UNIVERSITY OF HAWAI'I SYSTEM
Legislative Testimony

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House Committee on Finance
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HB 232 HD1 – RELATING TO COLLECTIVE BARGAINING

Chair Luke, Vice Chair Cullen, and members of the Committee:

I am respectfully submitting written testimony on behalf of the University of Hawai'i **opposing** House Bill 232 House Draft 1 Relating to Collective Bargaining. The "description" for this measure states that its purpose is to:

> *Clarify the allowable scope of collective bargaining negotiations regarding the rights and obligations of a public employer.*

Rather than creating clarity, this measure proposes to amend HRS § 89-9(d) in two distinct ways, both of which directly impinge upon fundamental management rights recognized and protected by the Hawai'i Supreme Court in United Public Workers v. Hanneman, 106 Hawai'i 359, 365, 105 P. 3d 236, 242 (2005). As a representative employer group, the University opposes any degradation of employer rights and obligations to ensure optimal and efficient working conditions.

In Hanneman, the City made the decision to transfer a number of refuse workers from one baseyard to another due to a workforce deficiency in Honolulu, and a surplus of workers in Pearl City. UPW refused offers by the City to consult and instead demanded negotiations, arguing that transfers were an **obligatory** subject of bargaining because the decision affected "*conditions of work*." In other words, UPW's position was that there could be no such transfers without mutual consent.

The Hawai'i Labor Relation's Board ruled that the City's management rights were subject to a "*balancing test*," but our Supreme Court **reversed**, ruling that the duty to negotiate extends only so far as it does not *"infringe upon an employer's management rights under section 89-9(d)."* Specifically, the Court stated as follows:

> *HRS §89-9 does not expressly state or imply that an employer's right to transfer employees is subject to a balancing of interests. Contrary to the HLRB's interpretation, our holding in [University of Hawai'i Professional Assembly v. Tomasu, 79 Hawai'i 154, 900 P.2d 161 (1995)] does not approve of the HLRB's balancing test. Rather, we believe Tomasu stands for the proposition that, in reading HRS §§89-9(a), (c), and (d) together, parties are permitted and*

> *encouraged to negotiate all matters affecting wages, hours and conditions of employment* ***as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d). In other words, the right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights.*** *Accordingly, in light of the plain language of HRS §89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer was subject to bargaining under HRS §89-9(a).*

Subsequently, HRS §89-9(d) was amended in 2007 to clarify that the public employers were not precluded from agreeing to negotiate procedures and criteria for those specific management actions set forth in paragraphs (3) through (5) of §89-9(d) namely: *promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, and discharges or other disciplinary actions*.

The statute expressly and with probative clarity states that any such negotiations over procedures and criteria are a *"permissive subject of bargaining,"* thereby distinguishing this type of bargaining from that which is **mandated** by HRS §89-9(a) *to wit*:

> *(a) The employer and the exclusive representatives* ***shall*** *meet at reasonable times; including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and* ***shall negotiate*** *in good faith with respect to wages, hours…and other conditions of employment which are subject to collective bargaining* … (Emphasis added.)

In other words, a public employer may not be compelled to negotiate procedures and criteria for promotions, demotions or the like, but it is not precluded from doing so, either because it believes it is good management practice to do so, or because a union offers something of value in exchange.

As a first order of business, this bill proposes to **remove** the key clarifying language *"as a permissive subject of bargaining,"* from the statute. No explanation for this removal is offered, but it is apparent that the goal is to hamstring the very management rights expressly and unambiguously protected by the Court in Hanneman with regard to the management actions described in paragraphs (3) through (5) of §89-9(d).

Indeed, the impetus for this measure appears to be a 2016 case before the HLRB (Case CE-11-879, Order 482) where a public union argued that a public employer could not implement a new training program without its approval because it allegedly impacted conditions of work. The Board disagreed, ruling that the employer was obligated to consult, not bargain with the union about the plan. It is apparent that this bill is intended to effectively negate that decision and require union consent in the future before a public employer can train its employees.

But that is not all, for as a second order of business, this bill introduces an entirely separate restriction on management rights by also requiring the public employers to bargain over the *"implementation"* of every single management decision described in paragraphs **(1) through (8)** of §89-9(d).

It is extremely significant that HRS §89-9(d) specifically does not include in its list of "*permissive*" subjects or bargaining those management actions set forth in paragraphs (1),(2)(6),(7),and (8) of the statute. Why? **Because these actions go to the very core of the managerial decision making process.**

Thus, under this measure, if a public employer wants to alter the minimum qualifications of a position, or change one of its examinations, or direct its employees, or commence a training program, or increase efficiencies, or, as in Hanneman, transfer employees, it would not be able to do so without the assent of all relevant unions. Make no mistake, giving a public union veto power over *"implementation"* of a management decision means just what it implies. It means the decision never sees the light of actual **application** without that union's consent.

Moreover, it is no answer to argue that implementation would only be subject to mandatory bargaining if it *"affects terms and conditions of employment"* as stated in the measure. The problem with this language is that it is crucially incomplete.

Specifically, if the measure stated that bargaining over implementation of a management decision would only be necessary if it *"affects terms and conditions of employment* ***set forth in a collective bargaining agreement,"*** that would be one thing. Then at least, we would have clarity (albeit, rather self evident clarity). Instead, the measure contains an ambiguous, un-tethered phrase that is basically no different than the "*conditions of work*" argument unsuccessfully employed by UPW in Hanneman.

In sum, this bill does not "*clarify the allowable scope of collective bargaining*;" on the contrary, it seeks to dismantle management rights presently protected by HRS §89-9(d).

Thank you for the opportunity to provide testimony on this measure.