

The House of Representatives  
The Twenty-Fifth Legislature  
Regular Session of 2009

Committee on Labor & Public Employment

Rep. Karl Rhoads, Chair

Rep. Kyle T. Yamashita, Vice Chair

DATE: Friday, February 13, 2009  
TIME: 8:30 a.m.  
PLACE: House Conference Room 309  
State Capitol  
415 South Beretania Street

**TESTIMONY OF THE UNITED PUBLIC WORKERS, AFSCME, LOCAL  
646, AFL-CIO ON H.B. 1106 RELATING TO PUBLIC EMPLOYMENT**

My name is Dayton M. Nakanelua, and I am the state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW currently represents approximately 8,700 blue collar, non-supervisory employees in bargaining unit 1, and 2,800 institutional, health, and correctional workers in bargaining unit 10 in the State of Hawaii and the various counties. The UPW opposes House Bill No. 1106 which authorizes the governor to unilaterally implement "furloughs," and to statutorily establish terms and conditions of employment relating to wages, lay-offs, vacation, sick leave, health benefits, and deferred compensation. This measure undermines the constitutional and statutory rights of employees to engage in collective bargaining and impairs longstanding contractual rights of employees.

We do not agree with the proponents of this bill that the right to "furlough" is an inherent right of the chief executive of this state. The term has been sparingly used in our statutes, and applies primarily to the correctional setting. See e.g., Section 352-26, Hawaii Revised Statutes (HRS) (referring to furlough of inmates in custody at the youth correctional facility), Section 353-10-5, HRS (referring to furloughs of those detained in correctional facilities). In the employment setting the term has a well recognized meaning. A furlough is defined as follows in Roberts' Dictionary of Industrial Relations (3rd ed. 1986) at 236:

Furlough. A leave of absence from work or other duties usually initiated by an employee to meet some special problem. It is temporary in nature since the employee plans to return as the furlough period is over. The Civil Reform Act defines furlough as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons." (Emphasis added).

Historically, the UPW and public employers consider a leave of absence without pay as a mandatory subject of collective bargaining under Section 89-9 (a), HRS. Courts have held that a duty to bargain applies "over furlough of employees." See Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 557 A.2d 1112 (Pa. Cmwth. 1989). Section 38 of the unit 1 and 10 agreements sets forth the terms and conditions for leaves without pay. The current agreement contains a provision which was intended to forestall layoffs of employees as follows:

38.02 Leaves without pay to delay reduction-in-force. A regular employee may be granted a leave of absence without pay for not more than twelve (12) months in order to delay a planned layoff when the position which the employee occupies has been abolished. If the employee has not been placed at the expiration of the

twelve (12) month period, the employee shall be subject to section 12. (Emphasis added).

If adopted the measure before you will impair the contractual rights of employees and may be unconstitutional under Article I, Section 10 of the U.S. Constitution. See University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999).

Moreover, this measure will undermine the process of collective bargaining as set forth in Chapter 89. Hawaii is one of six states in the country which has afforded constitutional protection to private and public employees to engage in "collective bargaining" under Article XIII. A "furlough" is a core subject of "collective bargaining" because it affects employee's "wages," "hours of work" and terms of employment as referred to in Section 89-9 (a), HRS. A furlough of all employees once a month represents a significant reduction in the negotiated wages of employees as set forth in Section 23 of the unit 1 and 10 collective bargaining agreements. It obviously changes the hours of work expected of employees as defined in Section 25 of the collective bargaining agreements. The legislature should avoid enacting statutes which substantively determine the terms and conditions of employment. In 1999 lawmakers imposed a wage freeze (through Act 100) to address a similar fiscal crisis. The enactment was struck down as it violated the constitutional right of employees to engage in collective bargaining. United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002). In addition, this measure proposes to change the pre-emption provision of chapter 89. Section 89-19, HRS, currently provides that chapter 89 takes precedence over "all conflicting statutes concerning this subject matter." This bill in part contradicts

this long established statutory requirement by proposing that the proposed measure pre-empt the provisions of chapter 89.

We are aware that Governor Arnold Schwarzenegger has announced the furlough of state workers twice a month in California as a means of addressing the state's \$42 billion deficit. That action is being challenged in the courts in Professional Engineers in California Government v. Schwarzenegger, Case No. 34-2008-80000126-CU-WM-GDS in the Superior Court (County of Sacramento). We are keeping a close watch as that case works its way through the appellate court system. However, we are mindful that unlike Hawaii the State of California does not afford to employees the constitutional right to engage in collective bargaining. There are other differences between the two states which affect the collective bargaining process.

For the foregoing reasons we urge you not to intervene by enacting statutes which adversely affect the collective bargaining process over matters relating to furloughs or leaves without pay. As a final note matters relating to layoffs, vacation, sick leave, health benefits, and deferred compensation are also mandatory subjects of bargaining covered by chapter 89. If you wish to protect retirement benefits (which is not negotiable under Section 89-9 (d), HRS), chapter 88 should be amended to provide for service credit during leaves of absence without pay.