

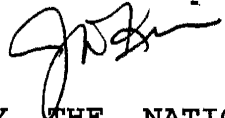
ALAN M. ARAKAWA
Mayor

BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740 FAX 270-7152

June 2, 2006

MEMO TO: G. Riki Hokama
Council Chair

F R O M: John D. Kim, Deputy Corporation Counsel 

SUBJECT: PRESCRIPTION DRUG PROGRAM OFFERED BY THE NATIONAL
ASSOCIATION OF COUNTIES (NACO) (PAF 05-166)

This is in response to your memorandum of September 29, 2005, requesting legal advice on various questions and issues posed regarding the above-referenced matter.

1. Please review and comment on agreement entitled, "AdvancePCS Health, L.P. Managed Pharmacy Benefit Services Agreement Consumer Card Program."

The Managed Pharmacy Benefit Services Agreement Consumer Card Program ("Program") is a prescription drug plan. A prescription drug plan is a health benefits plan as defined in Hawaii Revised Statutes ("HRS") Chapter 87A,¹ pertaining to the Hawaii employer-

¹ HRS § 87A-1, states, in part:

"Health benefits plan" means:

- (1) A group insurance contract or service agreement that may include medical, hospital, surgical, prescribed drugs, vision, and dental services, in which a carrier agrees to provide, pay for, arrange for, or reimburse the cost of the services as determined by the board; or
- (2) A similar schedule of benefits established by the board and provided through the fund on a self-insured basis. (Emphasis added.)

union health benefits trust fund (EUTF).² The purpose of the trust fund is to provide a health benefits plan to government employees and their dependents.³ The trust fund is administered by a board of trustees, which is charged with carrying out the purpose of the fund.⁴ Any agreement for a health benefits plan must be reviewed by the board of trustees.⁵

Based on HRS Chapter 87A, we are of the opinion that the Program offered by the National Association of Counties must be approved by the board of trustees of the Hawaii employer-union health benefits trust fund before the County of Maui may enter into the Program agreement.

This Department telephoned the office of Mr. James Williams, Administrator of the Hawaii employer-union health benefits trust fund, regarding the Program. While we did not speak with Mr. Williams directly, we were informed by his staff that our analysis

² HRS §87A-30 ("**Hawaii employer-union health benefits trust fund; establishment.** There is established outside the state treasury, a trust fund to be known as the "Hawaii Employer-Union Health Benefits Trust Fund." The fund shall consist of contributions, interest, income, dividends, refunds, rate credits, and other returns. The fund shall be under the control of the board and placed under the department of budget and finance for administrative purposes.")

³ HRS §87A-31 ("**Trust fund; purpose.** (a) The fund shall be used to provide employee-beneficiaries and dependent-beneficiaries with health and other benefit plans, and to pay administrative and other expenses of the fund.

(b) The fund, including any earnings on investments, and rate credits or reimbursements from any carrier or self-insured plan and any earning or interest derived therefrom, may be used to stabilize health and other benefit plan rates; provided that the approval of the governor and the legislature shall be necessary to fund administrative and other expenses necessary to effectuate these purposes....")

⁴ HRS §87A-15 ("**Administration of the fund.** The board shall administer and carry out the purpose of the fund. Health and other benefit plans shall be provided at a cost affordable to both the public employers and the public employees.")

⁵ *Id.*; HRS §87A-16 ("**Health benefits plan; carriers.** (a) The board shall establish the health benefits plan or plans, which shall be exempt from the minimum group requirements of chapter 431.")

G. Riki Hokama
Council Chair
Page 3
June 2, 2006

is correct. EUTF staff is aware of a number of similar programs that the EUTF has not approved as a health benefits plan.

2. Would County participation in the Managed Pharmacy Benefit Services Agreement Consumer Card Program be subject to State procurement laws?

As discussed above, we believe that the Program is a health benefits plan that is subject to the review and approval of the EUTF board of trustees. Because the board of trustees is charged with the establishment of health benefits plans, the selection of health benefits carriers is presumably subject to EUTF selection criteria and procedures. Inasmuch as this Department does not advise the EUTF board of trustees, we are not familiar with the details of such criteria and procedures, and we have not undertaken to obtain such information from the EUTF board and staff. If necessary and desired, we can seek to obtain this information to the extent it is available.

The Program agreement does not involve the expenditure of public funds, and, therefore, does not appear to constitute a procurement of services under HRS Chapter 103D, pertaining to the Hawaii Public Procurement Code.⁶ By informal telephone conference, we have been informed that the State Procurement Office believes that entry into a health benefits plan of the type described herein would not constitute a procurement so long as no consideration (including, for example, promotional activities) were given by the participating county. Should further consideration be given to County participation in the Program, we advise that confirmation of the position expressed by the State Procurement Office be obtained.

The Program agreement does provide for the payment of fees by a county in the event that the county requests "customer-specific programming".⁷ Such customized program or systems work is charged at a rate of \$150.00 per hour.

The Program agreement does not elaborate on the kind of changes to Program services that require customized programming. In the event that County considers entering into the Program

⁶ See HRS §103D-102(a) ("This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance....")

⁷ AdvancePCS Health, L.P., Managed Pharmacy Benefit Services Agreement Consumer Card Program, at 12-13 (Ex. "A", "B").

G. Riki Hokama
Council Chair
Page 4
June 2, 2006

agreement, we recommend that this aspect of the agreement be discussed and clarified with AdvancePCS.

3. Are there any additional legal issues involved with County participation in this program?

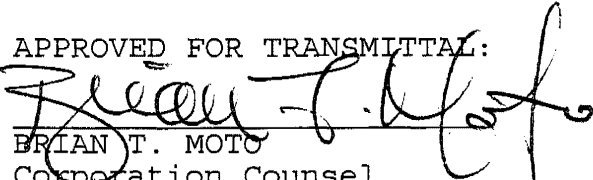
HRS §89-9(d) excludes from the scope of collective bargaining benefits of (but not contributions to) the Hawaii employer-union health benefits trust fund.⁸ Under the Program as we understand it, participating County employees will not pay any fees or be required to make contributions to the Program. Accordingly, we do not believe that County participation in the Program would be subject to collective bargaining.

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cc: Kalbert Young, Director of Finance
Lynn Krieg, Director of Personnel Services
Lance Hiromoto, Deputy Director of Personnel Services
Michele White, Legal Assistant

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

⁸ HRS §89-9(a) ("The employer and the exclusive representative 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, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining...."); HRS §89-9(d) ("Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h)...."); HRS §89-9(e) ("Negotiations relating to contributions to the Hawaii employer-union health benefits trust fund shall be for the purpose of agreeing upon the amounts which the State and counties shall contribute under section 87-4, toward the payment of the costs for a health benefits plan, as defined in section 87-1(8)....").