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January 29, 2009

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
For Hearing on Friday, January 30, 2009
8:30 a.m., Conference Room 309

BY

MARIE C. LADERTA, DIRECTOR

House Bill No. 787
Relating to Whistleblowers' Protection

WRITTEN TESTIMONY ONLY

TO CHAIRPERSON KARL RHOADS AND MEMBERS OF THE COMMITTEE:

The purpose of H. B. No. 787 is to provide additional protection to public employees who report violations of the law, and other improper activities such as waste, gross misconduct, incompetence, or inefficiency.

The Department of Human Resources Development **has concerns** about this measure and believes that existing whistleblower protections provide sufficient coverage to public employees. While we appreciate the intent of protecting public employees who report government waste or inefficiency, the bill is overly broad in the kinds of public employer actions that could be covered. An individual employee may perceive an action to be wasteful or inefficient without understanding the public policy basis for such actions. The concepts of waste and inefficiency are subjective and often a matter of individual opinion.

We are also concerned with the need to balance whistleblowers' protection with the public employer's right to take non-retaliatory and non-discriminatory personnel

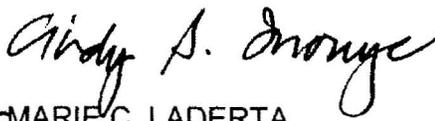
actions for legitimate reasons, as provided by other statutes or applicable collective bargaining agreements. Public employers should be allowed to take such personnel actions without being exposed to liability under this bill. Notably, this bill does not provide an exception for an employee who intentionally or knowingly files a false complaint.

We believe that the existing provisions in the statute for relief and damages are adequate and that allowing civil action for punitive damages could be costly and lead to excessive litigation.

In addition, we find the language for the notice posting requirement to be vague and suggestive that the notices must be posted outside the worksite. The language in the existing statute is clear and provides sufficient notice to employees of their protections under this law.

Thank you for the opportunity to testify on this matter.

Respectfully submitted,


for MARIE C. LADERTA
Director



Robin K. Matsunaga
Ombudsman

David T. Tomatani
First Assistant

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STATE OF HAWAII**

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**TESTIMONY OF ROBIN K. MATSUNAGA, OMBUDSMAN,
ON H.B. NO. 787, A BILL FOR AN ACT
RELATING TO WHISTLEBLOWERS' PROTECTION**

**HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
JANUARY 30, 2009**

Chair Rhoads and Members of the Committee:

Thank you for the opportunity to present testimony on H.B. No. 787. The purpose of this bill is to provide additional protection to public employees who report violations of law and other improper activities such as economic waste, gross misconduct, incompetence, or inefficiency. The bill also expands the ombudsman's responsibilities regarding whistleblowers.

The Office of the Ombudsman concurs that it is important for public employees and their supervisors and employers to understand that every public employee has an obligation to report violations of law, waste, and gross misconduct, incompetence, or inefficiency by the employee's agency, and the right to do so without fear of retaliation. We also concur that unless public employees feel secure to take on the whistleblower role, improper activities by public agencies and officials could go unnoticed and taxpayers cannot be assured of honest and efficient government.

As you know, the ombudsman is authorized to investigate complaints from private citizens, businesses and public employees about administrative actions of state and county executive agencies. However, pursuant to the opinion of the Attorney General (Att. Gen. Op. 73-6), the ombudsman has no jurisdiction over employee complaints covered by collective bargaining agreements executed under Chapter 89, HRS.

Therefore, while the ombudsman may receive complaints from public employees regarding alleged retaliatory action by the employee's supervisor or agency, whether or not in response to the employee reporting a violation of law, waste, or gross misconduct, incompetence, or inefficiency by the employee's agency, the ombudsman can only investigate complaints regarding matters that are not covered under the employee's collective bargaining agreement.

Examples of matters covered under the collective bargaining grievance process include alleged retaliatory actions in the form of discipline, reassignment of duties, transfers, or other changes in working conditions.

It is important to remember that although the ombudsman has full investigative powers, the ombudsman does not have the power to enforce the law or to compel corrective action by an agency, but only to recommend corrective action. The law provides that if the ombudsman has a reasonable basis to believe that there may be a breach of duty or misconduct by any officer or employee of an agency, the ombudsman may refer the matter to the appropriate authorities.

Section 3 of H.B. No. 787 adds a new subpart to Chapter 378, HRS, to specifically address public employee whistleblowers. Among the new provisions is a requirement that every public employer “post and keep posted notices pertaining to the application of the law, as shall be prescribed by the state ombudsman, in conspicuous places in every establishment where any public employee is employed to permit the public employee to readily observe a copy on the way to or from the public employee’s place of employment.” Section 4 of the bill adds a new section to Chapter 78, HRS, that will require the ombudsman, upon receipt of any complaint made pursuant to the new subpart created in Section 3 of the bill, to “inform the complainant of the complainant’s rights under the law.” The new section also requires the ombudsman to “prescribe notices pertaining to the application of part V of chapter 378.”

We concur that requiring every public employer to post and keep posted in conspicuous places notices pertaining to the application of the Whistleblowers’ Law would help to increase awareness among public employees and employers. However, we are concerned that the proposed amendments that require the ombudsman to “inform the complainant of the complainant’s rights under the law” and “prescribe notices pertaining to the application of part V of chapter 378” are inconsistent with the function and role of the ombudsman, which is to investigate citizen complaints about government as an impartial third party, and not to act as an advocate of a complainant or a defender of an agency.

Impartiality is identified as one of the essential characteristics of an ombudsman by organizations such as the American Bar Association (ABA), the United States Ombudsman Association (USOA), and the International Ombudsman Institute. The USOA’s Governmental Ombudsman Standards provides that:

Impartiality is at the heart of the Ombudsman concept. Both the complainant and the agency are able to place confidence in the Ombudsman knowing that the Ombudsman has no vested interest in the outcome of a complaint investigation. If the Ombudsman is not perceived to be impartial by the complainant, the complainant will not seek the Ombudsman's assistance. If the Ombudsman is not perceived to be impartial by the agency, the agency will be resistant to the investigation and unlikely to accept the Ombudsman's criticism and recommendations. It is not sufficient for the Ombudsman to avoid actual conflict of interest but also to avoid the appearance of such a conflict to instill the utmost confidence.

The ABA, in its Standards for the Establishment and Operation of Ombuds Offices dated February 2004, states in part that an ombudsman "should not, nor should an entity expect or authorize an ombuds to ... make binding decisions or determine rights."

We are very concerned that requiring the ombudsman to "inform the complainant of the complainant's rights under the law" would equate to requiring the ombudsman to act as the complainant's counselor and legal advisor, a function that is more appropriately performed by a private attorney. In addition, we believe that to "prescribe notices pertaining to the application of the law" requires a formal interpretation of the whistleblower protection law, a function that is more appropriately placed with the Department of Labor and Industrial Relations or the Department of the Attorney General. Therefore, **we respectfully request that this committee consider amending Sections 3 and 4 of the bill to replace the references to the ombudsman with a more appropriate entity, such as the Department of Labor and Industrial Relations or the Department of the Attorney General. We note that such a change would not diminish the ombudsman's existing authority to investigate improper actions by an agency that may be reported by public employee whistleblowers or a public employee whistleblower's complaint of retaliation by a supervisor or agency.**

Should this committee decide to continue to place the responsibility for prescribing the notices pertaining to the application of the law with the ombudsman, we respectfully request clarification of whether printing and disseminating the required notices is also the responsibility of the ombudsman. If the ombudsman is responsible for printing and disseminating the required notices, funds to accomplish this task will need to be appropriated to the office.

Finally, Section 5 of the bill amends Section 96-8, HRS, to add as an appropriate subject for investigation a violation of the new section being added to Chapter 378, HRS, in Section 3 of the bill. However, since paragraph 1 of Section 96-8, HRS authorizes the ombudsman to investigate complaints about actions that are "contrary to law" (regardless of whether they come from a private citizen, business, or public employee), an amendment of Section 96-8 to specify that the ombudsman may investigate violations of the new section being added to Chapter 378 in Section 3 of this bill is not necessary. Therefore, **we respectfully request that Section 5 of the bill be deleted.**

Thank you for your consideration of this testimony. Your favorable consideration of the requested amendments to H.B. No. 787 would be appreciated. If you have any questions, I would be happy to answer them.

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

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MUFI HANNEMANN
MAYOR



KENNETH Y. NAKAMATSU
DIRECTOR

January 30, 2009

The Honorable Karl Rhoads, Chair
and Members of the Committee
on Labor & Public Employment
State House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members of the Committee:

Subject: House Bill 787 Relating To Whistleblowers' Protection

I am Kenneth Y. Nakamatsu, Director of Human Resources, City and County of Honolulu, testifying on House Bill 787. We recognize the bill is intended to provide additional protections to public employees who engage in protected complaint activity and agree that protection from acts of retaliation are absolutely imperative. However, we believe that sufficient protections exist within current law to cover these individuals. As we also have concerns about certain aspects of H.B. 787, we are unable to support the bill at this time.

Our primary concern is with the establishment of broad and vague categories of complaints that become protected activity under the proposed amendments. Specifically, actions that are categorized as "economically wasteful", involve "gross misconduct, incompetence, or inefficiency" in H.B. 787. These terms must be defined or they will arguably be subject to a wide range of interpretation and potentially unnecessary litigation.

The language in the bill regarding a "condition that may significantly threaten the health or safety of the public or the public employee" also raises concern as such issues are already highly regulated in various other statutes and regulations. Without proper definition and/or references to specific statutes, regulations, and ordinances, individual employees will be empowered to assert causes of action based on their own interpretations and standards. An individual might also be able to raise personal agenda under the provision of proposed protection that addresses the health and safety of the individual public employee.

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and Members of the Committee on
Labor & Public Employment
January 30, 2009
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Another concern is with regard to the provision in the proposed bill that would allow a public employee to bring an action seeking punitive damages. We believe such an award against a municipality is against public policy. Punitive damages are awarded to punish individuals who engage in prohibited behavior. However, when such damages are awarded against a government entity it is the taxpayers, not the individual who engaged in the behavior, who are punished.

We further note that punitive damages are used as a deterrent to others. However, we are unsure of the strength of this deterrent where the taxpayers pay the damages. Please know that we are not advocating that individual employees be permitted to seek damages against other employees. Instead we are advocating that actions already available to the public employer (such as terminating the employment of an employee who engages in wrongdoing) currently provide a stronger deterrent to individual employees than the punitive damages permitted under the bill.

Finally, the proposed amendment seeks to amend the state ombudsman's responsibilities regarding whistleblowers'. We believe that Hawaii Revised Statutes ("HRS") Section 96-8 already provides fairly wide latitude to the scope of administrative acts which can be investigated under the authority of the office of the ombudsman and the proposed amendment to the section is unnecessary.

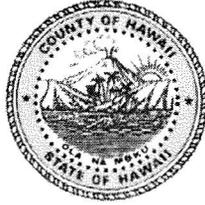
Please let me be clear, that we support protection for employees who report violations of federal, state, and local laws, rules, regulations, or ordinances. With all due respect, we ask that you recognize that there are already an abundance of statutes, regulations and ordinances that provide for the protection of those who report such violations. For example, HRS Chapter 378, Part V specifically provides for the protection of an employee who reports such violations to a public body. Thus, while we support the need for whistleblower protections, we cannot support the passage of H.B. 787 in its present form.

Thank you for the opportunity to testify before you.

Sincerely,


for KEN Y. NAKAMATSU
Director

Harry Kim
Mayor



Michael R. Ben, SPHR
Director of Human Resources

Ronald K. Takahashi
Deputy Director of Human Resources

County of Hawai'i Department of Human Resources

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January 30, 2009

The Honorable Karl Rhoads, Chair
And Members of the Committee on Labor & Public Employment
House of Representatives
State Capitol
Honolulu, HI 96813

Dear Chair Rhoads and Members of the Committee:

Re: HB 787 Whistleblowers' Protection

I am Michael R. Ben, Director of Human Resources for the County of Hawai'i.

HB 787 proposes to provide additional protection to public employees who report violations of law, and other improper activities such as waste, gross misconduct, incompetence, or inefficiency.

I have two comments to offer.

Impact on Legitimate Law Enforcement Activities

I am concerned specifically about undercover operations which are an essential part of law enforcement. I would not want to jeopardize these operations or the health and safety of our employees involved in these operations because another public employee wishes to report actions which are alleged to be economically wasteful or alleged gross misconduct, incompetence, or inefficiency while these undercover operations are in progress.

I ask you to examine this issue closer and determine whether or not there is a "loophole" in this proposed law that would in fact jeopardize legitimate undercover activities and the health and safety of the public employees involved.

Hawai'i County is an Equal Opportunity Provider and Employer.

The Honorable Karl Rhoads, Chair
And Members of the Committee on Labor & Public Employment
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Redundancy

The new §378-___(a)(1) is redundant, as "Any violation of a federal , state, or local law, rule, ordinance, or regulation is already covered under §378-62 (1)(A).

Also, in the new §378-___(d), the definition of "public employee" need only be:

"Public employee" means any employee of the State or any county, or the political subdivision and agencies of the State or any county.

The references to "employee under contract," "any civil service employee," "any probationary or provisional provisional employee" are all redundant because they all fit the definition I have just stated.

However, if you wish to retain these references to the different types of employees, I recommended inserting the word "including" between the word "county," and the phrase "any employee under contract."

Thank you.

Sincerely,



Michael R. Ben, SPHR
Director of Human Resources



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Labor and Public Employment

Testimony by
HGEA/AFSCME, Local 152, AFL-CIO
January 30, 2009

H.B. 787 - RELATING TO THE
WHISTLEBLOWERS' PROTECTION

The Hawaii Government Employees Association strongly supports the purpose and intent of H.B. 787 - Relating to the Whistleblowers' Protection. We believe improvements to the State's whistleblowers' protection law are necessary to make it more effective. This bill protects public employees if they experience retaliation from their employers after reporting practices or policies that are violations of the law, economically wasteful, inefficient, or which they believe pose a danger to public health and safety. Under the provisions of H.B. 787, public employees who become the objects of retaliation for serving as a whistleblower would be able to seek relief and damages under Section 378-63, HRS, as well as civil action for punitive damages.

Employees will be reluctant to come forward and report these types of problems if they are subject to retaliation. An employer's power to discipline or fire public employees should not be used to undermine the law or to compromise the safety and health of employees or the general public.

A wide range of federal legislation provides protection to government and private sector employees who report illegal actions or a specific danger to public health and safety. Under federal environmental laws, employees are permitted to come forward and report alleged violations affecting public safety. Many states also protect reporting of actions that are contrary to health, safety, welfare and environmental laws. It is time to improve Hawaii's law and provide stronger protection to its state and county employees.

Many state and county employees are directly responsible for protecting public health and safety through the administration of statutory requirements and the enforcement rules and regulations. H.B. 787 will help them uphold appropriate standards in their area of expertise. Thank you for the opportunity to testify in support of H.B. 787.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director