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Case No. 18-CU-10-370, 19-CE-10-923**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DANIEL EDWARD PARKER,

Complainant(s),

and

~~UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO;~~ and DEPARTMENT
OF PUBLIC SAFETY, State of Hawai'i,

Respondent(s).

CASE NO(S). ~~18-CU-10-370~~
19-CE-10-923

ORDER NO. 3788

ORDER CLARIFYING DEPARTMENT OF
PUBLIC SAFETY, STATE OF HAWAII'S
REQUIREMENTS FOR COMPLIANCE
WITH DECISION NO. 502

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STATE OF HAWAII'S REQUIREMENTS FOR COMPLIANCE WITH DECISION NO. 502**

1. Introduction and Statement of the Case

1.1. Decision No. 502

On March 23, 2021, the Board issued Decision No. 502, which held that Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD) committed prohibited practices for its conduct regarding its discharge of Complainant DANIEL EDWARD PARKER (Complainant or Parker) and ordered, among other things, certain remedies, including reinstatement, back pay, and a notice of compliance regarding the steps taken to comply with the Order contained in the Decision and Order (Notice of Compliance).

1.2. Proceedings Regarding Compliance with Decision No. 502

On April 26, 2021, PSD filed the Notice of Compliance informing the Board of Parker's reinstatement with benefits as ordered in Decision No. 502. Attached to the Notice of Compliance were exhibits documenting the actions taken regarding compliance, including an April 15, 2021 notification of reinstatement from PSD Director Max Otani (Otani) to Parker, Employee Personnel Action(s) Reports, dated April 19, 2021, with a calculation sheet, to show benefits reinstated, an April 22, 2021 notification to Parker of the removal of that reference to his

discharge from his personnel records, and an April 7, 2021 email string to Renee Laulusa (Laulusa) confirming the posting of Decision No. 502.

Subsequently, Parker sent an email notifying the Board that, among other things, PSD Deputy Director Maria Cook informed him that he was required to attend eight weeks of Basic Corrections Training (BCT) from June 14 - August 27, 2021 on O'ahu. Parker objected to this requirement because of undue hardship and that other Adult Correctional Officer (ACO) IIIs, who have returned from worker's compensation leave longer than his three-year discharge period, were provided with a shorter on-the-job training (OTJ training).

PSD filed a supplement to the Notice of Compliance transmitting a copy of an email and a check issued to Parker for \$ 53,774.34 for the back pay.

The Board held a Status Conference on the compliance issues on May 28, 2021. At the conference, PSD requested the HOM on the issues of compliance with Decision No 502.

On June 8, 2021, PSD filed a Prehearing Brief in support of its position on the compliance issues to be addressed at the HOM.

At the compliance HOM, PSD called the current PSD Deputy Director for Corrections, Tommy Johnson (Johnson), and PSD Human Resources Specialist VI, Laulusa, as witnesses. Parker called himself as a witness. PSD submitted Exhibits A-G, and Parker submitted no exhibits. At the HOM, the Board inquired regarding the (re)trainings and (re)certifications of MCCC ACOs during the three-years that Parker was on discharge. PSD promised to provide certain information regarding MCCC ACOs (re)certifications, including their expirations, extensions, and availability on Maui; and a list of BCT modules instructed by Marte Martinez.

On June 23, 2021, the Board issued Order No. 3768 requiring that PSD submit additional information on training, including a list of (re)trainings, (re)certifications, and (re)qualifications that PSD is requiring Parker to complete for his reinstatement. In addition, for each of these (re)trainings, (re)certifications, and (re)qualifications requirements, the Board requested specific information, including whether: 1) MCCC ACO IIIs are or were, during the period of Parker's authorized leave with pay (ALWP) for his discharge, required to complete the requirement; 2) Parker can complete the requirement through OTJ training; 3) the requirement was provided to MCCC ACO IIIs during the COVID-19 pandemic and 4) the requirement is currently or anticipated to be provided on the island of Maui for those MCCC ACO IIIs needing to complete the requirement.

On July 8, 2021, PSD submitted a response to Order No. 3768.

1.3. Issues

The parties agreed that the disputed issues regarding PSD's compliance with the Decision No. 502 are as follows:

1. Whether PSD's requirement that Parker undergo the full BCT on O'ahu complies with the Board's order contained in Decision No. 502 to reinstate Parker to his ACO III position?
2. Whether PSD's payment of \$53,774.34 for back pay, which includes an offset for wages Parker earned from other employment performed during the period between his discharge and his reinstatement by PSD, complies with the back pay award made in Decision No. 502?

2. Relevant Background and Findings of Fact

In Decision No. 502, the Board ordered, among other things, the following:

3. Within 30 days of this Order, reinstate Daniel Edward Parker to his former position as an ACO III at MCCC without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed;
4. Make Daniel Edward Parker whole, including back pay with interest and other benefits suffered as a result of the misconduct taken against him.

9. PSD shall notify the Board of the steps taken to comply with this Order within 45 days of receipt of this Decision and Order.

2.1. Training for Parker and Other MCCC ACO IIIs

At the time of his discharge, Parker was an ACO III who had been employed by PSD at MCCC for almost five years.

Parker completed the entire BCT as a recruit. After BCT, all ACOs are periodically required to complete additional certifications and recertifications.

BCT is only given at PSD's Training and Staff Development center (TSD) on O'ahu. During BCT, for each recruit, PSD pays a salary and bears the costs of hotel, per diem, meals, and transportation, including air travel from the trainee's island of origin to O'ahu and back and ground transportation from the hotel to the TSD.

After Decision No. 502 was issued, on April 15, 2021, Otani sent a letter notifying Parker of his reinstatement to his MCCC ACO III position in accordance with Decision No. 502, and his placement on ALWP pay for the period April 28, 2018 to April 19, 2021. Based on a decision by Johnson, Otani directed Parker to attend BCT on O‘ahu from June 14, 2021 to August 27, 2021. Although acknowledging Parker’s concern that attending BCT would cause undue hardship, Otani justified his decision as necessary to provide Parker with the training and familiarization for a successful transition back into the workforce.

Johnson decided that Parker should undergo BCT based on his assessment of safety and PSD liability concerns, and his position that any PSD employee returning from one year or more of leave should be retrained. However, Parker is the only reinstated employee who Johnson has required to undergo BCT. Other employees returning from worker’s compensation leave longer than Parker’s leave or returning after being on a leave for more than a year have not been required to undergo BCT.

Johnson’s objective in this training requirement was to have Parker ready to return to the line fully trained and certified. Johnson noted that Parker needed to repeat BCT because during his absence, there were changes to PSD training and policies, such as Prison Rape Elimination Act (PREA). Further, Parker needed to be (re)certified in weapons, use of force, workplace violence, and pepper spray (OC spray).

Regarding the BCT requirement for Parker, Johnson consulted with and instructed the training office administrator that when Parker arrived at BCT, the administrator should assess and test Parker’s proficiency for certain modules based on Parker’s prior experience and knowledge. Parker should be allowed to test out of the modules in which he is proficient thereby shortening his BCT period.

BCT is given on a pass or fail basis. Typically, if a recruit fails to pass a module, a recruit may retest at least once. Because Parker is reinstated without a probationary period, he will not be subject to discharge for any failure during training.

During the period that Parker was discharged, MCCC ACO IIIs with no break in service received OJT refresher training and (re)certifications. None of these MCCC ACOs have been required to take BCT modules or been required to travel to O‘ahu for training unless unavailable on Maui. Since 2019, No MCCC ACO has been recertified in weapons training. During the COVID pandemic, no MCCC ACO has been recertified in CPR and policy update training has been delayed.

2.2. Back Pay Calculation and Payment to Parker

Parker is the first PSD employee reinstated under a Board order.

PSD’s prior reinstatements of employees were done under an arbitration award or a settlement agreement. For these reinstatements with back pay, PSD has applied an unwritten practice for an employee reinstated after more than a year, who has earned income. The back pay calculation includes an offset of the earned income from the total gross pay that the reinstated employee would have earned during the period of PSD’s wrongful discharge. However, if the employee is reinstated by PSD within a year or less or has no earned income, there is no offset of for earned income in calculating the back pay.

From his April 28, 2018 discharge date to his April 19, 2021 reinstatement date, Parker was deemed to be on ALWP.

Parker received a check from the State of Hawai‘i, dated May 5, 2021, for \$53,774.34. The check was a combined payment for his regular pay of \$2,554.50 (gross pay) and retroactive base pay of \$120,511.72 (gross pay). The deductions of \$59,446.58 for taxes and \$9,845.30 for retirement were taken from this combined payment of regular pay and retroactive base pay.

Because Parker was reinstated more than a year after his wrongful PSD discharge and had earned income, PSD followed its unwritten practice and offset his earned income in calculating his back pay. Parker’s total gross back pay for the period from April 28, 2018 to April 19, 2021 was \$171,798.14, which was offset by his earned income of \$51,286.42 for that period. PSD’s calculation of the payment for the retroactive base pay is as follows:

Total Gross Pay 4/28/18-4/19/21	\$171,798.14
Deducted Earned Income for 4/28/18-4/19/21	\$ 51,286.42
Retroactive Base Pay Shown on Ex. E and G	\$120,511.72

The back pay calculation did not include any compensation for the overtime earned by other ACO IIIs during his period of ALWP, or out of pocket costs for health insurance benefits that he incurred while on discharge.

Parker was credited with three years of retirement based on his ALWP without the offset.

3. Analysis and Conclusions of Law

HRS § 377-9(d) provides that after the final hearing, the Board is required to make and file a decision, which may require the person [complained of] to, among other things, “take affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay[.]”

The Hawai'i Supreme Court (Court) has held that in addition to the HLRB's express powers, an administrative agency's authority includes those necessary to carry out the powers expressly granted. State of Hawaii v. Nakanelua, 134 Hawai'i 489, 514, 345 P.3d 155, 180 (2015).

3.1. Back Pay

Regarding the back pay award, PSD takes the position that the offset for interim wages made in calculating Parker's back pay ordered by the Board is appropriate and equitable. PSD relies on the general proposition that a wrongfully discharged employee is entitled to the amount due during the remainder of the contract term, reduced by income which the employee has earned. This proposition is based on the established contract law principle that a party whose contract has been breached is not entitled to be placed in a better position because of the breach than he would have been in had the contract been performed. Therefore, PSD asserts that if his interim wages were not offset, Parker would be in a better position than if he was not terminated. PSD also relies on the unwritten PSD policy and past reinstatements under arbitration awards and settlement agreements, which as Laulusa concedes, specifically provided for the offset of earned income in the calculation of the back pay. Significantly, PSD provides no statutory authority for its position that back pay is offset by earned income.

The Board disagrees that PSD's payment of back pay to Parker with the offset for earned income complied with Decision No. 502.

Obviously, Parker's back pay award under Decision No. 502 was not made under a collective bargaining agreement, an arbitration award, or settlement agreement, specifically providing for an offset of earned income in calculating back pay. So, the contract law principles are not controlling of this award. While PSD further relies on the unwritten departmental policy providing for an offset of any earned income, this unwritten policy also does not control the back pay awarded by the Board under Decision No. 502.

The Board ordered Parker's reinstatement and make whole remedies, including back pay, under its HRS § 89-14ⁱ and HRS § 377-9(d) authority set forth above. The Board's HRS § 377-9(d) authority to craft remedies for prohibited practices has been recognized as very broad. Del Monte Fresh Produce, Inc. v. It'l Warehouse Union, Local 142, 112 Hawai'i 489, 492, 146 P.3d 1066, 1068 (2006).

The Board's order of back pay for Parker was unambiguous and provided no offset for his earned income during the three-year period of his wrongful discharge. Even with arbitration awards, while a make whole remedy can be offset or subject to mitigation, courts have refused to assume the offset or mitigation. *See, e.g., United Elec., Radio & Machine Workers of Am. v. GE*, 2020 U.S. Dist. LEXIS 55677, at *12 (D. Pa.); Wis. State Emp. Union v Wis. Emp. Rels. Comm'n, 189 Wis.2d 406, 416, 525 N.W.2d 783, 787 (Wis. Ct. App. 1994)

In rendering this back pay award, the Board is informed by the Court's reasoning in discrimination cases regarding the purpose of back pay awards: to make victimized employees whole for the injuries suffered from the past discrimination; and to deter future discrimination. The Court particularly emphasized the importance of the deterrence function to provide the spur or catalyst which causes employers to self-examine and to self-evaluate their employment practices. Sam Teague, Ltd. v. Hawaii Civ. Rts. Comm'n, 89 Hawai'i 269, 281, 971 P.2d 1104, 1116 (1999).

While the finding of PSD's interference with Parker's right to assert his HRS Chapter 89 rights is not discrimination *per se*, the Board finds the deterrence concern is equally significant in the interference context. Decision No. 502 made specific findings and conclusions regarding Ryan's misconduct in attempting to implement the videotaped, consensual strip search that led to Parker's discharge and his history of racist and disparaging remarks about Parker. Decision No. 502 made additional findings regarding Nobriga's and Espinda's deliberate misconduct in covering up the inappropriately conducted attempted strip search. Like the purpose of a back pay award for discrimination, the Board finds equally compelling the importance of the deterrence factor of a back pay award for PSD's willful interference with an employee's rights under HRS Chapter 89.

Therefore, the Board clarifies and emphasizes that the back pay ordered for Parker under Decision No. 502 is not to be offset by his earned income during the three-period between his discharge and his reinstatement.

The Board orders PSD to pay Parker an additional \$51,286.42, the amount PSD offset in calculating his back pay, to comply with the back pay order. In ordering no offset, the Board points out that no interest nor overtime paid to other ACO IIIs during the three-year period was requested or awarded in calculating the back pay owed to Parker.

3.2. Reimbursement for Parker's Out of Pocket Health Insurance Expenses

At the HOM, Parker raised the issue of his out-of-pocket health insurance expenses through his former wife's employment that he incurred while on discharge. However, he provided no documentation for the out-of-pocket cost of the health care insurance. Therefore, the Board was unable to render an award for the cost of such health care insurance.

3.3 Training

PSD argues that, because Parker is returning to work after a three-year absence, he should be required to attend the eight-week BCT on O'ahu due to safety and liability concerns and to fully prepare him to "return to the line." PSD further asserts that taking the entire BCT is necessary because Parker needs to be brought up to date with his certifications and with the changes to various departmental policies, procedures, and training. PSD emphasizes that while

Parker is required to complete the entire BCT, Parker will be given the opportunity to fulfill each module requirement by demonstrating his proficiency through a testing out. In addition, if Parker fails a module, he will not be subject to discharge, but the training staff will work with him and allow him to retest until he passes. Further, Parker is being reinstated without a probationary period. Therefore, Parker is not being treated as a regular recruit but rather as an ACO undergoing an in-depth refresher training.

The Board recognizes PSD's concerns and if Parker voluntarily underwent the full BCT under the conditions offered by the department, it may be the optimal opportunity for him and the optimal reinstatement situation for his employer PSD. However, opportunity and reinstatement under optimal conditions are not required under the circumstances of this case.

PSD acknowledges that Parker's discharge was not his fault, and he is not being treated as a newly hired ACO recruit. In fact, at the time of his discharge, Parker was a veteran ACO III with almost five-years of experience. Decision No. 502 ordered Parker to be reinstated to his MCCC ACO III position "without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed." Therefore, Parker should be subject to the same training and certification requirements that any other MCCC ACO III with almost five years of experience was required to fulfill during the three-years that Parker was on ALWP for his wrongful discharge.

To determine those requirements, at the HOM, the Board made specific requests for information from PSD regarding the specific training and certifications that other MCCC ACO IIIs fulfilled during the three-year period that Parker was discharged, which PSD promised to provide. In addition, the Board followed up with Order No. 3768 to clarify the information needed for the Board to render a determination of Parker's training requirements. PSD's submission in response to the requests made at the HOM and in Order No. 3768 provided information limited to the current BCT program and vague responses regarding the training, which MCCC ACO IIIs have undergone during the period between Parker's discharge and his reinstatement. In short, PSD's submission was unresponsive and failed to provide any specific information regarding the differences between the BCT being required of Parker and the OTJ refresher type training provided to MCCC ACO IIIs while Parker was on ALWP for his discharge.

The only information contained in PSD's submission that is helpful to the Board's determination regarding the training issue is PSD's admission that, "The required training [for Parker] is different from the in-service 'refresher' type training that is provided to ACO IIIs at MCCC." Moreover, PSD has admitted that other reinstated ACOs, who have returned to duty from worker's compensation or otherwise, have not been required to undergo and complete the current BCT program.

Upon the limited information provided by PSD regarding the training and certifications required of ACO IIIs during the three-year period that Parker was on ALWP for his wrongful discharge and to balance the concerns and needs of both Parker and PSD, the Board orders PSD to establish an individualized training and certification program for Parker according to the following requirements and parameters:

1. Parker must be able to undergo and complete whatever (re)training and (re)certifications are required by PSD on Maui and is not to be required to travel to O‘ahu for such (re)trainings and (re)certifications;
2. Parker is required to complete whatever (re)certifications and (re)trainings are required for his MCCC ACO III position that are available on Maui or when they become available on Maui;
3. Parker should be provided with the same “in-service ‘refresher’” training that have been provided to ACO IIIs at MCCC[]” during the period from the date of his wrongful discharge on April 28, 2021 to April 19, 2021, the date of his reinstatement to his MCCC ACO III position;
4. As promised by PSD at the HOM, Parker is not to be subject to any disciplinary consequence for failing any of this required training, certification, or recertification and should be allowed to retest and retake the coursework or testing until the required training or certification is passed

5. Order

The Board orders that PSD comply with the back pay and training orders as set forth above. The Board further orders that PSD notify the Board of the steps taken to comply with this Order within 45 days of receipt of this Order.

DATED: Honolulu, Hawai‘i, August 6, 2021.

HAWAI‘I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

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



J.N. MUSTO, Member

Copies sent to:

Matthew Padgett, Esq.

James Halvorson, Deputy Attorney General

ⁱ HRS § 89-14 provides that, “Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in 377-9[.]”

PARKER v. ~~UPW~~, PSD

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