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CITY AND COUNTY OF HONOLULU

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THE HONORABLE DONOVAN M. DELA CRUZ, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Twenty-Ninth State Legislature
Regular Session of 2018
State of Hawai`i

March 29, 2018

RE: H.B. 2114, H.D. 2, S.D. 1; RELATING TO COLLECTIVE BARGAINING.

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the Senate Committee on Ways and Means, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to H.B. 2114, H.D. 2, S.D. 1.

If enacted, this bill would require collective bargaining on the very subjects that HRS §89-9(d) was specifically designed to exclude from collective bargaining, and would require collective bargaining on matters long-established as permissive subjects. Essentially, this would nullify a public employer's rights and obligations to manage its workforce, and--as a result--impede the public employer's ability to effectively carry out day-to-day operations and services.

As currently written, HRS §89-9(d) simultaneously lays out the rights and obligations of a public employer, and mandates that no collective bargaining agreement shall be permitted to interfere with these rights and obligations. Specifically, there can be no collective bargaining agreement on "any proposal...which would interfere with the rights and obligations of a public employer to" carry out eight enumerated areas, which range from "[determining] methods, means, and personnel by which the employer's operations are to be conducted," to "[taking] such actions as may be necessary to carry out the missions of the employer in cases of emergencies."

While the statute does not specify to whom the public employers' obligations are owed, legislative records indicate a clear sense of obligation to the public and providing uninterrupted services to the public. Indeed, the Conference Committee Report from the creation of HRS Chapter 89 states:

> ...[A]ny collective bargaining law enacted should clearly specify the areas and manner in which public employees shall bargain collectively **if we are to avoid, or at least to minimize, the controversies which have arisen in**

> **other jurisdictions** where collective bargaining is permitted **and which have often resulted in the disruption of public services**." [1]

(Emphasis added.) Consistent with this, the policy clause of HRS Chapter 89, HRS §89-1, states:

> "**[I]it is the public policy of the State** to promote harmonious and cooperative relations between government and its employees and **to protect the public by assuring effective and orderly operations of government**."

(Emphasis added.) Thus, the exclusions contained in HRS §89-9(d)(1) through (8) collectively allow a public employer to manage the day-to-day (or emergency) operations of its workforce, helping to maintain efficient and effective public services. Notably, these exclusions have withstood the test of time and have remained relatively unchanged since HRS Chapter 89 and HRS §89-9(d) were first enacted in 1970, despite numerous amendments to HRS §89-9 since that time.[2]

"Implementation by the employer"

Contrary to the need for uninterrupted public services, the amendments proposed in H.B. 2114, H.D. 2, S.D. 1, would undoubtedly result in increased delays, disputes and disruptions in operations and services. While the matters listed under HRS §89-9(d)(1) through (8) have always been excluded from collective bargaining (to the extent they interfere with the rights and obligations of public employers), the proposed amendments on **page 2, lines 15-17**, would force the "implementation" of these matters into collective bargaining, if it "affects terms and conditions of employment that are subject to [mandatory or permissive] collective bargaining."

Without further limitations on this provision, it may be argued that practically **any** employer action taken under HRS §89-9(d)(1) through (8)—directing employees, determining standards and qualifications for work, and so forth—"affects" the terms and conditions of employment. Thus, more and more of these matters would be forced into negotiations, and any resulting controversies could impede public employers from providing effective and orderly public services. Ultimately, it serves little or no purpose to exclude certain rights and obligations of public employers from collective bargaining, if "implementation" of these things is still subject to collective bargaining.

"Permissive subject of bargaining"

Equally disruptive would be the proposed language in H.B. 2114, H.D. 2, S.D. 1, **page 2, line 21**, which would make certain, long-standing, "permissive subjects of bargaining" mandatory, with a clear inference that the newly proposed changes (regarding implementation) would also be a mandatory subject for negotiations.

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[1] Conference Comm. Rep. No 24, on S.B. 1696-70, in 1970 House Journal. (Emphasis added.)

[2] Act 171, Section 2, Session Laws 1970. States in relevant part: "The employer and the exclusive representative shall not agree to any proposal...which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies."

Following the eight rights and obligations excluded from collective bargaining, HRS §89-8(d) provides that the procedures and criteria used by a public employer, to carry out specific matters under—essentially—HRS §89-9(d)(3), (4) and (5) are permitted in collective bargaining at the discretion of the public employer and the exclusive representative. If such procedures and/or criteria are agreed upon, an employee can seek recourse via the grievance procedure, if any of the procedures or criteria are violated.

By way of background, the first iteration of this language was passed by the Legislature in 1988,[3] to "clarif[y] the scope of management rights under Section 89-9(d)," clearly making these matters optional (i.e. permissive) subjects of negotiation.[4] The current iteration was enacted in 2007, in response to a Hawaii Supreme Court decision in *United Public Workers, AFSCME, Local 646, AFL-CIO v. Hanneman*, 106 Haw 359, 105 P.3d 236 (2005) (aka "*UPW v. Hanneman*"), expounding that these are not only permissive subjects of bargaining for collective bargaining agreements, but also for supplemental agreements reached by the parties.[5]

Despite the change in wording, this portion of HRS §89-9(d) has always been very clear that these "permissive subjects of bargaining" are just that; they are permissive, not required. However, if this language is removed, our courts "must give effect to every word of a statute wherever possible," including the omission of words,[6] and the inference would be that these subjects of bargaining are no longer permissive; they are required. **Making these subjects mandatory would not only present a complete change from the original intent of this provision—and from 35 years of case law and collective bargaining negotiations that have relied upon it—but it would likely attach to the new language discussed above, making "implementation" of the eight permissive subjects into required subjects of collective bargaining as well.**

If passed, the amendments proposed in H.B. 2114, H.D. 2, S.D. 1, would inevitably and unnecessarily impede the ability for public employers to effectively manage their workforce and maintain uninterrupted public services. While the Department recognizes that collective bargaining is generally an important means of ensuring employees' rights, we also believe that certain matters—namely, those listed in HRS §89-9(d)(1) through (8)—must be retained as the employer's right and obligation, and we further believe that the permissive subjects of negotiation, listed under HRS §89-9(d), must continue to be permissive. Making all of these into mandatory subjects of negotiation would inevitably result in increased delays, controversy and disruption to public services, and would run contrary to the very purpose of HRS §89-9(d).

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of H.B. 2114, H.D. 2, S.D. 1. Thank you for the opportunity to testify on this matter.

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[3] Act 399, Section 4, Session Laws 1988. States in relevant part: "...provided that the employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit, procedures governing the suspension, demotion, discharge or other disciplinary actions taken against employees, and procedures governing the lay-off of employees; provided further that violations of the procedures so negotiated may be the subject of a grievance process agreed to by the employer and the exclusive representative." (Emphasis added.)

[4] House Stand. Comm. Rep. No. 986-88, on S.B. 3164, 1988 House Journal.

[5] Senate Stand. Comm. Rep. No 889, on S.B. 1642, 2007 Senate Journal.

[6] *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 70, 131 S.Ct. 716, 724 (2011), citing *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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

The Twenty-Ninth Legislature, State of Hawaii
The Senate
Committee on Ways and Means
Testimony by
Hawaii Government Employees Association

March 29, 2018

H.B. 2114, H.D. 2, S.D. 1 –
RELATING TO COLLECTIVE BARGAINING

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of H.B. 2114, H.D. 2, S.D. 1 which provides that negotiations over the implementation of management decisions affecting the terms and conditions of employment are not precluded from bargaining.

This important measure makes necessary amendments to Ch. 89-9, Hawaii Revised Statutes, to clarify and delineate the scope of bargaining between the public sector employers and the exclusive representatives. H.B. 2114, H.D. 2, S.D. 1 correctly recognizes that the impact of management decisions should be negotiated as they relate to the terms and conditions of employment.

The amendments contained in H.B. 2114 are necessary to ensure fairness in the process of negotiations. Thank you for the opportunity to testify in strong support of the passage of this measure.

Respectfully submitted,

Randy Perreira
Executive Director

HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Quality Healthcare For All"

Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

March 29, 2018
Conference Room 211
10:50 a.m.
Hawaii State Capitol

Testimony Opposing House Bill 2114, HD2, SD1 Relating to Collective Bargaining. Provides that negotiations over the implementation of management decisions affecting the terms and conditions of employment that are subject to collective bargaining are not precluded from collective bargaining negotiation.

Linda Rosen, M.D., M.P.H.
Chief Executive Officer
Hawaii Health Systems Corporation

CHAIR DELA CRUZ, VICE CHAIR KEITH-AGARAN, AND MEMBERS OF THE SENATE COMMITTEE ON WAYS AND MEANS:

H.B. 2114 H.D. 2, S.D. 1 clarifies the allowable scope of collective bargaining negotiations regarding the rights and obligations of a public employer.

Hawaii Health Systems Corporation ("HHSC") understands the purpose of this bill but **opposes** the wording of this bill, as more fully set forth below, because it leads to an ambiguity about which subjects are permissive and which are mandatory. HHSC therefore proposes amending the bill as set forth below:

1. In referencing bargaining, this bill deletes the phrase". . . a permissive subject" and replaces it with the word "subjects", which implies that those management decisions that are acknowledged to be permissive subjects of bargaining would become "mandatory subjects of bargaining".
2. This bill further adds the phrase, ". . . provided that such obligation does not compel either party to agree to a proposal or make a concession." While this states the existing right of parties engaged in good faith bargaining, it does not address the ambiguity created regarding permissive and mandatory subjects of negotiation noted in paragraph 1 above.

3. The current wording of the statute promotes joint decision making between the employers and exclusive representatives by balancing the role of the employer to manage and direct operations and the exclusive representative's role to advocate and negotiate for its members as it relates to wages, hours, and working conditions.
4. HHSC is a state agency committed to providing the highest quality health care in an often quickly changing work environment, requiring management's ability to direct its workforce, determine minimum qualifications and work standards, and to take appropriate action to ensure satisfactory performance. This must be done in compliance with federal and state regulations which directly impact operational decisions.
5. HHSC proposes the addition of language to the measure as follows:

Amend section 89-9(d)(8), HRS, as follows:

> This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and <u>except as otherwise provided in this chapter,</u> shall not preclude negotiations over the <u>implementation of management decisions that materially affect terms and conditions of employment that are properly subject to collective bargaining. This subsection shall not preclude, but does not mandate, negotiations over the</u> procedures and criterial on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Amend section 89-10(d), HRS, as follows:

> Whenever there are provisions in a collective bargaining agreement concerning a matter under chapter 76 or 78 that is negotiable under chapter 89, the terms of the agreement shall prevail; provided that <u>in no instance will the arbitration panel consider for inclusion any final position that is</u> not consistent with section 89-9(d).

6. Finally, in the event that the Committee declines to accept the proposed amendment, HHSC respectively requests that the Committee consider the addition of a sunset date for this bill. This would allow the employer and the exclusive representative to consider the impact of the bill on operations and afford an opportunity for appropriate further refinement.

Based upon the above, Hawaii Health Systems Corporation respectfully recommends that further consideration of the above concerns be given.

Thank you for the opportunity to testify on this important measure.

HAWAII STATE AFL-CIO

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The Twenty-Ninth Legislature, State of Hawaii
Hawaii State Senate
Committee on Ways and Means

Testimony by
Hawaii State AFL-CIO

March 29, 2018

H.B. 2114, H.D.2, S.D.1 – RELATING TO COLLECTIVE BARGAINING

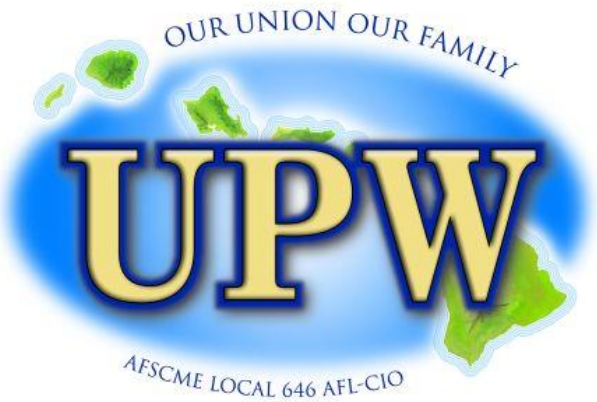
The Hawaii State AFL-CIO strongly supports H.B. 2114, H.D.2, S.D.1 which provides that negotiations over the implementation of management decisions affecting the terms and conditions of employment that are subject to collective bargaining are not precluded from collective bargaining negotiations and specifies that negotiations over the procedures and criteria of certain subjects of bargaining shall not compel either party to agree to a proposal or make a concession.

Workers have the right to collectively bargain and should be able to negotiate their wages, benefits, and work conditions. H.B. 2114, H.D.2, S.D.1 simply ensures their voices are heard during collective bargaining negotiations. The Hawaii State AFL-CIO strongly urges the passage of H.B. 2114, H.D.2, S.D.1.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President



THE HAWAII STATE SENATE
The Twenty-Ninth Legislature
Regular Session of 2018

COMMITTEE ON WAYS AND MEANS
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

DATE OF HEARING: Wednesday, March 28, 2018
TIME OF HEARING: 10:50 a.m.
PLACE OF HEARING: State Capitol
415 South Beretania Street
Conference Room 211

TESTIMONY ON HOUSE BILL 2114, HD2, SD1 RELATING TO COLLECTIVE BARGAINING

By DAYTON M. NAKANELUA,
State Director of the United Public Workers (UPW),
AFSCME Local 646, AFL-CIO

My name is Dayton M. Nakanelua, State Director of the United Public Workers, AFSCME, Local 646, AFL-CIO. The UPW is the exclusive bargaining representative for approximately 12,000 public employees, which include blue collar, non-supervisory employees in Bargaining Unit 01 and institutional, health and correctional employees in Bargaining Unit 10, in the State of Hawaii and various counties. The UPW also represents about 1,500 members of the private sector.

HB2114, HD2, SD2 provides clarity in establishing that the impact of management decisions that affect the terms and conditions of employment are subjects of collective bargaining and are not precluded from collective bargaining negotiations. Heretofore, they were "permissive subjects" to collective bargaining negotiations where both the exclusive representative and the employer had to agree to bargain on an issue. However, if one party refused to bargain then there is no negotiation. The UPW strongly supports this measure.

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 SENATE COMMITTEE ON WAYS AND MEANS

RE: HB 2114, HD 2, SD 1 - RELATING TO COLLECTIVE BARGAINING

THURSDAY, MARCH 29, 2018

WILBERT HOLCK, EXECUTIVE DIRECTOR
HAWAII STATE TEACHERS ASSOCIATION

Chair Dela Cruz and Members of the Committee:

The Hawaii State Teachers Association **strongly supports HB 2114, HD 2, SD 1**, relating to collective bargaining.

This proposal clarifies the obligation of the state to engage in negotiations in a fair and respectable manner. While HSTA recognizes the right of the state to manage employee work, we strongly affirm the importance of protecting employees' right to negotiate those subjects outlined in HRS 89-9.

Collective bargaining is especially important to public school teachers. It is in the best interest of both the employer and the union to ensure that bargaining occurs in a way that supports an employee's ability to enhance their professionalism, leads to a workplace free from health and safety risks, and is conducted in a fair and equitable manner. Our state's commitment to collective bargaining is even more urgent under the pending threat of the Supreme Court's ruling in *Janus v. AFSCME*, which could fundamentally undermine Hawai'i's dedication to labor management peace by constraining collective bargaining representatives' ability to collect resources from their members and, in turn, diminishing public employees' ability to negotiate with management and represent their members' interests.

To preserve the islands' longstanding devotion to the protection of workers' rights, the Hawaii State Teachers Association asks your committee to **support** this bill.

The Senate Committee on Ways and Means
Thursday, March 29, 2018
10:50 AM, Conference Room 211

RE: **HB 2114, HD2, SD1 Relating to Collective Bargaining**

Attention: Chair Donovan M. Dela Cruz, Vice Chair Gilbert S.C. Keith-Agaran and members of the Committee

The University of Hawaii Professional Assembly (UHPA) **urges the committee to support HB 2114, HD2, SD1** This will bring clarity to Chapter 89 by recognizing that negotiations may take place on the effect and consequences of management decisions relating to the terms and conditions of employment.

In the previous legislative session, a similar bill was passed with very strong support of the legislature. Unfortunately, Governor Ige vetoed the measure.

Now comes HB 2114, HD2, SD1 which reflects collaborative work between the Governor's staff and representatives of the public sector unions to advance a bill that both can abide by and implement in a manner that maintains the balance of interests between labor and management.

UHPA seeks the Labor Committee's support for HB 2114, HD2, SD1.

Respectfully submitted,

Kristeen Hanselman
Executive Director

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