

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

DAVID Y. IGE, Governor, State of  
Hawai'i; and RYKER WADA, Director,  
Department of Human Resource  
Development, State of Hawai'i,

Respondents.

CASE NOS. CE-01-712a  
CE-10-712b

ORDER NO. 3483

ORDER GRANTING, IN PART, AND  
DENYING, IN PART, RESPONDENT  
UNITED PUBLIC WORKERS'  
MOTION FOR APPROVAL OF  
ATTORNEY'S FEES AND COSTS AND  
DISMISSING AND CLOSING THE  
CASE

ORDER GRANTING, IN PART, AND DENYING, IN PART,  
RESPONDENT UNITED PUBLIC WORKERS' MOTION FOR  
ATTORNEY'S FEES AND COSTS AND DISMISSING AND CLOSING THE CASE

On June 29, 2009, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant or UPW) filed with the Hawai'i Labor Relations Board (Board) the instant prohibited practice complaint (Complaint) against DAVID Y. IGE, Governor, State of Hawai'i and RYKER WADA, Director, Department of Human Resource Development, State of Hawai'i (collectively Respondents)<sup>i</sup> alleging violations of Hawai'i Revised Statutes (HRS) § 89-13(a)(5), (7), and (8) for, among other things, a failure to provide timely and/or full responses to the UPW's request for information regarding certain grievances as required by the Unit 1 and 10 collective bargaining agreements (collectively CBAs) and the duty to bargain in good faith under HRS § 89-9(a).

2009 Hawaii Session Laws Act 6, § 2, at 813-14 (Act 6) amending HRS § 377-9(d) was enacted in the 2009 Special Session on July 15, 2009 and had an effective date of July 1, 2009. Act 6 amended HRS § 377-9(d) into its current form as follows:

(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 ~~[such]~~ affirmative action, including reinstatement of employees ~~[with or without pay, as the board may deem proper.]~~ 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 in original)

On July 9, 2009, the UPW filed a Motion for Summary Judgment (MSJ) on the grounds that there were no genuine issues of material fact in dispute in connection with Respondents' failure to provide information as requested by the UPW, and that UPW was entitled to summary judgment as a matter of law on the prohibited practices.

On July 16, 2009, Respondents filed Respondents' Memorandum in Opposition to UPW's Motion for Summary Judgment Filed on July 9, 2009.

On August 5, 2009, the Board held a hearing on the UPW's MSJ.

On August 26, 2009, the Board issued Order No. [2633] Granting Complainant's Motion for Summary Judgment (Order No. 2633) based on a determination that it was undisputed that despite numerous continuances granted by UPW, Laderta<sup>ii</sup> failed to provide responses to UPW's requests for information submitted on December 3, 2007, as required by the CBAs § 15.09. Accordingly, the Board held that the Respondents wilfully violated the CBAs by failing to provide

information needed by the UPW to investigate and process its class grievances, and that it need not address whether Respondents' conduct violated HRS § 89-13(a)(5) and (7). The Board ordered, among other things, that Respondents provide information in their possession, pursuant to the CBAs § 15.09, requested by the UPW on December 3, 2007 and notify the Board in writing of the steps taken in compliance within 10 days of the receipt of the Order.

On September 8, 2009, Complainant filed UPW's Motion to Enforce HLRB Order No. 2633 (Motion to Enforce) asserting that Respondent Laderta failed to comply with Order No. 2633 and appeared to be withholding vital and time sensitive information regarding the unlawful privatization and contracting out of State employees by failing to provide the requested information within seven calendar days of the Board's order.

On September 10, 2009, Respondents filed Respondents Linda Lingle and Marie Laderta's Proof of Compliance.

On September 11, 2009, Respondents filed Respondents' Opposition to United Public Worker's [sic] Motion to Enforce Order No. 2633.

On September 14, 2009, Respondents filed Respondents Linda Lingle and Marie Laderta's Supplemental Proof of Compliance.

On September 15, 2009, UPW filed Second Supplemental Declaration of Dayton M. Nakanelua in Support of Motion to Enforce HLRB Order No. 2633 Filed on September 8, 2009.

On September 17, 2009, Respondents filed Respondents Linda Lingle and Marie Laderta's Third Supplemental Proof of Compliance.

On September 25, 2009, the Board issued a Notice of Hearing on UPW's Motion to Enforce HLRB Order No. 2633 for October 1, 2009.

On September 30, 2009, the UPW filed Motion to Continue Hearing on UPW's Motion to Enforce HLRB Order No. 2633 Filed on September 8, 2009.

On October 2, 2009, Respondents filed Linda Lingle and Marie Laderta's Fourth Supplemental Proof of Compliance.

On October 13, 2009, the Board issued Order No. 2649 Granting Complainant's Motion to Continue Hearing on UPW's Motion to Enforce HLRB Order Filed on September 8, 2009 and a notice rescheduling the hearing on the Motion to Enforce to October 28, 2009.

At the hearing on the Motion to Enforce, the Board scheduled a status conference for November 10, 2009.

At the November 10, 2009 status conference, the Board scheduled a second status conference for December 7, 2009.

At the December 7, 2009 status conference, the Board's records indicated that Complainant's counsel represented that she would go back to talk to the client regarding the contracting information and that another status conference was not necessary.

On January 31, 2019, the Board issued a Notice of Intent to Dismiss [Complaint] that stated in part:

On December 7, 2009, the Board held a status conference in the Board's hearing room,....The Board's records from that status conference indicate that Complainant's attorney would be speaking with Complainant regarding contracting information and that Complainant's attorney represented that there was no need for another status conference. Thereafter, the Board's records show no further actions taken by either party.

The Board then, among other things, notified the parties that the Complaint would be dismissed unless a written objection was received from any party within ten days of issuance of this notice, setting forth good cause as to why the case should not be dismissed.

On February 7, 2019, the Complainant filed UPW's Opposition to Case Dismissal, which objected to the Notice of Intent to Dismiss because "[a]s the prevailing party in the case UPW is entitled to make whole relief including costs, attorney's fess and civil penalties under Hawai'i Revised Statutes (HRS) § 377-9(d)."

On February 8, 2019, Respondents filed Respondents' Response to Notice of Intent to Dismiss (Response to NOI). In their Response to NOI, the Respondents initially noted that the facts that the Complaint was filed on June 29, 2009 and pertained to alleged failures to timely respond to information requests dating back to December 3, 2007 and June 8, 2008, and that Act 6 amending HRS § 377-9(d) was enacted in a Special Session on July 15, 2009 and became effective on July 1, 2009. Respondents then argued that it was inaccurate for UPW to assert that as the prevailing party, UPW was entitled to make whole relief. In support, Respondents asserted that because generally, no civil statute shall have an *ex post facto* effect, unless it specifically so states, Act 6 therefore governs allegations of discrete prohibited practices allegedly taking place from July 1, 2009. Finally, Respondents took the position that this matter should be dismissed because although the Union moved for enforcement of Order 2633, the Board did not rule on the

Motion to Enforce, status conferences were held, the parties were able to work out their difficulties, and UPW took no action on this case for the past ten years.

On March 14, 2019, UPW filed a Motion for Approval of Attorney's Fees and Costs (Motion for Attorney's Fees and Costs (Motion for Attorney's Fees/Costs) requesting "reasonable" attorney's fees in the amount of \$12,565.44 and costs in the amount of \$943.41 from Respondents for the successful prosecution of the Complaint. The UPW contends that the request for attorney's fees and costs are reasonable. Further, that Respondents' contention regarding the inapplicability of HRS § 377-9(d) lacks merit because the 2009 amendment to HRS § 377-9(d) became effective on July 1, 2009 and was applicable to pending cases based on Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974) (Bradley). The Motion was supported by the Declaration of Herbert Takahashi, which contained a detailed breakdown of his attorney's fees and costs.

On March 19, 2019, Respondents filed Respondents' Memorandum in Opposition to Complainant's Motion for Approval of Attorney's Fees and Costs (Respondents' Opposition). In their Opposition, Respondents noted the following facts. Act 6 amending HRS § 377-9(d) was enacted on July 15, 2009 with an effective date of July 1, 2009. The Complaint was filed on June 29, 2009 and pertained to alleged failures to timely respond to information requests dating back several years. UPW's MSJ was granted on August 27, 2009. On September 8, 2009, UPW filed the Motion to Enforce claiming Respondents violated the Order by not providing all information demanded by the Union within seven days of the issuance of the Order. Respondents then turned to the Bradley ruling relied on by the UPW, which specifically stated that a court is to apply the law in effect at the time it renders its decision, "there is statutory direction....to the contrary[.]" to argue that Act 6 contains a "very clear and unambiguous statutory direction in this instance that mandates that the Act only take effect on a specific date, namely July 1, 2009." Therefore, based on the legislative intent, the Motion for Attorney's Fees/Costs should be dismissed. Alternatively, Respondents argue that if the Board concludes that the Legislature intended for Act 6 to retroactively apply for a period in excess of the 15 days (period between enactment and effective date), UPW should not be allowed attorney's fees or costs for any work performed after the Board issued Order No. 2633.

In the consolidated cases of United Public Workers, AFSCME, Local 646, AFL-CIO v. Char, Civil No. 10-1-1931-09 (KKS) and United Public Workers, AFSCME, Local 646, AFL-CIO v. Char, Civil No. 10-1-1063-09 (KKS), the First Circuit Court, State of Hawai'i (First Circuit), issued a Decision and Order Reversing and Modifying Hawai'i Labor Relations Board Order No. 2729 and Remanding Case with Instructions for Further Proceedings in CE-10-744, at \*4 (March 24, 2011) (Char). In reversing and modifying Board Order No. 2729, the First Circuit, among other things, interpreted HRS§ 377-9(d) as mandating that if the Board finds the prohibited practice complaint to be valid, the Board is required to provide relief, including affirmative actions and make whole orders, including back pay with interest, costs, and attorney's fees.

Prior to ruling on the request for relief in this case, the Board addresses the Respondents' basic assertion that attorney's fees are not warranted in this case because the Complaint was filed prior to the enactment and effective date of Act 6 and the alleged misconduct dated back several years. The Board recognizes that there are significant factual distinctions between this case and the Bradley case relied on by UPW. Further; Bradley specifically addressed the issue of whether a statutory provision is applicable to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law. Nonetheless, the Hawai'i Supreme Court has applied the broad principle from Bradley that the court is to apply the law in effect at the time it renders its decision with respect to remedial or procedural laws, which "do not affect existing rights, but merely alter the means of enforcing or giving effect to such rights[]" in other contexts. See Tam v. Kaiser Permanente, 94 Hawai'i 487, 495, 17 P.3d 219, 227 (2001). There is no question that attorney's fees are considered remedial relief. Kona Vill. Realty, Inc. v. Sunstone Realty Partners, XIV, LLC, 123 Hawai'i 476, 485, 236 P.3d 456, 458 (2010).

Although not in effect at the time of the filing of the Complaint in this case, Act 6 was in effect when both the Order No. 2633 granting summary judgment to UPW (filed on August 26, 2009) and the issue of the propriety of attorney's fees and costs (the Motion for Attorney's Fees was filed on March 14, 2019) arose. Therefore, the Board is compelled to disagree with Respondents' position insofar as they assert that UPW was precluded from any make whole relief because Act 6 was not in effect until July 1, 2009 and no civil statute shall have an *ex post facto* effect, unless it specifically so states. As Act 6 became effective as of July 1, 2009, the Board will consider an award of attorney's fees and costs for services rendered in this case by Complainant's attorney from the July 1, 2009.

The Board has broad discretion in ordering affirmative remedies for unfair labor or prohibited practices. However, the award must be reasonable. United Public Workers, AFSCME, Local 646, AFL-CIO v. Hamamoto, Board Case No. CE-01-539, Order No. 3005, at \*15 (July 9, 2014); United Public Workers, AFSCME, Local 646, AFL-CIO v. Hamamoto, Board Case No. CE-01-539, Order No. 3303, at \*3 (November 6, 2017) (Order No. 3303). Further, the party seeking attorney's fees has the burden to show the reasonableness of the fee asked for and received. Waikoloa Dev. Co. v. Wakoloa Heights Land Investors, LLP, 129 Hawai'i 450, \_\_\_, 303 P.3d 1227, \_\_\_ (App. 2013).

Based on a review of the Motion for Attorney's Fees/Costs, the attorney's fees and costs incurred after July 1, 2009 were basically for work performed regarding the MSJ, the prehearing statement, and the Motion to Enforce. There is no dispute that Order No. 2366 granting summary judgment in favor of UPW determined that Respondents committed a prohibited practice. Therefore, under Char, UPW is entitled to attorney's fees and costs for services rendered on the MSJ. Following the filing of the Motion to Enforce, Respondents filed four proofs of compliance,

and the Board held a hearing and two status conferences on the Motion to Enforce. At the final December 7, 2009 status conference, UPW's counsel represented that there was no need for an additional status conference. Nine years elapsed after that status conference without any further action by UPW on the Motion to Enforce. The Board, on its own initiative, issued the Notice of Intent to Dismiss on January 31, 2019. UPW's claim for make whole relief includes attorney's fees and costs regarding the work performed on the Motion to Enforce. However, the Board disagrees with UPW and agrees with Respondents on this issue that UPW is not entitled to any attorney's fees or costs for any work performed regarding the Motion to Enforce, which was abandoned by the UPW and not ruled on by the Board.

Accordingly, for the reasons set forth above and based on a review of the record, including the Motion for Attorney's Fees, the Board determines that UPW is entitled to a claim of 28 hours for attorney's fees for services rendered during the period from July 2, 2009 through August 28, 2009 in the preparation, filing, and argument of the MSJ and the prehearing statement. Respondents have not objected to the UPW's counsel's hourly rate of \$ 250.00 per hour, which the Boards finds reasonable. Therefore, the Board finds and concludes that UPW is entitled to \$ 7,000 (28 hours x \$250) in attorney's fees and taxes thereon of \$ 329.84 (\$7,000 x 4.712%), for a total of \$ 7,329.84 in attorney's fees.

Regarding the costs claimed by UPW, the Board determines that UPW is entitled to the costs associated with the MSJ and the prehearing statement. UPW has claimed \$ 814.40 of costs associated with preparation of the MSJ and \$ 11.20 for the prehearing statement. In calculating these costs, UPW has charged \$ 0.20 per page for photocopying. The Board finds that a reasonable photocopying cost per page is \$ 0.10; and will therefore, reduce the costs associated with the MSJ and prehearing statement by half. The Board awards \$ 412.80 in costs.

UPW made no request for civil penalties. However, the First Circuit in Char also ruled that a civil penalty under HRS § 377-9(d) is mandatory where there has been a finding of a violation of HRS § 89-13(a)(8). Char, at \*5. The Char decision further interpreted the statutory provision as providing the Board with "ultimate discretion" in setting the amount of the civil penalty, provided it does not exceed the amount of \$ 10,000 for each violation. *Id.* at \*5-6. The statutory provision further requires, however, that the Board 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 the public interest. Based on the totality of the record, the Board finds that Respondents shall be penalized \$100.00. In so ruling, the Board takes into account the number of grievances involved, the gravity of the prohibited practice, the impact on the UPW and other persons seeking to exercise rights guaranteed by HRS § 377-9, and the public interest, which the Board finds were not severe. The Board finds that, although the processing of the grievances may have been delayed, Respondents did continue to provide information; ultimately,

the proceedings ceased for nine years. Pursuant to the First Circuit's order in Char, the civil penalty is to be paid into the general fund of the State of Hawai'i.

Since this Order resolves the issue of make whole relief, which is the basis of UPW's objection to the Notice of Intent to Dismiss issued by the Board in this case, the Board dismisses this case.

ORDER

Based on the foregoing reasons, the Board grants, in part, and denies, in part, the Motion for Attorney's Fees and Costs and orders the following:

1. Respondents to pay to Complainant \$7,329.84 in attorney's fees, which includes the taxes requested;
2. Respondents to pay to Complainant \$412.80 in costs;
3. Respondents to pay \$100.00 to the State of Hawai'i general funds as a civil penalty; and
4. This case is dismissed and closed.

DATED: Honolulu, Hawai'i, April 12, 2019.

HAWAI'I LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



J.N. MUSTO, Member





UPW v. David Ige, et al.

Case Nos. CE-01-712a, CE-10-712b

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNITED PUBLIC WORKERS' MOTION FOR APPROVAL OF ATTORNEY'S FEES AND COSTS AND DISMISSING AND CLOSING THE CASE  
ORDER NO. 3483

Copies sent to:

Herbert R. Takahashi, Esq.

Richard H. Thomason, Deputy Attorney General

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<sup>i</sup> The named Respondents in the prohibited practice complaint were Linda Lingle, Governor, State of Hawai'i (Lingle) and Marie Laderta (Laderta), Director, Department of Human Resources Development, State of Hawai'i (DHRD). When the Board's administrative rules are silent on procedural matters, the Board has looked to analogous provisions of the Rules of Court. Ballera v. Del Monte Fresh Produce Hawai'i, Inc., Board Case No. 00-1(CE), Order No. 1978, at \*5 (January 11, 2001). Under Hawai'i Rules of Civil Procedure Rule 25(d)(1), when a public officer is a party to an action in an official capacity and while that action is pending, the public officer dies, resigns, or otherwise ceases to hold office, 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 that does not affect the substantive rights of the parties shall be disregarded. Accordingly, the current Governor, State of Hawai'i is David Y. Ige and the current Director of DHRD is Ryker Wada are substituted for Lingle and Laderta as parties to this proceeding.

<sup>ii</sup> See note 1, *supra*.