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WRITTEN ONLY

Testimony Presented Before the
Senate Committee on Judiciary
The Honorable Karl Rhoads, Chair
The Honorable Mike Gabbard, Vice Chair

Friday, March 1, 2024 at 10:00 a.m.
Conference Room 016, State Capitol
and Videoconference

by Marcus R. Oshiro
Chairperson, Hawaii Labor Relations Board

S.B. No. 2718, S.D. 1, Related [sic] to Administrative Procedures

Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Hawaii Labor Relations Board (HLRB or Board) supports S.B. No. 2718, S.D. 1, which would allow the HLRB to admit and consider hearsay evidence.

The HLRB is a quasi-judicial agency that administers collective bargaining and unfair labor practices under Chapters 89 and 377 of the Hawaii Revised Statutes (HRS) and adjudicates appeals of contests of citations and orders issued by the Hawaii Occupational Safety and Health Division of the Department of Labor and Industrial Relations under HRS Chapter 396. As an administrative agency, the HLRB is subject to the administrative procedures set forth in HRS Chapter 91.

HRS § 91-10(1) provides that in contested cases:

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

(Emphasis added.)

HRS § 377-9(c) provides:

A full and complete record shall be kept of all proceedings had before the board and all testimony and proceedings shall be taken down by a reporter engaged for such purpose or by use of a mechanical recording device. It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review. In the proceedings the board shall not be bound by technical rules of evidence. No hearsay evidence, however, shall be admitted or considered.

(Emphasis added.)

Currently, HRS § 91-10(1) and HRS § 377-9(c) conflict with each other and HRS § 377-9(c) conflicts with itself.

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

Under the Hawai‘i Rules of Evidence, HRS Chapter 626, there are a myriad of exceptions (*see* Rules 802.1, 803, and 804) that allow certain types of hearsay evidence into the record. A strict reading of HRS § 377-9(c) could find that the HLRB cannot consider any hearsay evidence which would mean evidence that could be introduced in any other court or administrative proceeding under a hearsay exception, would not be permissible in a hearing before the HLRB. This type of construction conflicts with HRS § 91-10(1) and conflicts with the general principles that proceedings before administrative agencies are less formal and not bound by technical rules of evidence.

Notably, parties who appear before the Board are not required to be represented by legal counsel, and about half of all cases before the HLRB involve *pro se* or self-represented litigants. This measure would allow the HLRB to level the playing field and provide a fair hearing for all parties involved.

Thank you for the opportunity to provide testimony in support of S.B. No. 2718, S.D. 1.