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Case No. CE-01-539

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

PATRICIA HAMAMOTO¹, Superintendent,
Department of Education, State of Hawaii; and
CONNECTIONS, A NEW CENTURY
PUBLIC CHARTER SCHOOL,

Respondents.

CASE NO. CE-01-539

ORDER NO. 3303

ORDER GRANTING IN PART AND
DENYING IN PART UPW'S MOTION FOR
AFFIRMATIVE RELIEF PURSUANT TO
DECISION NO. 491 OF THE BOARD

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION
FOR AFFIRMATIVE RELIEF PURSUANT TO DECISION NO. 491 OF THE BOARD

On August 16, 2017, the Hawaii Labor Relations Board issued Decision No. 491 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER (D & O) in the above-entitled case. The D & O ordered, in part, the following:

(4) Any request for affirmative relief by Complainant, including attorney's fees, in accordance with HRS § 377-9, must be requested by a motion filed no later than twenty days after the date of the final Decision and Order. The affirmative relief requested shall be limited to that attributable to the retaliation claim, and the motion shall include sufficient details to substantiate and provide justification for the affirmative relief requested to enable the Board to determine the reasonableness of the request. Respondents shall have ten days from receipt of the

¹ Pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 25(d)(1), when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party; proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. Although the Board does not amend the caption in this matter, the Board, pursuant to HRCP Rule 25(d)(1), deems the successor of any named public respondent to be a party in this matter.

motion to file an opposition. Upon submission of adequate proof by the Complainant, the Board may order further affirmative relief in accordance with HRS § 377-9.

On September 5, 2017, Complainant UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW), filed UPW'S MOTION FOR AFFIRMATIVE RELIEF PURSUANT TO DECISION NO. 491 OF THE BOARD (Motion) accompanied by a MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF JAMES A. AH SING ON AFFIRMATIVE RELIEF (Ah Sing Declaration); DECLARATION OF DAYTON M. NAKANELUA (Nakanelua Declaration); AFFIDAVIT OF REBECCA L. COVERT (Covert Affidavit); EXHIBITS 65 THROUGH 72. The Motion requested affirmative relief in the form of: 1) payment to Complainant James Ah Sing (Complainant or Ah Sing) lost earnings from the trash hauling business through December 2014 in the amount of \$4,500, plus taxes; 2) reimbursement of the union for \$4,403.44 in attorney's fees and costs incurred in these proceedings attributable to the retaliation claim; and 3) civil penalties of not more than \$15,000 payable to Ah Sing for Respondents' retaliatory conduct, taking into account the gravity of the prohibited practices committed by Respondent, the impact on public employees and on the public interest related to the retaliation claim.

Respondents PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; and CONNECTIONS, A NEW CENTURY PUBLIC CHARTER SCHOOL (Connections or Respondent and collectively Respondents) filed no opposition to the Motion within the five days required by Hawaii Administrative Rules §12-42-8(g)(3)(iii).

"Ordinarily, attorney's fees cannot be awarded as damages or costs unless so provided by statute, stipulation or agreement." Blair v. Ing, 96 Hawai'i 327, 329, 31 P.3d 184, 186 (2001) (citing Shangai Inv. Co. v. Aletka Co., Ltd., 92 Hawai'i 482, 501, 993 P.2d 516, 535 (2000)).

The requested attorney's fees and costs in this case are made pursuant to Hawaii Revised Statutes (HRS) § 377-9, which states in relevant part:

(d) After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the determination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take affirmative

action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay with interest, costs, and attorneys' fees. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order. Furthermore, an employer or employee who wilfully or repeatedly commits unfair or prohibited practices that interfere with the statutory rights of an employer or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a civil penalty not to exceed \$10,000 for each violation. In determining the amount of any penalty under this section, the board shall consider the gravity of the unfair or prohibited practice and the impact of the practice on the charging party, on other persons seeking to exercise rights guaranteed by this section, or on public interest.

(Emphasis added).

The Board has the discretion in the amount of an attorney's fees and costs award, but the award must be reasonable. Chun v. Bd. of Trustees of the Emp. Retirement System, 92 Hawai'i 432, 439, 992 P.2d 127, 134 (2000); Pancakes of Hawaii v. Pomare Properties Corp., 85 Hawai'i 286, 299, 944 P.2d 83, 96 (Haw. Ct. App. 1997) (citing Azer v. Myers, 8 Haw. App. 86, 133, 793 P.2d 1189, 1216).

Based on a review of the Motion, the Ah Sing Declaration, and Exhibits 48 and 58, the Board finds that the make whole remedy requested by Complainant of \$4,500 for the loss of earnings from the trash hauling business from October through December 2003 and all of 2004 to be reasonable. However, the Board finds that the taxes on the \$4,500 were not adequately substantiated. There was no evidence substantiating that, under the contract with Connections, Complainant would have received the amount of those taxes in addition to his payment for his services for the period in question or specific proof of the amount and/or tax rate.

Based on the Covert Affidavit, the Board further determines that the hourly rate and the hours of activity associated with the retaliation claim are reasonable. Accordingly, the \$4,255.04 in attorney's fees, which includes the tax requested, is reasonable. Regarding the costs, however, the photocopying cost per page of \$.20 per page is high. The Board finds that \$.10 per page is reasonable. Therefore, the requested costs of \$ 148.40 for photocopying are reduced by half to \$ 74.20.

Regarding the request for civil penalties¹ for a total of \$15,000 (\$1,000 a month for 15 months of repeated violations against Ah Sing discriminating against him for his concerted activity and deprived him of the earnings from the refuse hauling contract) payable to Ah Sing, the Board is unable to approve the request in its entirety for the following reasons.

As asserted by Complainant, HRS § 377-9(d) set for above specifies the relevant factors to be considered in determining the civil penalty. This provision states in relevant part:

Furthermore, an employer or employee who wilfully or repeatedly commits unfair or prohibited practices that interfere with the statutory rights of an employer or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a civil penalty not to exceed \$10,000 for each violation. In determining the amount of any penalty under this section, the board shall consider the gravity of the prohibited practice and the impact of the practice on the charging party, on other persons seeking to exercise rights guaranteed by this section, or on public interest.

Applying the relevant factors to the penalty requested, the Board agrees that a civil penalty should be imposed in this case because the Board concluded in Decision No. 491 that Connections by Thatcher's conduct "violated HRS § 89-13(a)(4) by wilfullyⁱⁱ retaliating against Ah Sing." (Emphasis added) As the First Circuit Court, State of Hawaii (First Circuit) has held, under HRS §377-9(d) made applicable to prohibited practice controversies under HRS 89 by HRS § 89-14,ⁱⁱⁱ a civil penalty is mandatory where respondents committed prohibited practices in violation of HRS § 89-13(a). United Public Workers, AFSCME, Local 646, AFL-CIO v. Char, Civil No. 10-1-1931-09 (March 24, 2011), at *5 (Char). However, regarding the amount of the civil penalty, the circuit court interpreted HRS § 377-9(d) to afford the Board "ultimate discretion" in setting the amount of the civil penalty provided that it does not exceed the amount of \$10,000 for each violation. In its discretion, the Board disagrees with the UPW's requested civil penalty on two grounds. First, based on Char, civil penalties are required to be paid to the State of Hawaii general fund, not to the Complainant. The First Circuit in Char, among other things, overturned the Board's decision and order in that case directing that payment of the \$900 civil penalty be made to the director of the Department of Budget and Finance, State of Hawaii, and held that because HRS § 377-9(d) does not specify the entity to whom the civil penalty must be paid, the payment of the civil penalties should not be paid to a specific governmental agency but rather to the State of Hawaii general fund. This position appears consistent with HRS § 103-2 General Funds, which provides in relevant part, "All revenues of the State or of any agency thereof not specifically appropriated to other purposes shall be general realizations of the State to be available for general use in financing government operations and services, which revenues and realizations in their aggregate are herein referred to as the 'general fund'." Second, the Board finds that the requested \$15,000 in civil penalties is excessive. In this regard, the Board is cognizant of the UPW's assertions regarding the seriousness of the impact of the retaliatory conduct on Complainant, on other employees, and the "public interest" and Complainant's argument that Connections' failure to continue the trash contract fell under the "repeatedly commits unfair or prohibited practices" based on the Sevako v. Anchor Motor Freight, Inc., 792

F.2d 570, 574 (6th Cir. 1986) (Sevako), and the cases cited. However, the Board finds that Sevako and the cases cited therein inapposite because those cases applied the continuing violation theory to determine whether the cause of action was timely and there could be a recovery for the injuries from the first annual bid. Significantly, these cases did not apply the continuing violation theory to a determination whether the unfair or prohibited practices were repetitive in nature, as asserted by the UPW. Further, the Board, in its discretion, rules that the \$15,000 penalty request is excessive based on the nature of the prohibited practice. Despite Complainant's assertion of a serious impact on Complainant, other employees, and the "public interest" by Connections' retaliation, the Board is unable to find adequate proof in the record in support. Rather, the record shows that the impact was limited to the cancellation of an agreement to haul trash outside of Ah Sing's employment with Connections, for which Complainant is being made whole by this order granting his request for \$4,500 for the loss of earnings in October through December 2003 and all of 2004. There is simply no evidence that Complainant, other employees, or the "public interest" suffered a serious impact from Thatcher's retaliation. Accordingly, the Board orders Connections to pay \$1 as the civil penalty in this case to the State of Hawaii general fund.

For all of the foregoing reasons, the Board grants in part and denies in part the Motion and orders the following:

1. Respondents to pay \$4,500 as a make whole remedy to Complainant for the loss of earnings from the trash hauling business from October through December 2003 and all of 2004;
2. Respondents to pay \$4,255.04 in attorney's fees, which includes the taxes requested;
3. Respondents to pay \$ 74.20 in costs; and
4. Connections to pay \$1 to the State of Hawaii general fund as a civil penalty.

DATED: Honolulu, Hawaii, Nov. 6, 2017.

HAWAII LABOR RELATIONS BOARD



Sesnita A. D. Moepono
SESNITA A.D. MOEPONO, Member

J.N. Musto
J.N. MUSTO, Member

Copy to:

Rebecca L. Covert, Esq.
Jeffrey P. Keating, Deputy Attorney General

ⁱ The significance of the term “civil penalty” has been noted by the United States Supreme Court:

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States v. Regan*, 232 U.S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases).

ⁱⁱ However, the Board notes that the Cayetano rule has been altered by the Hawaii Supreme Court’s decision in Hawaii Gov’t Emp. Ass’n . Local 152 v. Casupang, 116 Hawai’i 73, 99, 170 P.3d 324, 350 (2007), in which the Court held that “in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the ‘conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89[.]’”

ⁱⁱⁱ HRS § 89-14 provides in relevant part that “Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9;...”.

Case No. CE-01-539 – UPW v. Hamamoto and Connections, A New Century Public Charter School – ORDER GRANTING IN PART AND DENYING IN PART UPW’S MOTION FOR AFFIRMATIVE RELIEF PURSUANT TO DECISION NO. 491 OF THE BOARD.

Order No. 3303