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MEMO TO: Riki Hokama, Chair
Budget and Finance Committee

FROM: Jeffrey Ueoka, Deputy Corporation Counsel

DATE: April 6, 2016

SUBJECT: **COST ITEM PROPOSAL (HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, BARGAINING UNIT 14)** (BF-6)

We are in receipt of your memorandum dated March 31, 2016, inquiring about the effect of the Council of the County of Maui not approving Cost Items[1] presented to it in relation to the Bargaining Unit 14 arbitration decision. In short, it is not our belief that if the Maui County Council does not approve the cost items for Bargaining Unit 14 by June 30. 2016, negotiations will resume in July.

The Bargaining Unit 14 cost items resulting from an arbitration decision were submitted to the Maui County Council in accordance with the provisions of Section 89-11(g), Hawaii Revised Statutes ("HRS"). In order to analyze this issue it is important to distinguish between an arbitrated decision reached in accordance with Section 89-11, HRS, and an agreement reached between the public employer and the exclusive representative, hereinafter collectively referred to as the "Parties", that is subject to the requirements of Section 89-10, HRS. The provisions of Section 89-11, HRS, are invoked in the event of an impasse between the Parties.

For your reference we have attached as Exhibit "1", an Opinion from the Department of the Attorney General, dated August 4, 1998 ("Opinion"), which

[1] "Cost items" means all items agreed to in the course of collective bargaining that an employer cannot absorb under its customary operating budgetary procedures and that require additional appropriations by its respective legislative body for implementation. Section 89-2, HRS.

is relevant to your question. It is an opinion and therefore does not have the force and effect of law, however it does provide a detailed analysis of the various laws governing this issue. The Opinion focuses on the language contained in Section 89-10(b), HRS.

Section 89-10(b), HRS:

> **All cost items shall be subject to appropriations by the appropriate legislative bodies.** The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. **The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.** (Emphasis added)

While the Opinion ultimately states that failure to approve cost items will result in the rejection of cost items and return of the cost items for further bargaining, it draws the conclusion that the language regarding the requirement of legislative appropriation is identical in Sections 89-10 and 89-11, HRS. While Section 89-10(b) clearly states that upon rejection of any cost items by any of the legislative bodies results in the return of the cost items for further bargaining, Section 89-11(g), HRS is silent in regards to the result of rejection by the legislative body. Section 89-11(g), HRS, states, in relevant part:

> All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies.

The relevancy of this distinction is further supported by the language of Section 89-10(a), HRS, which acknowledges the difference between the requirements to submit cost items is Sections 89-10 and 89-11, HRS. Section 89-10(a), HRS:

> Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to

> ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, **regardless of the requirements to submit cost items under this section and section 89-11.** (Emphasis added)

Section 89-11(e), HRS, limits Bargaining Unit 14's remedies to mediation and arbitration in the event of an impasse. To require an arbitrated decision to go back for "further bargaining" seems counter-intuitive being that arbitration was necessitated by the fact that bargaining had reached an impasse and Bargaining Unit 14's remedies are limited by statute. It is also stated that, "[t]he decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel[,]" and that, "[t]he parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement."[2] These statements imply that the decisions of the arbitration panel are final and that further bargaining is not intended.

This memorandum should not be read to imply or be interpreted to mean that that the legislative bodies are required to appropriate funds for the cost items submitted, it is simply a statement that it is our understanding that for arbitrated decisions, upon rejection of cost items by a legislative body, the cost items are not returned to the parties for further bargaining. The legislative bodies are not included in the collective bargaining process, however it is clear that the power to fund cost items still lies with the bodies. Employers still have options in the event that the legislative bodies fail to appropriate for cost items, Section 89-11(g), HRS, states, "[t]he parties may, at any time and by mutual agreement, amend or modify the panel's decision[,]" however, as stated above, arbitration resulted from the Parties reaching an impasse in negotiations.

Ultimately we are unable to definitively state what will happen in the event that the Council fails to approve the cost items for Bargaining Unit 14 by June 30. 2016, as we are unsure what action will be taken by the exclusive representative and any attempt by our office to predict this would be purely speculative. As discussed above, we do not feel that negotiations will

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[2] Section 89-11(g), HRS

automatically resume in July, as this arbitrated decision was reached in accordance with Section 89-11, HRS, which does not contain the requirement that the cost items be submitted to the Parties for further bargaining upon rejection by the legislative bodies.

Please feel free to contact me if you have any further questions or concerns regarding this issue.

JTU:lkk
Attachment

APPROVED FOR TRANSMITTAL:

PATRICK K. WONG
Corporation Counsel

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August 4, 1998

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Dear Messrs. Wurdeman, Arakawa and Schmidt:

Re: Effect of Legislature's Failure to Appropriate Funds for Cost Items Contained in Public Employees Collective Bargaining Agreements

This responds to the requests for an opinion on the effect of the failure of the legislature to fund negotiated and/or arbitrated pay raises for public employees from Hawaii County Corporation Counsel, dated June 1, 1998, from City and County of Honolulu Corporation Counsel dated June 12, 1998, and from Maui County Corporation Counsel, dated June 18, 1998. In addition, Maui County Corporation Counsel poses another related question of whether Maui County may lawfully pay negotiated pay increases now even though the Legislature has not approved any cost items related to pay increases.

SHORT ANSWER

The effect of the failure of the State Legislature to approve the funding of negotiated and/or arbitrated pay raises prior to adjournment sine die constitutes a rejection of cost items and all cost items are returned to the parties for bargaining. No jurisdiction within the Employer group has the

EXHIBIT "1"

legal authority to unilaterally pay wage increase or other cost items which require specific appropriations from the respective legislative bodies. The non-cost items remain in effect.

DISCUSSION

The Legislature clearly reserved authority to fund or not fund cost items contained within any collective bargaining agreement reached between the public employer and the exclusive bargaining representatives. Section 89-10(b), Hawaii Revised Statutes (HRS), states:

> (b) **All cost items shall be subject to appropriations by the appropriate legislative bodies.** The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. **The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.** [Emphasis added].

Section 89-2, HRS, defines cost items as including "wages, hours, and other terms and conditions of employment the implementation of which requires an appropriation by a legislative body."

The process to obtain appropriation to fund the cost items begins after the respective exclusive bargaining representatives notify the Office of Collective Bargaining that a negotiated agreement has been ratified. Upon receipt of such a notice, the employer is required to submit the cost items to the appropriate legislative bodies. The Governor, as the employer for the State,

submitted the cost items to the Legislature for the following bargaining units on the following dates: Unit 01 on May 1, 1998; Unit 02 on January 14, 1998; Unit 03 on November 12, 1997; Unit 04 on November 12, 1997; Unit 06 on October 2, 1997; Unit 08 on February 9, 1998; Unit 09 on March 26, 1998; and Unit 13 on March 24, 1998.

Bills to appropriate funds to pay for salary increases and other cost adjustments negotiated in fiscal biennium 1995-1997 had been introduced in the House on January 22, 1997, for each of the collective bargaining units. Each of these bills were carried over into the Regular Session of 1998. These so-called "vehicle" bills were introduced with zero dollars appropriated to fund cost items because the amounts necessary for funding the respective cost items were not yet known at the time the bills were introduced. Normal practice is for the Legislature to insert the appropriate dollar amount obtained from the cost data submitted by the Governor for each bargaining unit into each appropriation bill. After the Legislature received the cost data from the Governor, the Legislature did not insert the cost data into the respective vehicle bills, hold hearings or take committee action on the bills, or conduct a floor vote.[1]

The Legislature adjourned sine die on May 14, 1998 without expressly approving or rejecting the cost items for any of the public employee bargaining units.

The effect of the Legislature's failure to act upon requests for appropriation to fund cost items properly submitted is determined by Chapter 89, HRS.

A review of the legislative history of Chapter 89, HRS, reveals that the original bill for Chapter 89, HRS, Senate Bill (S.B.) No. 1696-70, introduced in 1970 read as follows:

> A request for funds necessary to implement such written agreement, and for approval of any other matter requiring the approval of the appropriate legislative body, shall be submitted by the employer to the legislative body within 14 days of the date on which

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[1] During the 1997 Regular Session, two House Committees held hearings on these "vehicle bills" but no substantive action was taken because the parties were still in negotiations over each of the collective bargaining agreements and cost data could not yet be determined.

> the agreement is executed. Matters requiring the approval of the State Legislature shall be submitted by the employer within 14 days of the Legislature convenes, if it is not in session at the time the agreement is executed. Request for funds to implement the agreement shall be included in the Governor's operating budget. The legislative body may approve or reject such submission, as a whole, by a majority vote of those present and voting on the matter; but, if rejected, the matter shall be returned to the parties for further bargaining. Failure by the employer to submit such requests to the legislative body within the appropriate period shall be considered to be a refusal to bargain, in violation of Section 5(a)(5) of this Act. **Such requests shall be considered approved if the legislative body fails to act within thirty days of the end of the period for submission to the legislative body. The parties may agree that those provisions of the agreement not requiring action by the legislative body shall be effective and operative in accordance with the term of the agreement. If the legislative body rejects the provisions submitted to it by the employer, either party may reopen all or part of the remainder of the agreement.** [Emphasis added.]

The Senate amended S.B. 1696-70 by removing the provision which provided that a request for funds was to be considered "approved if the legislative body failed to act within thirty days of the end of the period for submission to the legislative body."

The apparent intended effect of the removal of the automatic approval provision was that the failure of the Legislature to approve the cost items properly submitted to the Legislature cannot be construed as approval of the cost item.

In 1972, the Attorney General was asked to render his opinion on three questions concerning legislative approval of cost items in a collective bargaining agreement. One of the questions was "[b]y what means could the Legislature approve or reject the cost items?" The Attorney General responded that a rejection may be indicated by the failure to appropriate the necessary funds. This response was published as Attorney General Opinion No. 72-10. There has been no change in the statute since 1972 which would affect this opinion.

The seminal case involving legislative failure to act upon cost items was filed in 1979 before the Hawaii Public Employment Relations Board in Hawaii Firefighters v. Ariyoshi, Decision No. 111, 2 HPERB 286 (1979). This case involved a collective bargaining agreement arbitrated pursuant to Section 89-11(d), HRS. Like section 89-10, HRS, section 89-11, HRS, has a provision that "all items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies." In the Hawaii Firefighters case, the respective legislative bodies had all failed to expressly approve or disapprove the cost items submitted to them for funding. As a result, the union filed a prohibited practice charge against the Governor and all the Mayors. The Board discussed at length the Governor's submittal of the cost items for funding and the Legislature's adjournment without acting upon the funding request despite the fact that the Legislature had enough time to act upon the request had it desired to do so. The Board described the Legislature's adjournment without acting upon the request to fund the cost items as a "rejection of the cost items.". Hawaii Firefighters, 2 HPERB at 299. The Board's dictum is consistent with the opinion expressed in the Attorney General Opinion No. 72-10.

The Hawaii Public Employment Relations Board (the predecessor of the Hawaii Labor Relations Board) is the agency created to administer Chapter 89, HRS. It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous. Keliipuleole v. Wilson, 85 Hawaii 217, 226 (1997).

The practice has particular weight when it involves a contemporaneous construction of a statute by those "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424 (1982).

The Attorney General's opinion was issued over twenty six years ago. The Hawaii Labor Relations Board's case was decided over nineteen years ago. The two are in agreement that legislative failure to appropriate funding for cost items is to be considered rejection.

> A uniform practical construction given to a statute for a considerable period of time by an executive department of a government which is charged to carry out such a statute, although not controlling, is entitled to much weight in case of doubt as to the meaning of the statute.

Keller v. Thompson, 56 Haw. 183, 190 (1975).

It is noteworthy that in Hawaii Firefighters v. Ariyoshi, 2 HPERB at 299 -300, the Hawaii Labor Relations Board found that the rejection of cost items by the Legislature had been a disaster for collective bargaining and invited the Legislature to consider the true worth of the arbitration mechanism contained in subsection 89-11(d). Despite this invitation, the Legislature has left intact the legislative approval requirement for cost items contained in both sections 89-10(b) and 89-11(d), HRS. In 1995, the Legislature amended section 89-11(d), HRS, to expand the number of bargaining units subject to binding arbitration but left unchanged the approval requirement.

In State v. Dannenberg, 74 Haw. 75 (1992), the Hawaii Supreme Court looked at legislative inaction as an expression of legislative intent.

> This court has previously said that where the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature and the effect of legislation.

74 Haw. at 83.

Even though legislative inaction in response to an administrative board's ruling may not be considered in the same light as legislative inaction in response to a Supreme Court ruling, we believe that the intimacy with which the Legislature is involved in the approval or rejection of cost items in public employee collective bargaining coupled with the fact that the findings of the Hawaii Labor Relations Board have been left undisturbed for nearly twenty years together give weight to the argument that the legislature has given tacit approval to the Board's interpretation of the effect of legislative inaction on cost items.

Another question asked is the status of the non-cost items when the cost items are rejected. Section 89-10(b), HRS, states only that rejected cost items will be returned to the parties for additional bargaining. Non-cost items are not mentioned.

In Attorney General Opinion No. 72-10, the Attorney General opined that non-cost items in a collective bargaining agreement are not affected by the Legislature's action or inaction on cost items and thus may be implemented without further legislative approval. In a April 12, 1979 informal Attorney General Opinion, we reiterated that if "a legislative body rejects a cost item, all cost items are returned to the parties for further bargaining. However, non-cost items are not re-negotiated."

The legislative intent as expressed in the committee reports at the time § 89-10(b), HRS, was passed into law in 1970 supports the conclusion that non-cost items were to be unaffected by the rejection of the cost items. The Conference Committee Report (25-70) on Senate Bill No. 1696-70, S.D. 1, H.D. 3, C.D. 1, expressly incorporated the intention contained in House Standing Committee Report No. 761-70, which states as follows:

> Your Committee has made the following amendments:
>
> ...
>
> 6. **Legislative ratification.** Under **S. B. No. 1696-70, S. D. 1, H. D. 1,** if the State Legislature or the legislative body of any county rejects any of the cost items submitted to them, **all** cost items shall be returned to the parties for further bargaining and either party may reopen **all** or a part of the remainder of the agreement. Your Committee feels that reopening all issues upon the rejection by legislative body may unnecessarily result in negation of all points of agreement. [Emphasis in the original.]

Specifically, the language in S.B. No. 1696-70, S.D. 1, H.D. 1, a previous draft, had read in relevant part as follows:

> If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining and **either party may reopen all or part of the remainder of the agreement.** [Emphasis added.]

Following the amendment, S.B. No. 1696-70, S.D. 1, H.D. 1, and H.D. 2, read as follows:

> If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

This provision was enacted as § 89-10(b), HRS, and has remained unchanged since its passage in 1970.

Based on the foregoing, we conclude that there is no statutory basis upon which either party is entitled to reopen the non-cost items in the event a legislative body has failed to approve any cost item submitted to it.

Finally, the parties enter into the negotiations and reach agreements knowing that any agreement that includes cost items is subject to approval by the respective legislative bodies. Moreover, rejection of the cost items by a legislative body returns the rejected cost items to the parties for continued negotiations. While the parties may be able to negotiate the rejected cost items without reopening the non-cost items, § 89-10(b) does not appear to preclude the parties from reopening non-cost items by mutual consent if they deem it necessary to reach agreement on cost items.

The failure of the Legislature to approve any of the cost items submitted for the collective bargaining units 1, 2, 3, 4, 6, 8, 9, and 13 constitutes a rejection of those cost items by the Legislature. Consequently, pursuant to § 89-10(b), HRS, the cost items are to be returned to the parties for additional bargaining. The rejection does not apply to non-cost items and the agreement of the parties as to non-cost items remains in effect.

In addition to the foregoing, the Maui County Corporation Counsel raises an additional question concerning the timing of the payment of the salary increases. Mr. Schmidt asserts that the legislature appropriated funds for the salaries of employees in each of the respective bargaining units. Although such appropriations did not include money to pay the negotiated increases, Mr. Schmidt posits that there is sufficient funding to pay the negotiated increases although a payroll lag or reduction in force may be necessary. Therefore, Mr. Schmidt asks whether Maui County can begin paying the wage increases now.

The salaries for employees in the various bargaining units were appropriated for two years during the 1997 legislative session. This biennium budget remains in effect through the current fiscal year. Additional funding for the negotiated pay increases was sought through various communications from the Governor to the Legislature. Since the Legislature failed to act on these requested increases, it is clear that the Legislature did not appropriate funds for these cost items. To argue otherwise disregards § 89-10(b), HRS, which specifically requires legislative action to fund cost items.

As to any jurisdiction being free to commence paying their employees the salary increases, this would violate both the express language of § 89-10(b), HRS, and the spirit of Chapter 76, HRS. In the informal Attorney General opinion dated April 12, 1979, the Attorney General determined that when Section 89-10(b), HRS, is read together with Section 89-10(c), HRS, the Legislative intent is clear that the State Legislature and the county legislative bodies are required to "act in concert", meaning some common plan. The common plan is that all Legislative bodies should act in common on cost items at the time they act on the operating budgets of the employees. Each legislative body may approve or reject the cost items submitted to it and if a legislative body rejects a cost item, all cost items are returned to the parties for further bargaining.

As we noted in the legislative history, the purpose of Statewide negotiations was to allow the legislative bodies to make their appropriations in context.

Senate Stad. Comm. Rep. 745-70 states:

> Each legislative body, who has a responsibility to properly allocate public funds entrusted to it, may approve or reject the cost items submitted to it. Here, again, the importance of having Statewide negotiating enables the respective legislative bodies to appropriate funds in the proper perspective with other competing demands. It is difficult to imagine how a legislative body could properly allocate funds when there are numerous requests, each requiring separate consideration, for appropriations to implement collective bargaining agreements. Even with negotiations on a statewide level, it is difficult to allocate funds properly when requests for appropriations are submitted at varying intervals throughout the year; thus, public employers and

> exclusive representatives are encouraged to conclude negotiations at a time to coincide with the period during which the appropriate legislative bodies may act on the operating budget of the employers.

From this we noted in the April 12, 1979 informal opinion as follows:

> Because it is not clear whether one legislative body will reject any cost item until all such bodies have considered those items, all jurisdictions may be required to wait a reasonable period of time to allow the other legislative bodies to consider the applicable cost items.

In addition, Sections 76-2 and 76-3, HRS, are clear expressions of legislative intent. Section 76-2, HRS, states in part:

> It is the intent of the legislature that the construction and interpretation of any of the provisions of this chapter and of chapter 77 be uniform for the State and the several counties.

Section 76-3, HRS, states:

> It is the intent of the legislature that the system of personnel administration established by this chapter and chapter 77 shall be as uniformly administered as is practicable. In order to promote such uniformity, the several commissioners and directors of the state department of personnel services and of the county departments of civil service and the administrative director of the courts shall meet at least once each year at the call of the director of personnel services of the State.

Finally, section 89-6(b), HRS, defines the public employer for the purpose of negotiations as the governor or the governor's designated representatives together with the mayors of all the counties or their designated representatives, the governor having four votes, and each of the mayors having one vote, with decisions to be made by the employer group on the basis of simple majority. Thus, neither the governor nor any of the mayors are authorized to negotiate unilaterally.

CONCLUSION

In conclusion, as the Governor submitted all cost items for bargaining units 1, 2, 3, 4, 6, 8, 9, and 13 to the State Legislature, and as the Legislature failed to approve the cost items prior to adjournment sine die, the cost items are rejected and returned to the parties for bargaining. The non-cost items of the respective collective bargaining agreements remain in effect. No jurisdiction has the authority to unilaterally pay wage increases or other cost items which require specific appropriations from the respective legislative bodies.

Very truly yours,

James E. Halvorson
Deputy Attorney General

APPROVED:

for Margery S. Bronster
Attorney General

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