ACT 90 S.B. NO. 1096

A Bill for an Act Relating to Government.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. The legislature finds that while the State's economy is demonstrating some evidence of recovery after almost a decade of low growth and recession, the demands on government for the delivery of core services continue to increase. The legislature also finds that the use of tax and fee hikes to meet projected government expense increases are counterproductive to the very economic recovery that produces revenues to fund those expenses. As such, it is more important than ever that government have the ability to deliver services by the most efficient means possible.

To this end, the State and its counties have long used the private sector to provide public services to Hawaii's citizens. Historically, government agencies and private organizations have benefited from outsourcing to increase efficiency and take advantage of larger economies of scale, and have used resources that are owned or have been developed by the private sector to achieve savings for the long-term good. When time and need have suggested that opportunities would be missed or that costs might be avoided or minimized, government has used private sector services and expertise to take advantage of the opportunity rather than "start from scratch." In certain instances, outsourcing could provide the flexibility needed to enable government to remain fluid in its ability to effectively provide services for the ever changing needs of its constituency.

However, in recent years, certain circumstances have contributed to curtailing state and county governments' ability to utilize privatization as a means of cutting costs and more efficiently managing its resources.

Because of the Hawaii supreme court's decision in the consolidated cases *Konno v. County of Hawaii*, 85 Haw. 61 (1997) and other occurrences, the basic authority of state and county government to deliver public services through the private sector has been called into question.

In *Konno,* the Hawaii supreme court invalidated a contract between the county of Hawaii and a private landfill developer and operator after concluding that under the State's civil service laws, only civil servants could perform the services and fill the positions historically and customarily provided or filled by civil servants. While the supreme court in *Konno* "emphasize[d] that nothing in this opinion should be interpreted as passing judgment, one way or the other, on the wisdom of privatization," and acknowledged that "[w]hether or not, as a policy matter, private entities should be allowed to provide public services entails a judgment ordinarily consigned to the legislature", it also noted that "the civil service encompasses those services that have been customarily and historically provided by civil servants", and concluded that, absent express legislative authority to obtain services from other sources, civil servants must provide these services.

Consequently, state and county agencies, in some instances, were precluded from entering into service contracts with private providers to obtain the services they needed, reduce direct labor, material, and equipment costs, and take advantage of indirect savings through contractual provisions for insurance and indemnification against third-party and regulatory liability claims.

Recognizing the negative fiscal impact the *Konno* decision would have on government, the legislature enacted Act 230, Session Laws of Hawaii 1998 (Act 230), which provided the necessary express authority to the State and counties to contract with the private sector. Act 230 also established a committee to develop a

managed process that would allow state and county agencies to contract with the private sector for the provision of government services, thereby making government more efficient and cost-effective. The justification for establishing the process was to ensure that when government decides to seek services from the private sector, it relies on the accurate assessment of costs and perceived benefits in order to make informed and responsible decisions. Although the managed process committee completed its work mandated pursuant to Act 230 and submitted its recommendations to the governor and the legislature, a complete working model of managed competition has yet to be implemented.

Not willing to wait or rely solely upon the results of Act 230 to make government more efficient and responsive to the needs of the public, the legislature enacted Act 253, Session Laws of Hawaii 2000 (Act 253), otherwise known as the Civil Service Modernization Act. Act 253 contained sweeping employment reforms that shape the way government service will be defined in the twenty-first century. Under this new paradigm, no longer will public agencies be resigned to the "one size fits all" mentality of hiring, allocating, training, and retaining their employees. Act 253 in part, enables the State, counties, and other public jurisdictions to custom tailor their workforce to suit their particular needs. Act 253 also authorized the use of experimental modernization projects by public agencies as a means to modernize and streamline their operations in lieu of privatizing the functions of the public agency.

Although the managed competition process embodied in Act 230 and the experimental modernization project concept authorized under Act 253 paved the way towards improving government efficiency and provided management with some of the tools necessary to effect change, the legislature believes that more can be done to expedite the process of improving the cost-effectiveness of providing services to the public.

As such, in furtherance of the new paradigm embraced under Acts 230 and 253, the legislature asserts that privatization should be included as a management tool to assist government in remaining fluid in its ability to effectively provide services for the ever changing needs of its constituency. The legislature believes that providing public sector management with a full complement of management tools to choose from...namely privatization, managed competition, and experimental modernization projects...affords public sector management a vast array of options to achieve its goal of government efficiency.

However, the legislature is fully aware of the negative impact privatization and managed competition will have on public sector employees' ability to negotiate fair and adequate compensation packages, as the balance of negotiating power will be tipped in favor of public sector management. In order to ensure that the fragile balance between employer and employee negotiating leverage is maintained, the legislature believes that certain public employees should have their right to strike reinstated and that the essential employee statutes should be repealed.

The purpose of this Act is to make government more efficient and economical by:

(1) Enabling the governor and the executives of other jurisdictions to utilize privatization as a management tool to provide government services more efficiently;

(2) Authorizing the governor and the executives of other jurisdictions to utilize a managed competition process as a management tool to provide government services more efficiently, if they so choose;

(3) Addressing and resolving the uncertainty generated by the Hawaii supreme court's decision in *Konno v. County of Hawaii*, 85 Haw. 61 (1997), regarding government's ability to rely upon the private sector for services government needs or is required to provide;

(4) Restoring the right to strike for all collective bargaining units except firefighters, police officers, and institutional, health, and correctional workers; and
(5) Repealing references to essential employees and essential positions.

PART II

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
PRIVATIZATION

§ **-1 Scope and application.** This chapter preempts and supersedes all other state law with regard to determining whether services, including services obtained in conjunction with the procurement of goods and construction, funded by the State or any of its counties, should be provided exclusively by government or obtained through government contracts from the private sector. Procurement laws shall be applied, as appropriate, if a determination is made pursuant to this chapter that a service should be obtained by contract from the private sector.

§ **-2 Determination; standards.** (a) Notwithstanding any law to the contrary, including but not limited to chapters 46, 76, 77, 78, 89, and 89A, any other applicable civil service law, customary or historical past practices, or the fact that the services hereinafter described may have been performed by persons or positions in civil service, any state or county official in whom procurement authority is vested by law may enter into a contract financed by public funds, with a private entity to obtain services, including services provided in conjunction with the procurement of goods or construction, from a private entity, when there is reasonable basis to believe that the service of equivalent or better quality than that which could be provided by a government agency can be provided at lower cost.

(b) For purposes of this chapter, a "private entity" is any individual, company, or organization that is not an employee or agency within the federal, state, or county government.

(c) In the determination made pursuant to this chapter, the state or county official shall consider whether contracting with the private entity will:

(1) Jeopardize the government's ability to provide the service if the private entity fails to perform, or the contract becomes unprofitable or impossible for a private entity to perform;
(2) Impact on any employee covered by civil service laws; provided that the impact shall not prevent the procurement of services pursuant to this chapter;
(3) Affect the nature of the service the agency needs, including whether:
    (A) The service is self-contained or part of a larger service delivery system;
    (B) The service is geographically dispersed;
    (C) The service is a core or ancillary government service and if in-house resources are available or needed;
    (D) Government control is necessary;
    (E) Government accountability can be shared; and
    (F) Governmental authority will be diluted;
(4) Increase the potential for achieving cost savings, including:
    (A) The need to abandon or repurchase capital improvements or equipment that are not fully depreciated;

(B) The extent to which the service is available in the private sector marketplace; and

(C) The extent to which federal or state restrictions may reduce private sector interest in providing or performing the needed or required service; and

(5) Affect the extent to which the services are needed or required, and how the criteria to select a service provider can be described in objective specifications.

(d) Any employee displacements shall be subject to section 46- or 89A-1(e) as appropriate.

§ **-3 Annual reports.** Each state and county department and agency that uses the contracting process set out in this chapter, shall submit a report to the legislature no later than twenty days prior to the convening of the regular session of each year beginning with 2002. The report shall include:

(1) An itemization of all services that were outsourced or subjected to the processes set out in this chapter;

(2) The agency's or department's justification that standards for determination were met;

(3) The cost of services obtained through the process set out in this chapter;

(4) A copy of all contracts entered into under this chapter; and

(5) An accounting of civil service employees displaced as a consequence of this chapter.''

PART III

SECTION 3. Chapter 46, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§46- Authority of counties to engage in the process of managed competition; established.** (a) Subject to the approval of the governor and the respective mayor of the county, the agency designated by the mayor with the responsibility to oversee the managed process for public-private competition for government services shall:

(1) Assist the mayor in formulating the county's philosophy for public collective bargaining and for the managed process for public-private competition for government services, including which particular service can be provided more efficiently, effectively, and economically considering all relevant costs; and

(2) Coordinate and negotiate the terms and conditions or the managed competition process on behalf of the county with exclusive representatives of affected public employees and private contractors.

(b) If a county executes a contract with a private contractor pursuant to the managed competition process authorized under this section, the county may use the layoff provisions of the civil service laws and the respective collective bargaining contracts to release employees displaced from their positions by the managed competition process. Prior to implementing any layoff provision of the civil service laws or a collective bargaining contract, the county shall use its resources for placing, retraining, and providing voluntary severance incentives for displaced employees. Methods that may be used to minimize or avoid the adverse effects of an agency's decision to secure needed services from contractors may include:

(1) Coordination with the private service provider awarded the contract under this section to continue a displaced employee's employment as an employee of the contractor;

(2) Reassignment to another civil service position the employee is qualified to fill;
(3) Retraining to qualify the employee for reassignment; and
(4) Severance incentives."

SECTION 4. Section 89A-1, Hawaii Revised Statutes is amended to read as follows:

"**§89A-1 Office of collective bargaining [~~in the state government established.~~] and managed competition.** (a) There shall be established an office of collective bargaining and managed competition in the office of the governor to assist the governor in [~~negotiating with and entering into written agreements between the public employers~~] the implementation and review of the managed process of public-private competition for particular government services through the managed competition process and negotiations between the State and the exclusive representatives on matters of wages, hours, and other negotiable terms and conditions of employment.

(b) The position of chief negotiator for the State is hereby established to head the office. The chief negotiator shall be experienced in labor relations. [~~The governor shall appoint and remove the chief negotiator and the deputy negotiators, who shall not be subject to chapters 76, 77, and 89. Effective January 1, 1989, and January 1, 1990, the salary of the chief negotiator shall be set by the governor within the range from $69,748 to $74,608 and $72,886 to $77,966 a year, respectively. The chief negotiator and deputy negotiators shall be included in any benefit program generally applicable to the officers and employees of the State. All other employees shall be appointed in accordance with chapters 76 and 77. The chief negotiator shall serve as one of the governor's designated representatives as set forth in section 89-6(b).~~] The governor shall appoint the chief negotiator and may also appoint deputy negotiators to assist the chief negotiator. The governor, at pleasure, may remove the chief negotiator and any deputy negotiator. All other employees shall be appointed by the chief negotiator. All employees in the office of collective bargaining and managed competition shall be included in any benefit programs generally applicable to employees of the State.

(c) Subject to the approval of the governor, the office of collective bargaining and managed competition shall:

(1) Assist the governor in formulating the State's philosophy for public collective bargaining and for the managed process for public-private competition for government services, including which particular service can be provided more efficiently, effectively, and economically considering all relevant costs; and
(2) Coordinate and negotiate the terms and conditions of the managed competition process on behalf of the State with exclusive representatives of affected public employees and private contractors.

(d) No employee of the office of collective bargaining and managed competition shall be included in the civil service, any civil service classification system, or any appropriate bargaining unit; provided that any civil service position in existence on the effective date of this Act shall not be exempted from civil service until the incumbent in that position on the effective date of this Act vacates that position.

(e) If the State executes a contract with a private contractor pursuant to the managed competition process authorized under this section, the State may use the layoff provisions of the civil service laws and the respective collective bargaining contracts to release employees displaced from their positions by the managed competition process. Prior to implementing any layoff provision of the civil service laws or a collective bargaining contract, the State shall use its resources for placing,

retraining, and providing voluntary severance incentives for displaced employees. Methods that may be used to minimize or avoid the adverse effects of an agency's decision to secure needed services from contractors may include:

(1) Coordination with the private service provider awarded the contract under this section to continue a displaced employee's employment as an employee of the contractor;
(2) Reassignment to another civil service position the employee is qualified to fill;
(3) Retraining to qualify the employee for reassignment; and
(4) Severance incentives."

SECTION 5. Act 253, Session Laws of Hawaii 2000, section 104, is amended by amending section 89A-1, Hawaii Revised Statutes, to read as follows:

"**§89A-1 Office of collective bargaining and managed competition.** (a) There shall be established an office of collective bargaining and managed competition in the office of the governor to assist the governor in implementation and review of the managed process of public-private competition for particular government services through the managed competition process and negotiations between the State and the exclusive representatives on matters of wages, hours, and other negotiable terms and conditions of employment.

(b) The position of chief negotiator for the State is hereby established to head the office. The chief negotiator shall be experienced in labor relations. The governor shall appoint the chief negotiator and may also appoint deputy negotiators to assist the chief negotiator. The governor, at pleasure, may remove the chief negotiator and any deputy negotiator. All other employees shall be appointed by the chief negotiator. All employees in the office of collective bargaining and managed competition shall be included in any benefit programs generally applicable to employees of the State.

(c) Subject to the approval of the governor, the office of collective bargaining and managed competition shall:

(1) Assist the governor in formulating the State's philosophy for public collective bargaining and for the managed process for public-private competition for government services, including which particular service can be provided more efficiently, effectively, and economically considering all relevant costs; and
(2) Coordinate and negotiate the managed competition process [~~to ensure the negotiations of subject matters that are negotiable under the collective bargaining laws in the public sectors.~~] on behalf of the State with exclusive representatives of affected public employees and private contractors.

(d) No employee of the office of collective bargaining and managed competition shall be included in the civil service, any civil service classification system, or any appropriate bargaining unit; provided that any civil service position in existence on[1] July 1, 2002, shall not be exempted from civil service until the incumbent in that position on[1] July 1, 2002, vacates that position.

(e) If the State executes a contract with a private contractor pursuant to the managed competition process authorized under this section, the State may use the layoff provisions of the civil service laws and the respective collective bargaining contracts to release employees displaced from their positions by the managed competition process. Prior to implementing any layoff provision of the civil service laws or a collective bargaining contract, the State shall use its resources for placing, retraining, and providing voluntary severance incentives for displaced employees.

Methods that may be used to minimize or avoid the adverse effects of an agency's decision to secure needed services from contractors may include:

(1) Coordination with the private service provider awarded the contract under this section to continue a displaced employee's employment as an employee of the contractor;

(2) Reassignment to another civil service position the employee is qualified to fill;

(3) Retraining to qualify the employee for reassignment; and

(4) Severance incentives."

PART IV

SECTION 6. Section 89-11, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

"(d) If a dispute between a public employer and the exclusive representative of [~~appropriate bargaining unit (2), supervisory employees in blue collar positions; appropriate bargaining unit (3), nonsupervisory employees in white collar positions; appropriate bargaining unit (4), supervisory employees in white collar positions; appropriate bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; appropriate bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; optional appropriate bargaining unit (9), registered professional nurses;~~] optional appropriate-bargaining unit (10), institutional, health, and correctional workers; optional appropriate-bargaining[2] unit (11), firefighters; or optional appropriate bargaining unit (12), police officers[~~; or optional appropriate bargaining unit (13), professional and scientific employees, other than registered professional nurses,~~] exists over the terms of an initial or renewed agreement more than ninety working days after written notification by either party to initiate negotiations, either party may give written notice to the board that an impasse exists and the board shall assist in the voluntary resolution of the impasse by appointing a mediator within three days after the date of impasse. If the dispute continues to exist fifteen working days after the date of impasse, the dispute shall be submitted to arbitration proceedings as provided herein.

The board shall immediately determine whether the parties to the dispute have mutually agreed upon an arbitration procedure and whether the parties have agreed upon a person or persons whom the parties desire to be appointed as the arbitrator or as a panel of arbitrators, as the case may be.

If the board determines that an arbitration procedure mutually agreed upon by the parties will result in a final and binding decision, and that an arbitrator or arbitration panel has been mutually agreed upon, it shall appoint such arbitrator or arbitration panel and permit the parties to proceed with the arbitration procedure mutually agreed upon.

If, after eighteen working days from the date of impasse, the parties have not mutually agreed upon an arbitration procedure and an arbitrator or arbitration panel, the board shall immediately notify the employer and the exclusive representative that the issues in dispute shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

Within twenty-one working days from the date of impasse, two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The impartial third member of the arbitration panel shall be selected by the two previously selected panel members and shall chair the arbitration panel.

In the event that the two previously selected arbitration panel members fail to select an impartial third arbitrator within twenty-four working days from the date of

impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the impartial arbitrator shall be selected. Within five calendar days after receipt of such list, the parties shall alternately strike names therefrom until a single name is left, who shall be immediately appointed by the board as the impartial arbitrator and chairperson of the arbitration panel.

Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final offer which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions other than those relating to contributions by the State and respective counties to the Hawaii public employees health fund which each party is proposing for inclusion in the final agreement.

Within twenty calendar days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final offers. Nothing in this section shall be construed to prohibit the parties from reaching a voluntary settlement on the unresolved issues, with or without the assistance of a mediator, at any time prior to the conclusion of the hearing conducted by the arbitration panel.

Within thirty calendar days after the conclusion of the hearing, a majority of the arbitration panel shall issue a final and binding decision.

In reaching a decision, the arbitration panel shall give weight to the factors listed below and shall include in a written opinion an explanation of how the factors were taken into account in reaching the decision:

(1) The lawful authority of the employer.
(2) Stipulations of the parties.
(3) The interests and welfare of the public.
(4) The financial ability of the employer to meet these costs.
(5) The present and future general economic condition of the counties and the State.
(6) Comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other persons performing similar services, and of other state and county employees in Hawaii.
(7) The average consumer prices for goods or services, commonly known as the cost of living.
(8) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(9) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(10) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service or in private employment.

The decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel. If the parties have reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii public employees health fund by the tenth working day after the arbitration panel issues its decision, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of

contributions agreed to by the parties. If the parties have not reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii public employees health fund by the close of business on the tenth working day after the arbitration panel issues its decision, the parties shall have five days to submit their respective recommendations for such contributions to the legislature, if it is in session, and if the legislature is not in session, the parties shall submit their respective recommendations for such contributions to the legislature during the next session of the legislature. In such event, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions established by the legislature by enactment, after the legislature has considered the recommendations for such contributions by the parties. It is strictly understood that no member of a bargaining unit subject to this subsection shall be allowed to participate in a strike on the issue of the amounts of contributions by the State and counties to the Hawaii public employees health fund. The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement. The parties may, at any time and by mutual agreement, amend or modify the panel's decision.

Agreements reached pursuant to the decision of an arbitration panel and the amounts of contributions by the State and counties to the Hawaii public employees health fund, as provided herein, shall not be subject to ratification by the employees concerned. All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies.

The costs for mediation shall be borne by the board. All other costs incurred by either party in complying with these provisions, including the costs of its selected member on the arbitration panel, shall be borne by the party incurring them, except that all costs and expenses of the impartial arbitrator shall be borne equally by the parties."

SECTION 7. Section 89-12, Hawaii Revised Statutes, is amended to read as follows:

"**§89-12 Strikes, rights and prohibitions.** (a) Participation in a strike shall be unlawful for any employee who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, or (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration [~~, or (3) is an essential~~ employee].

(b) It shall be lawful for an employee, who is not prohibited from striking under paragraph (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike after (1) the requirements of section 89-11 relating to the resolution of disputes have been complied with in good faith, (2) the proceedings for the prevention of any prohibited practices have been exhausted, (3) sixty days have elapsed since the fact-finding board has made public its findings and any recommendation, (4) the exclusive representative has given a ten-day notice of intent to strike to the board and to the employer.

[~~(c)(1) If a strike, which may endanger the health or safety of the public, is about to occur or is in progress, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health or safety of the public, the board shall establish specific requirements that must be complied with and which shall include, but not be limited to:~~

~~(A) Designation of essential positions; and~~

~~(B) Any other requirement it deems necessary in order to avoid or remove any imminent or present danger to the health or safety of the public.~~

~~(2) The public employer shall give notice to an essential employee:~~

~~(A) By serving or delivering a copy thereof to the essential employee being notified; or~~

~~(B) By mailing a copy thereof by certified or registered mail, return receipt requested, deliverable to the addressee only, addressed to the essential employee being notified at the essential employee's place of residence; or~~

~~(C) If service cannot be effected as set forth in (2)(A) or (2)(B) above, or if the strike is in progress, by publishing at least once a day for three consecutive days, a copy thereof in both of the newspapers having the largest general circulation in the State. After the final publication, it shall be conclusively presumed that the essential employee has received such notice.~~

~~After receipt of notice, it shall be the duty of the essential employee to contact the public employer for the essential employee's work assignment.~~]

[~~(d)~~] (c) No employee organization shall declare or authorize a strike of employees, which is or would be in violation of this section. Where it is alleged by the public employer that an employee organization has declared or authorized a strike of employees which is or would be in violation of this section, the public employer may apply to the board for a declaration that the strike is or would be unlawful and the board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.

[~~(e)~~] (d) If any employee organization or any employee is violating or failing to comply with the requirements of this section, or if there is reasonable cause to believe that an employee organization or an employee will violate or fail to comply with such requirements, the public employer affected shall, forthwith, institute appropriate proceedings in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this section, or to require the employee organization or employees to comply with the requirements of this section. Jurisdiction to hear and dispose of all actions under this section is conferred upon each circuit court, and each court may issue in compliance with chapter 380, such orders and decrees, by way of injunction, mandatory injunction, or otherwise, as may be appropriate to enforce this section. The right to a jury trial shall not apply to any proceeding brought under this section."

SECTION 8. Section 89-2, Hawaii Revised Statutes, is amended by deleting the definitions of "essential employee" and "essential position".

["~~"Essential employee" means an employee designated by the public employer to fill an essential position.~~

~~"Essential position" means any position designated by the board as necessary to be worked in order to avoid or remove any imminent or present danger to the public health or safety, which position shall be filled by the public employer.~~"]

SECTION 9. Act 253, Session Laws of Hawaii 2000, section 100, is amended by amending subsections (d) and (e) of section 89-11, Hawaii Revised Statutes, to read as follows:

"(d) If an impasse exists between a public employer and the exclusive bargaining representative of bargaining unit (1), nonsupervisory employees in blue collar positions; bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining

unit (4), supervisory employees in white collar positions; bargaining unit (5), teachers and other personnel of the department of education; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; [~~or~~] bargaining unit (7), faculty of the University of Hawaii and the community college system [~~,~~]; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; or bargaining unit (13), professional and scientific employees, the board shall assist in the resolution of the impasse as follows:

(1) Voluntary mediation. During the first twenty days of the date of impasse, either party may request the board to assist in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of the public from a list of qualified persons maintained by the board.

(2) Fact-finding. If the impasse continues twenty days after the date of impasse, the board shall immediately appoint a fact-finding panel of not more than three members, representative of the public from a list of qualified persons maintained by the board. The fact-finding panel shall, in addition to powers delegated to it by the board, make recommendations for the resolution of the impasse pursuant to subsection (f). The fact-finding panel, acting by a majority of its members, shall transmit a report on its findings of fact and recommendations for the resolution of the impasse to both parties within sixty days after its appointment and notify the board of the date when it transmitted the fact-finding report.

(3) Mediation. If the impasse continues ten days after the transmittal of the fact-finding report, the board shall appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse. The parties shall make the fact-finding report available to the mediator or mediators.

(4) Fact-finding report made public. If the impasse continues sixty days after the transmittal of the fact-finding report, the parties shall make available to the board the fact-finding report which shall be released by the board for public information.

(5) Submission of fact-finding report and response of the parties. If the impasse continues and the parties have not mutually agreed to submit the dispute to arbitration for a decision by January 31 of an odd-numbered year, the employers shall submit on February 1 to the appropriate legislative bodies the employers' recommendations for the settlement of the impasse on all cost items together with the fact-finding report. The exclusive representative may submit to the appropriate legislative bodies its recommendations for the settlement of the cost items in impasse.

(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit [~~(2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit~~](10), institutional, health, and correctional workers; bargaining unit (11), firefighters; or bargaining unit (12), police officers[~~; or bargaining unit (13), professional and scientific employees~~], the board shall assist in the resolution of the impasse as follows:

(1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

(A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of such list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.''

SECTION 10. Act 253, Session Laws of Hawaii 2000, section 101, is amended by amending subsection (a) of section 89-12, Hawaii Revised Statutes, to read as follows:

"(a) It shall be unlawful for any employee to participate in a strike if the employee:

(1) Is not included in the appropriate bargaining unit involved in an impasse; or

(2) Is included in the appropriate bargaining unit involved in an impasse that has been referred to arbitration for a decision[~~; or~~

~~(3) Is an essential employee, but only when the employee is designated to fill an essential position~~]."

PART V

SECTION 11. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.[3]

SECTION 12. No contract between the State or a county and a private entity that was authorized or subject to Act 230, Session Laws of Hawaii 1998, in existence on the effective date of this Act, shall be impaired or diminished by the enactment of part II of this Act; provided that any such contract that fails to qualify under part II of this Act shall be terminated by agreement of the parties or by the State or county as soon as the contract may be lawfully terminated without impairment.

SECTION 13. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 14. This Act shall take effect upon its approval; provided that sections 5, 9, and 10 shall take effect on July 1, 2002; and provided further that part II of this Act shall be repealed on June 30, 2007.

(Approved May 3, 2001.)

Notes

1. Prior to amendment "the effective date of this Act" appeared here.
2. So in original.
3. Edited pursuant to HRS §23G-16.5.