



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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### SB 410 SD1 – RELATING TO COLLECTIVE BARGAINING

Chair Tokuda, Vice Chair Dela Cruz, and members of the Committee:

I am respectfully submitting written testimony on behalf of the University of Hawai'i **opposing** Senate Bill 410 SD1 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, Section 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.

Further, it has never been disputed that if the parties **do** agree to place procedures and criteria regarding a permissive subject of bargaining into a collective bargaining agreement, then mutual consent would be necessary to later modify same.

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). Accordingly, if passed, this bill would effectively negate that decision and require union consent in the future before a public employer can transfer, assign, demote, or layoff its employees, or do anything else listed in paragraphs (3) through (5) of §89-9(d).

Additionally, if this measure is passed, those Bargaining Units subject to impasse arbitration under HRS, §89-11(e) would be free to draft “final positions” on procedures and criteria for transfers, assignments, promotions, layoffs, demotions, discipline, or the like, and seek to have them **unilaterally** imposed upon the public employers by an arbitration panel even though §89-9(d) specifically **prohibits** public unions and employers from agreeing to any proposal that would “*interfere with the rights and obligations of a public employer*” to do any of the things listed in paragraphs (1) – (8) of the statute.

The ramifications of all the above are profound enough, 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.**

An example of how this measure would dramatically affect real-world labor relations is illustrated by 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.

This measure is so broad that if an employer wanted to train its employees, alter the minimum qualifications of a position, change one of its examinations, increase efficiencies, **or even take such actions as may be necessary in emergencies to carry out its functions**, 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,**” then at least, we would have clarity (albeit, rather self evident clarity, since it is undisputed that management decisions which materially alter the terms of labor agreements are subject to what has traditionally been referred to as “*effects bargaining*”).

Instead, the measure contains an ambiguous, un-tethered phrase that is basically no different than the amorphous “*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), and it seeks to expand mandatory bargaining obligations beyond the four corners of public sector collective bargaining agreements.

Thank you for the opportunity to provide testimony on this measure which should be held.