, citing Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 183 W.Va. 15 (1990), where the West Virginia Supreme Court of Appeals held that "[public] employees have no right to strike in the absence of express legislation or, at the very least, appropriate statutory provisions for collective bargaining, mediation, and arbitration."

4.19 Wyoming

Wyoming permits workers to organize for the purpose of collective bargaining, see Wyo. Stat. § 27-7-101, et seq., and also grants workers the right to work, see Wyo. Stat. § 27-7-108, et seq., but Wyoming laws are not specific to public employees nor do they provide a comprehensive labor relations scheme.

5. Conclusion

Considering the full legislative history of section 89-6, HRS, the Hawai‘i Labor Relations Board without further guidance and authorization from the Legislature, is unable to fashion or propose any objective standards and criteria for splitting off a group of state workers into a new bargaining unit to assist the Legislature in determining the appropriateness of requests that come before it. A survey of the 50 states revealed two general categories of laws: 1) those that authorize an agency or board to determine appropriate bargaining units based on statutory or other criteria; and 2) those that limit or prohibit public sector bargaining but reserve that determination to lawmakers. Hawai‘i, as may be expected, does not fit squarely into either category. Chapter 89, HRS, is unique to Hawai‘i and is reflective of our history, culture, and politics.

Since the inception of Act 171, SLH 1970, the Legislature has determined the appropriateness of bargaining units, initially establishing 13 bargaining units. For over 43 years, the number of bargaining units remained the same until the Legislature amended the law through Act 137, SLH 2013, to create bargaining unit 14, comprised of state law enforcement officers and state and county ocean safety and water safety officers, who were formerly included in bargaining units 03 and 04. Seven years later, the Legislature amended the law again through Act 31, SLH, 2020, to create bargaining unit 15, comprised of only state and county ocean safety and water safety officers, who were previously placed in bargaining unit 14. In both actions, the Legislature clearly met its constitutional responsibilities under Article XIII, section 2 of the Hawai‘i Constitution and demonstrated its exclusive legislative authority to establish appropriate bargaining units under Chapter 89, HRS.

Should the Legislature desire to relinquish the power to determine new bargaining units, as other states have done, it should itself, carefully examine and review the statutory standards and criteria of other states and amend Chapter 89, HRS, to: 1) establish standards and criteria for determining bargaining units; and 2) give the responsibility and authority of determining new bargaining units to the Hawai‘i Labor Relations Board.