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NO. 24308

IN THE SUPREME COURT OF THE STATE OF HAWAII

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UNITED PUBLIC WORKERS, AFSCME, Local 646,  
AFL-CIO, Complainant-Appellant,

vs.

JAMES H. APANA, JR.,<sup>1</sup> Mayor, County of Maui; STEPHEN  
YAMASHIRO, Mayor, County of Hawaii; MARYANNE KUSAKA,  
Mayor, County of Kauai; JEREMY HARRIS, Mayor, City and  
County of Honolulu; RAYMOND KOKUBUN, Director, Department  
of Personnel, County of Maui; MICHAEL BEN, Director,  
Department of Personnel, County of Hawaii;  
ALLAN TANIGAWA, Director, Department of Personnel,  
County of Kauai; and CHERYL K. OKUMA-SEPE, Director,  
Department of Human Services,<sup>2</sup> City and County  
of Honolulu, Respondents-Appellees,

and

HAWAII LABOR RELATIONS BOARD; BRIAN K. NAKAMURA, Chairperson;  
CHESTER C. KUNITAKE, Board Member; and KATHLEEN  
RACUYA-MARKRICH, Board Member, Appellees-Appellees.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 00-1-3200-10 SSM)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson and Nakayama, JJ.;  
Circuit Judge Crandall, assigned by reason of  
vacancy; and Acoba, J., concurring separately)

Complainant-appellant United Public Workers, AFSCME,  
Local 646, AFL-CIO (UPW) appeals from: (1) the April 30, 2001  
"Order Denying Appeal Filed on October 17, 2000 by [UPW]"; and

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<sup>1</sup> Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule  
43(c)(1), James H. Apana, Jr. has been substituted for Linda Lingle.

<sup>2</sup> Pursuant to HRAP 43(c)(1), Cheryl K. Okuma-Sepe, Director, Department  
of Human Resources has been substituted for Sandra Ebesu, Director, Department  
of Personnel.

(2) the Final Judgment, filed on May 17, 2001, and the First Amended Final Judgment, filed on May 24, 2001, in favor of the respondents-appellees (Respondents)<sup>3</sup> and appellees-appellees (Appellees)<sup>4</sup> and against UPW, entered by the Circuit Court of the First Circuit, the Honorable Sabrina S. McKenna presiding.

On appeal, UPW argues that the circuit court erred by refusing to enforce the Board's June 28, 2000 Order No. 1894, discussed infra, and affirming the Board's September 26, 2000 Order No. 1934<sup>5</sup> because the Board: (1) erred in concluding that its authority to petition the circuit court for enforcement of Order No. 1894 is permissive under Hawai'i Revised Statutes (HRS) §§ 377-9(e) (1993);<sup>6</sup> (2) exceeded its authority and jurisdiction

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<sup>3</sup> The Respondents are: (1) James H. Apana, Jr., Mayor of the County of Maui, see supra note 1; (2) Stephen Yamashiro, Mayor of the County of Hawai'i; (3) Maryanne Kusaka, Mayor of the County of Kauai; (4) Jeremy Harris, Mayor of the City and County of Honolulu; (5) Raymond Kokubon, Director of the Department of Personnel, County of Maui; (6) Michael Ben, Director of the Department of Personnel, County of Hawai'i; (7) Allan Tanigawa, Director of the Department of Personnel, County of Kauai; and (8) Cheryl Okuma-Sepe, Director of the Department of Human Services, see supra note 2, City and County of Honolulu.

<sup>4</sup> The Appellees are: the Hawai'i Labor Relations Board (the Board); Brian K. Nakamura, Chairperson; Chester C. Kunitake, Board Member; and Kathleen Racuya-Markrich, Board Member.

<sup>5</sup>

Order No. 1934 denied UPW's motion to enforce a previous Board order, the June 28, 2000 Order No. 1894 (Order No. 1894), which mandated that the various counties cease and desist prohibited practices, specifically, failing to provide UPW with information on "derogatory materials" older than two years in grievance files for Bargaining Units 01 and 10 employees.

<sup>6</sup> HRS § 377-9(e) states:

If any person fails or neglects to obey an order of the board while the same is in effect[, ] the board may petition the circuit judge of the judicial circuit wherein the person resides or usually transacts business for the enforcement of the order and for appropriate temporary relief or restraining order, and shall certify the file in the court the record in the proceedings, including all documents and

(continued...)

in reviewing the merits of and foregoing compliance with Order No. 1894; and (3) in the alternative, abused its discretion in refusing to enforce Order No. 1894.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the issues raised on appeal as follows. First, UPW has demonstrated that it has been "aggrieved" by the Board's decision and, therefore, has standing to appeal the decision to the circuit court pursuant to HRS § 377-9(f), which states in relevant part that "any person aggrieved by the decision or order of the [B]oard may obtain a review thereof as provided in Chapter 91<sup>7</sup> by instituting proceedings in the circuit court . . . ."

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<sup>6</sup>(...continued)

papers on file in the matter, the pleadings and testimony upon which the order was entered, and the decision and order of the board. Upon such filing the board shall cause notice thereof to be served upon the person by mailing a copy to the person's last known post office address, and thereupon the judge shall have jurisdiction in the premises.

(Emphasis added.)

<sup>7</sup> HRS § 91-14(g) (1993) enumerates the standard of review applicable to an agency appeal and provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decisions and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error or law; or
- (5) Clearly erroneous in view of the reliable,

(continued...)

Additionally, UPW has standing to appeal the circuit court's judgment pursuant to HRS § 377-9(j), which states that "[a]ny party may appeal from the judgment of a circuit court entered under this chapter to the supreme court . . . ." Therefore, we hold that UPW has standing to appeal the circuit court's order.

Second, we hold that the circuit court did not err in concluding that the Board's authority to petition the circuit court for an enforcement order under HRS § 377-9(e) is discretionary and not mandatory because, in light of the close proximity of the terms "may" and "shall" in the statute, the plain language of HRS § 377-9(e) manifests a clear legislative intent to grant the Board discretion to petition the circuit court for the enforcement of an order on a case-by-case basis. See Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997) (quoting In re Tax Appeal of Fasi, 63 Haw. 624, 626-27, 634 P.2d 98, 101 (1981) (citations omitted)). Once such a petition has been filed, the statute plainly mandates that the Board certify and file the record of the proceedings with the circuit court. Cf. Williamson v. Hawai'i Paroling Auth., 97 Hawai'i 183, 198, 35 P.3d 210, 225 (2001) (stating that the term "shall" as used in its ordinary

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<sup>7</sup>(...continued)

probative, and substantial evidence on the whole record; or  
(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

mandatory sense is emphasized by its juxtaposition with the term "may).

Finally, the record clearly indicates that the Board did not reconsider the merits or modify the remedial terms of Order No. 1894. The Board indicated in Order No. 1934 that, in the absence of an appeal, Order No. 1894 was final and binding and that the Respondents had failed to strictly comply with it. However, in light of the evidence presented and Respondents' substantial compliance with Order No. 1894, the Board reasoned that "it would be unproductive and an inefficient use of the circuit court's time for this Board to petition for enforcement." Therefore, we hold that, because the Board acted within its statutory authority under HRS § 377-9(e) in declining to petition the circuit court to enforce Order No. 1894 and its actions were not characterized by arbitrariness or an abuse of discretion, the circuit court did not err in denying enforcement of Order No. 1894. See Konno v. County of Hawai'i, 85 Hawai'i 61, 77, 937 P.2d 397, 413 (1997) (stating that this court's review of an agency's decision is "qualified by the principle that the agency's decision carries a presumption of validity and appellant has a heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences") (citations omitted). Accordingly,

IT IS HEREBY ORDERED that the May 24, 2001 Amended Final Judgment from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, June 27, 2003.

On the briefs:

Herbert R. Takahashi and  
Rebecca L. Covert (of  
Takahashi, Masui, &  
Vasconcellos), for  
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James H. Apana, Jr., Mayor,  
County of Maui and Raymond  
Kokubun, Director,  
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Maryanne Kusaka, Mayor,  
County of Kaua'i and Allan  
Tanigawa, Director,  
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City and County of Honolulu and  
Cheryl K. Okuma-Sepe, Director,  
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City and County of Honolulu

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appellees-appellees Hawai'i  
Labor Relations Board, Brian K.  
Nakamura, Chester C. Kunitake,  
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Yamashiro, Mayor, County of  
Hawai'i and Michael Ben, Director,  
Department of Personnel, County  
of Hawai'i

CONCURRENCE BY ACOBA, J.

I concur in the result.