

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,
and

ELIZABETH A. CHAR, M.D., Director,
Emergency Services, City and County of
Honolulu; and MUFU HANNEMANN,
Mayor, City and County of Honolulu,

Respondents.

CASE NO. CE-10-746

ORDER NO. 2730

ORDER REGARDING REMEDIES

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On April 16, 2010, the Hawaii Labor Relations Board (Board) issued Order No. 2699, Order Granting UPW's Motion for Summary Judgment and Denying Respondent's Motion to Dismiss or in the Alternative for Summary Judgment. The Board held that Respondents ELIZABETH A. CHAR, M.D., Director, Emergency Services, City and County of Honolulu and MUFU HANNEMANN, Mayor, City and County of Honolulu (collectively City or Respondents) committed a prohibited practice by wilfully violating Section 15.09 of the Unit 10 Agreement (Agreement) governing requests for information necessary for the processing of a grievance by failing to provide documents and other information within its possession in a timely manner. The Board held that Respondents committed a prohibited practice pursuant to Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (8)¹.

¹HRS § 89-13(a) provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; [or]

* * *

- (8) Violate the terms of a collective bargaining agreement[.]

The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Complainant), in its Motion for Summary Judgment, filed on February 1, 2010, requested appropriate relief including attorney's fees and costs incurred, and also fines under HRS § 377-9(d). In Order No. 2699, the Board reserved ruling on remedies and requested the parties further brief that specific matter prior to the Board ruling on the issue.

On April 29, 2010, the UPW filed its Memorandum in Support of Motion for Make Whole Remedies Including Costs and Attorney's Fees and Civil Penalties, and Respondents filed their Memorandum Re: Remedies. On May 12, 2010, Respondents filed a Supplemental Memorandum Re: Remedies, and on May 17, 2010, the UPW filed its Reply Brief to Respondents' Supplemental Memorandum Re: Remedies. The Board heard arguments on the issue of remedies on May 4 and 17, 2010.

The award of attorney's fees, costs, and penalties are governed by the 2009 revision to HRS § 377-9(d), which provides in relevant part (emphases added):

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. . . . 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.

The Board concludes that the award of costs and attorneys' fees lies within the Board's discretion, as the sentence that provides for such award commences with the phrase "final orders may" (emphasis added). The Board further concludes that the imposition of penalties on 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 is mandatory, as the portion of § 377-9(d) providing for such penalties specifies that such employer or employee "shall" be subject to a civil penalty not to exceed \$10,000 for each violation.

Where the verbs "shall" and "may" are used in the same statute, especially where they are used in close juxtaposition, courts will infer that the legislature realized the difference in meaning and intended that the verbs should carry with them their ordinary meanings. Gray v. Admin. Dir. Of the Court, State of Hawai'i, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997). The courts have therefore construed the verb "shall" to require a mandatory effect, and the verb "may" to have a non-mandatory, i.e., discretionary, effect. Id.

Here, the Board concludes that costs and attorney's fees are not warranted. Although the Board found that Respondents committed a prohibited practice by not producing documents in response to the UPW's request pursuant to Section 15.09 of the Agreement, the Board notes that the information requests were made during the arbitration stage of the grievance. Normally, the Board considers information requests made during the arbitration stage to be within the purview of the arbitrator under HRS 658A. In the present case, however, because the Board found in Order No. 2697 in Case No. CE-10-744 that Respondents delayed the selection of the arbitrators, the Board in the present case was not persuaded by Respondents' argument to defer to the discovery process under HRS Chapter 658A. Nevertheless, the Board finds that the scope of discovery available under Chapter 658A is broader than that provided for in Section 15.09 of the Agreement. Thus, while the Board found a prohibited practice here, the Board finds that an award of attorneys fees and costs is not warranted given the totality of circumstances.²

With respect to penalties, the Board finds that Respondents should be penalized \$500.00. The Board took into account the totality of circumstances, including the number of information requests involved in this matter; the gravity of the prohibited practice; and the impact on the UPW, other persons seeking to exercise rights guaranteed by HRS § 377-9, and public interest, which the Board finds were not severe, for the information requests were

²The Board further notifies the parties that, in the future, if a party requests attorneys' fees as a remedy, that such party submit detailed time sheets to the Board. Although the Board in this case found that attorneys' fees are not warranted, in future cases should the Board find that fees are warranted, the Board would required more detailed information regarding fees than was provided in this case.

made at the arbitration stage of the grievances, and as noted earlier, such requests are normally under the purview of the arbitrators and the control of discovery, including the scope and enforcement, are normally within the jurisdiction of the arbitrators.

The provisions of HRS § 377-9(d) do not specify the entity to whom penalties must be paid; accordingly, the Board looks to similar statutes for guidance. This Board administers the provisions of HRS Chapters 89 and 377; however, pursuant to HRS §§ 396-3 and 396-11, the Board also hears appeals concerning penalties issued pursuant to Hawaii's Occupational Safety and Health Division (HIOSH), Department of Labor and Industrial Relations, which administers occupational safety and health standards throughout the State. Such penalties are paid to the Director of Budget and Finance, State of Hawaii. Accordingly, the Board concludes that penalties issued pursuant to HRS § 377-9(d) shall be payable to the Director of Budget and Finance, State of Hawaii.

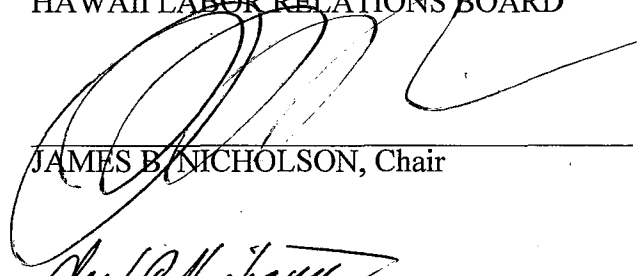
ORDER

The Board hereby orders Respondents to pay a penalty of \$ 500.00, payable to the Director of Budget and Finance, State of Hawaii, and delivered to the Board, and to post a copy of this order and Order No. 2699 in conspicuous places at the work sites where employees of Unit 10 assemble, and keep such copies posted for a period of 30 days from the initial date of posting.

The Board further orders Respondents to file a report with the Board certifying their compliance with the Board's orders within 30 days from the date of this order, with a certificate of service upon Complainant.

DATED: Honolulu, Hawaii _____ August 13, 2010 _____.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

Copies sent to:
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