

1 HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
2 Minutes of the Board of Trustees Meeting
3 Thursday, January 24, 2002
4
5

6 TRUSTEES PRESENT: Mr. Sam A. Callejo
7 Ms. Audrey Hidano
8 Ms. Joan Lewis
9 Ms. Kathryn S. Matayoshi
10 Mr. Neal Miyahira (Arrived: 10:55 a.m.)
11 Mr. Will Miyake
12 Mr. Chip Uwaine
13 Mr. Jimmy Yasuda
14 Mr. Davis Yogi
15

16 TRUSTEE ABSENT: Mr. Jim Williams (Out-of-State)
17

18 ATTORNEY: Mr. Brian Aburano, Deputy Attorney General
19

20 BUDGET & FINANCE Ms. Wanda Kimura
21 PROJECT TEAM Mr. Tracy Ban
22 Ms. Lynette Fukunaga
23 Mr. Gary Sanehira
24 Ms. Karen Tom
25 Mr. Tom Morrison, The Segal Company
26 Ms. Shirley Kawamoto
27

28 OTHERS PRESENT:
29 Ms. Julie Ugalde, Risk Mgmt., Dept. of Accounting & General Svcs.
30 Ms. Stephanie Tsubata, Marsh USA, Inc.
31 Mr. Mike Grossi, Marsh USA, Inc.
32 Mr. Rod Tam, HMSA
33 Ms. Monica Engle, VSP
34 Mr. Gordon Murakami, Royal State
35 Ms. Lilia Yu-Lum, Royal State National
36 Mr. Melvin Higa, MBAH
37 Mr. Melvin Kutara, City, Dept. of Human Resources
38 Ms. Gertrude Nitta, HGEA-Retiree
39 Mr. Maurice Morita, HSTA
40 Mr. Leroy Simms, Jr., HSTA
41 Mr. George Butterfield, HSTA-Retiree
42 Ms. Karen Muronaka, HSTA-Retiree
43 Ms. Jean Aoki, HSRTA
44 Mr. Peter Rodriguez, Hartford-LTC
45

46 A. CALL TO ORDER

1 The regular meeting of the Board of Trustees was called to order on January 24, 2002, at 9:00
2 a.m., in Conference Room 303/304 located at the No. 1 Capitol Building, 250 South Hotel
3 Street, Honolulu, by Chairperson Sam Callejo. Eight trustees (4 public employer trustees and
4 4 employee-beneficiary trustees) were present; it was announced that Mr. Williams was absent
5 and excused and that Mr. Miyahira would be arriving later during the meeting.
6

7 With no objections, agenda items V. A - D were moved to the beginning of the agenda to
8 accommodate briefing presenters from the State Risk Management and Marsh USA.
9

10 B. AGENDA ITEM V. A

11
12 Presentation by Deputy Attorney General Brian Aburano on the fiduciary responsibilities of the
13 trustees and errors and omissions insurance.
14

15 It is not entirely clear that the Legislature intended the Hawaii Employer-Union Health Benefits
16 Trust ("EUTF") to be treated as a conventional trust and to impose conventional trustee
17 fiduciary duties on the EUTF trustees. However, it is reasonable if not probable that the
18 EUTF trustees have fiduciary duties because they will be holding, investing, and
19 administrating monies contributed by both employee-beneficiaries and public employers.
20 Further, to the extent that the EUTF is a trust, trustees customarily are found to owe fiduciary
21 duties. To the extent that conventional fiduciary duties are imposed on the EUTF trustees, the
22 EUTF trustees would owe such fiduciary duties to the employee-beneficiaries of the trust. In
23 addition, there is a reasonable possibility that the EUTF trustees would owe fiduciary duties or
24 other duties and responsibilities to the state, public employers, and the public-at-large. This is
25 because: (a) the EUTF will be holding, investing, administrating money that the state and other
26 public employers have contributed to the fund; (b) Act 88 and its legislative history indicate
27 one of the purposes of the EUTF is to provide benefit plans at a cost affordable to public
28 employers; and (c) an Attorney General opinion letter to the Public Employees Health Fund
29 (PEHF), dated
30 January 6, 2000, opined that the PEHF owed duties to public employers as well as employee-
31 beneficiaries and had responsibilities to the taxpayers-at-large.
32

33 Mr. Aburano provided a summary of the main fiduciary duties that are typically owed by
34 trustees of conventional trusts. Preliminarily, he noted that the primary duty of trustees is to
35 carry out the settlor's intent which are principally determined by the terms of the trust. In the
36 case of the EUTF, the "terms of the trust" would be the statutes creating the EUTF. Mr.
37 Aburano discussed the following conventional trustee duties: (a) duty to administer the trust;
38 (b) duty not to delegate; (c) duty to exercise ordinary care, skill and diligence; (d) duty of
39 loyalty; (e) duty to take and keep control of trust property; (f) duty to preserve trust property
40 and make it productive; (g) duty to keep and render accounts and furnish information; and (h)
41 duty to enforce claims of trust and defend actions against the trust. With respect to the duty of
42 loyalty, Mr. Aburano stated that to the extent that the EUTF is treated like a conventional
43 trust, the primary duty of loyalty would be owed to the beneficiaries of the trust. However, he
44 noted that HRS §87A-5 provided for five trustees to be appointed to represent the public

1 employers, and that other provisions of HRS chapter 87A anticipated that there would be
2 conflicting votes between trustees representing the employee-beneficiaries and public
3 employers. Mr. Aburano indicated to the trustees that there could be substantial differences in
4 views and positions between the employee-beneficiary trustees and the public employer trustees
5 without either side violating their duty of loyalty. In addition, Mr. Aburano reminded the
6 trustees that the views and positions of employee-organizations as well as public employers
7 were not necessarily synonymous with the best interests of the beneficiaries of the EUTF.
8

9 Mr. Aburano was asked to check if the January 6, 2000 opinion is a public record and
10 available for the trustees review.
11

12 Mr. Aburano addressed whether the trust was required to purchase errors and omissions and
13 fiduciary liability insurance. Mr. Aburano's advice was that the legislative intent behind HRS
14 §87A-25(4) is not clear. It could be designed to protect the trustees and persons making claims
15 against the EUTF. However, it could also be designed to transfer the risk of loss from the
16 State to private insurers. With respect to the former, Mr. Aburano noted that the presence or
17 absence of insurance did not affect the trustee's immunity from state law claims under HRS
18 §26-35. 5(b) if the trustee acts in an official capacity and without a malicious or improper
19 purpose. While the presence of such insurance would affect the trustee's right to indemnity
20 under HRS §26-35.5(c), the loss of indemnity would only be to the extent that the trustees
21 were covered by the insurance – again assuming that they were acting in an official capacity
22 and without a malicious or improper purpose. Notwithstanding the foregoing, Mr. Aburano
23 concluded that it would be reasonable for the EUTF trustees to procure at least fiduciary
24 liability insurance for purposes of risk transfer which would cover any deductible or self-
25 insurance portion not provided by the current state risk management coverages.
26

27 Mr. Uwaine informed the trustees that he had written a letter to Mr. Aburano relative to the
28 Chun vs. Employee Retirement System ("ERS") decision. Mr. Aburano summarized the what
29 the Hawaii Supreme Court said about the duties of the Attorney General's office in the Chun
30 vs. ERS decision. Mr. Uwaine said that his letter asked if it was true as was stated in the
31 Chun vs. ERS decision that the trustees could be held civilly or criminally liable despite
32 receiving advice from the Attorney General. Mr. Aburano answered Mr. Uwaine's question in
33 the affirmative, but said that it was not likely. Mr. Aburano pointed out that if the trustees
34 received and followed the Attorney General's advice, it would be difficult to argue that they
35 acted for a malicious or improper purpose for purposes of avoiding immunity or indemnity
36 under HRS §26-35.5. Further, for purposes of qualified immunity under federal law, they
37 would have a good argument that they acted with a reasonable belief that their conduct was
38 lawful. Mr. Aburano pointed out that one instance where the trustees might not receive
39 protection under the Attorney General's advice was where they did not disclose all the facts to
40 the Attorney General before the advice was given.
41

42 C. AGENDA ITEM V. B.
43

1 Presentation by Julie Ugalde, State Risk Management Office, on the insurance available to
2 trustees.

3
4 A portfolio of materials and a copy of Ms. Ugalde's presentation were distributed to the
5 trustees. Ms. Ugalde explained the role of the State's Risk Management Office. She also
6 explained the State's current excess E&O and self insured coverages available to State boards
7 and trustees. Self insurance is where there is no private insurance coverage, but there is a
8 promise that the State will pay the loss from the General Fund under certain circumstances.
9 She informed the trustees that the State's Risk Management Office could obtain quotes on
10 insurance coverages for the EUTF with completed applications by the trustees (applications
11 were included in the portfolio). Ms. Ugalde noted that the State's Risk Management Office
12 currently worked through an insurance broker, Marsh USA, Inc.

13
14 Presentation by Stephanie Tsubata, Marsh USA, Inc., on the State's excess liability and crime
15 coverages.

16
17 Information on the State's current insurance policies were included in the portfolio of materials
18 given to each of the trustees. Ms. Tsubata indicated that they had also looked at fiduciary
19 liability insurance for the trustees. This insurance would provide defense counsel by the
20 carrier for individual trustees. Ms. Tsubata stated that the State's current crime policy
21 includes coverages that a fidelity bond would cover. Ms. Tsubata offered to provide a list of
22 similar government entities that carried fiduciary liability insurance through Marsh.

23
24 Mr. Charles Khim, a member of the public, made public comment to the agenda item. Ms.
25 Ugalde interrupted Mr. Khim in the middle of his comments by stating that Mr. Khim was
26 incorrect in stating that the first \$2 million in liability would be paid by the trustees. She
27 further stated that her office was responsible for up to \$10,000. Mr. Khim replied that the
28 first \$2 million in liability would be paid personally by the trustees if the Attorney General did
29 not present the matter to the Legislature or if the Legislature declined to fund the request for
30 payment of the liability.

31
32 Mr. Uwaine asked Ms. Ugalde if it was possible for the trustees to be personally liable if they
33 were found liable for a judgment in their individual capacity and the Attorney General did not
34 ask the Legislature to indemnify them or the Legislature refused to indemnify them. Ms.
35 Ugalde said that she was unaware of that ever happening. Mr. Uwaine said that did not
36 answer his question and repeated it. Ms. Ugalde declined to answer Mr. Uwaine's question,
37 stating that she could not answer the question because she was not an attorney. Mr. Aburano
38 stated that if the Attorney General did not ask the Legislature for indemnification or the
39 Legislature did not approve it, the trustees could be personally liable for a judgment made
40 against them in their individual capacity. Mr. Aburano said that while he did not have
41 personal knowledge on the subject, based on Ms. Ugalde's response, it appears that there was
42 no history of such a situation occurring.

1 Ms. Ugalde noted that there was an issue of whether the EUTF would waive its immunity if it
2 purchased primary insurance. Mr. Aburano was asked to check on this issue and to provide a
3 response in writing. He and Ms. Ugale were asked to review the legislative intent behind the
4 fidelity bond provision in HRS chapter 87A and whether the State's broader crime policy
5 coverage satisfied that provision.
6

7 PUBLIC COMMENT ON AGENDA ITEMS V. A – B.
8

9 C. Khim, a member of the public, provided his views of HRS §26-35.5, and provided his
10 views on the trustees' potential liability and fiduciary duties. He stated that the trustees were
11 ultimately liable even if they relied on the Attorney General's advice. He urged the trustees to
12 err on the side of caution as far as their potential personal liability was concerned and
13 recommended that they fulfill their statutory duty to purchase fiduciary insurance. Further, he
14 stated that they had a legal duty to obtain insurance under HRS §87A-25.
15

16 M. Higa, a member of the public, commented on the volatility of the cost of insurance rates;
17 whether the insurance being discussed is for employee-beneficiaries; and the authority of risk
18 management to provide coverage.
19

20 D. Meeting recessed at 10:55 a.m. and reconvened at 11:05 a.m. At this time, Mr. Miyahira
21 joined the meeting.
22

23 E. APPROVAL OF THE MINUTES (Agenda Item II)
24

25 Minutes for meetings of January 9, 2002 and January 17, 2002 were approved as corrected.
26 A correction to Judge Burns' title was made to the January 9, 2002 minutes.
27

28 F. REPORT BY INVESTIGATIVE OPERATIONAL COMMITTEE (Agenda Item III)
29

30 Mr. Miyake reviewed the proposed changes to the Operating Procedures recommended by the
31 committee. Copies of the recommended amended procedures were distributed to each trustee.
32

33 Additional changes were recommended during the board's discussions:
34

- 35 1. Change the word "approval" to "review" in the sentence: Agenda transmitted to chair
36 for [approval] review prior to public notice.
- 37 2. Change subcommittee names to simply "Administration Committee, Benefits
38 Committee, and Rules Committee".

39 Mr. Aburano reported that as requested by the board, he had discussed the subject of
40 standing committees with an attorney at the Office of Information Practice (OIP). The
41 attorney at OIP said that the Sunshine Law is silent on standing committees and that
42 OIP referred persons inquiring on this subject to the Attorney General's opinion written
43 for the UH board of regents which stated that standing committees should comply with
44 the Sunshine Law. The attorney at OIP stated that there is nothing in the Sunshine Law

1 that addresses committees making recommendations, however, she noted that the
2 general purpose of a committee is to make recommendations. OIP recommends that
3 standing committees follow Sunshine Law procedures.

- 4 3. Change the sentence and move to board officers: "Chairperson and vice-chairperson
5 will coordinate tasking of staff..." to "[tasking] assignments of staff will be made
6 through chair [and] or vice-chair and secretary/treasurer." A similar reference should
7 be made for committee chairpersons.
- 8 4. Change to reporting to the board by committees, add: "in the event that there is no
9 agreement, a simple report the non-agreement will be made by the committee to the
10 board."
- 11 5. Change consultation section to: "[exclusive] employee organizations registered with the
12 board".
- 13 6. Change input from public section in third bullet by deleting "action" item and revising
14 sentence to: "After the board had completed discussion on any item, the presiding
15 officer shall invite the public to ask questions or provide comments on the subject
16 matter prior to any action by the board." Also, add language that permits further board
17 discussion, action, or move on to the next agenda item.
- 18 7. Change terms of officers to clarify that the terms are for one year and beginning July 1,
19 2002; officers must vacate the positions on June 30. Delete bullet concerning current
20 officers shall remain in office until June 30, 2002.

21
22 Mr. Aburano recommended that the election of officers for March 1, 2002 through June 30,
23 2002 be added to the agenda for January 31, 2002 meeting.

24
25 Staff will prepare final proposed Operating Procedures with the foregoing changes and
26 approval of the Operating Procedures will be brought up as old business at the next meeting on
27 January 29, 2002.

28
29 Staff was asked to purchase a copy of Robert's Rules of Order, Newly Revised, 10th Edition,
30 for each trustee. Staff was asked to provide to all trustees copies of the summary of the roles of
31 chairperson, vice-chairperson, and secretary/treasurer (from Robert's Rules of Order) that had
32 been provided to the committee members.

- 33
34 G. Meeting recessed at 12:18 p.m. per request of the employee-beneficiary trustees for the
35 purpose of separate caucuses among the public employer trustees and the employee-beneficiary
36 trustees to discuss the selection of board officers effective March 1, 2002. Meeting reconvened
37 at 12:29 p.m. and the board continued its discussion on the proposed Operating Procedures.

38
39 H. MEETING TIMES

40 There was discussion as to the length of the next board meetings as there is no end time on the
41 agenda. Trustees agreed to schedule the next meeting, January 29, 2002, from 9:00 a.m. to
42 3:00 p.m. and establish end times for future meetings during the January 29, 2002 meeting.

1 I. ADJOURNMENT

2 Motion was made to adjourn by Ms. Matayoshi and seconded by Mr. Miyake. The motion
3 passed unanimously. (4 votes in favor by the employee-beneficiary trustees/5 votes in favor by
4 the public employer trustees).

5
6 The meeting was adjourned at 12:40 p.m.

7
8 Respectfully submitted,

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10
11
12

Clifford Uwaine, Secretary-Treasurer

13
14 APPROVED ON February 19, 2002.

15
16 Documents distributed:

- 17 1. Packet distributed by Ms. Julie A. Ugalde, Risk Management Officer, Ms. Stephanie Y.
18 Tsubata, and Mr. Michael Grossi, Marsh USA, Inc.
19 2. January 9, 2002 Minutes (5 pages)
20 3. January 10, 2002 Minutes (7 pages)
21 4. Board of Trustees Operating Procedures, January 17, 2002. (3 pages)
22 5. Agenda Items Submitted by Jim Williams – Explanation. (3 pages)
23 6. Operating Budget of the Trust, January 1, 2002 to June 30, 2003. (1 page)
24 7. Communications from the Public – Melvin Higa. (22 pages)