

LINDA LINGLE
GOVERNOR



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DIRECTOR

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STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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March 16, 2009

To: The Honorable Karl Rhoads, Chair
and Members of the House Committee on Labor and Public Employment

Date: Tuesday, March 17, 2009
Time: 8:30 a.m.
Place: Conference Room 309, State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

RE: S.B. 667 S.D. 2 - Relating to Whistleblowers' Protection

I. OVERVIEW OF PROPOSED LEGISLATION

S.B. 667 S.D. 2 proposes to provide additional protection to public employees who report violations of the law, and other improper activities such as "a gross waste of funds, gross misconduct, abuse of authority, or violation of a well-established, articulated, clear, and compelling public policy."

II. CURRENT LAW

Section 378-62, HRS already provides protection for whistleblowers.

III. HOUSE BILL

The Department strongly opposes this measure for the following reasons:

1. Current law already provides protections for whistleblowers. Whistleblowers already have protection against retaliation from raising a health or safety complaints in the workplace.
2. Allowing punitive damages could discourage administrators and officials from

making tough decisions that would promote efficiency and productivity, and could ultimately discourage public service.

3. This bill contains overly broad and vague language including “a gross waste of funds, gross misconduct, abuse of authority, or violation of a well-established, articulated, clear, and compelling public policy.” Failure to more specifically define such terms that are central to this bill will invite excessive litigation and increased expenses. Without properly anchoring these terms to a specific definition or reference to specific statutes and/or regulations, claimants are essentially invited to assert causes of action based on self-serving, subjective interpretations of ambiguous language.
4. Given the ambiguity discussed above, the bill does not appear to properly balance a public employer’s right to exercise non-retaliatory, legitimate actions that are non-discriminatory.

LINDA LINGLE
GOVERNOR OF HAWAII



MARIE C. LADERTA
DIRECTOR
CINDY S. INOUE
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

March 13, 2009

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
For Hearing on Tuesday, March 17, 2009
8:30 a.m., Conference Room 309

BY

MARIE C. LADERTA, DIRECTOR

**Senate Bill No. 667, SD2
Relating to Whistleblowers' Protection**

WRITTEN TESTIMONY ONLY

TO CHAIRPERSON RHOADS AND MEMBERS OF THE COMMITTEE:

The Department of Human Resources Development **strongly opposes** S.B. No. 667, S.D. 2, which is intended to provide additional protection to public employees who report violations of the law, and other improper activities such as fraud, waste, abuse, or gross misconduct.

The existing whistleblower protections provide sufficient coverage to public employees. In addition, 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 without understanding the public policy basis for such actions. More importantly, the subparagraph (2)(B) references to "*fraudulent activity, a gross waste of funds, gross misconduct, abuse of authority, or violation of a well-established, articulated, clear, and compelling public policy*" (see page 2, line 21) are too broad, vague, and subject to varying and conflicting interpretations. Without a clear definition for each of these

actions, there will be unnecessary, costly litigation on the various, conflicting interpretations.

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 duplicative and unnecessary because 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.

HAWAII COUNCIL OF MAYORS

Testimony of

Hawaii Council of Mayors

Bernard P. Carvalho, Jr., Mayor of Kauai

Mufi Hannemann, Mayor of Honolulu

Billy Kenoi, Mayor of Hawaii

Charmaine Tavares, Mayor of Maui

Before a Hearing of

House Committee on Labor and Public Employment

March 17, 2009

Senate Bill 667, S.D. 2, Relating to Whistleblowers' Protection

The Hawaii Council of Mayors recognizes the intent of this measure is to provide additional protections for public employees who engage in protected complaint activity. While we agree with the Legislature that protection from acts of retaliation is absolutely imperative, we are unable to support this bill.

A primary concern is the establishment of broad and vague categories of complaints that become protected activity under the measure, specifically actions that are categorized as involving "a gross waste of funds, gross misconduct or abuse of authority." These terms are undefined in the measure and, accordingly, may be subject to a wide range of interpretation—and potentially, unnecessary and costly litigation.

We further note that the language in the bill regarding "a condition that may significantly threaten the health and safety of the public or the public employee" raises concerns 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 may assert causes of action based on their own interpretations and standards.



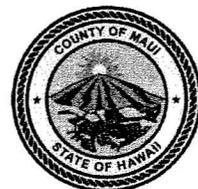
Mayor Billy Kenoi
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720



Mayor Mufi Hannemann
City and County of Honolulu
530 South King Street
Honolulu, Hawaii 96813



Mayor Bernard Carvalho, Jr.
County of Kauai
444 Rice Street
Lihue, Hawaii 96766



Mayor Charmaine Tavares
County of Maui
200 South High Street, 9th Floor
Wailuku, Hawaii 96793

We also find problematic the language affording protection to employees who are “about to report” wrongdoing. Clearly, an actual report provides a specific timeframe from which the whistleblower provisions apply. Since the “about to report” state is only known to the person intending to make the report and is generally not verifiable to others, the protections afforded under the bill would begin before any notice was provided to those who are held to the provisions of this law. Further, it is our understanding that a major reason for providing whistleblower protection is to encourage the reporting of wrongdoing so corrective action can be taken. However, corrective action cannot be taken until the wrongdoing is known. Accordingly, to encourage timely reporting which will enable timely corrections, the protections should only be afforded to those who actually report the wrongdoing.

Finally, we are concerned that the bill, as proposed, will allow a public employee to bring an action to seek punitive damages. Punitive damages are awarded to punish individuals who engage in prohibited behavior. However, when such damages are awarded against a county, it is the taxpayers, and not the individual employee who engaged in the prohibited behavior, who are punished. As such, in this case, the punitive damages fail to accomplish the goal of punishing the wrongdoer and may drive up the cost of government.

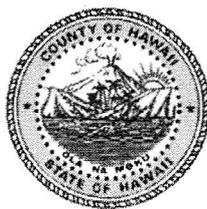
Please know that we are not advocating that individual employees be permitted to seek damages against other employees. We believe that effective means already exist to manage public employees who engage in wrongdoing. Our ability to terminate (or otherwise discipline) employees who engage in prohibited behavior, including retaliation against whistleblowers, provides a much stronger deterrent to employees than would the punitive damages permitted under this bill.

All mayors are united in our support of protections for employees who report violations of laws, rules, ordinances, and regulations. We note, however, that public employees are already afforded whistleblower protection under some of those same laws, rules, and regulations, as well as other laws. For example, Chapter 378, Part V, Hawaii Revised Statutes, provides protection to employees who report violations of federal, state and local laws, and rules and regulations to a public body.

Given the protections already in existence and the concerns raised by the provisions of this bill, the Hawaii Council of Mayors cannot support the passage of this measure in its present form.

Mahalo.

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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March 17, 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: SB 667 SD 2 Relating to Whistleblowers' Protection

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

SB 667 SD 2 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.

As with HB 787 you heard on January 30, 2009, 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
March 17, 2009
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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



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

S.B. NO. 667, S.D. 2, RELATING TO WHISTLEBLOWERS'S PROTECTION.

BEFORE THE:

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

LATE

DATE: Tuesday, March 17, 2009 **TIME:** 8:30 AM

LOCATION: State Capitol, Room 309

TESTIFIER(S): Mark J. Bennett, Attorney General,
or James Halvorson, Supervising Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General opposes this bill in its present form.

The stated purpose of this bill is to provide additional protection to public employees who report wrongful conduct in the workplace. The goal of such added protection is to "help ensure the efficiency and integrity of state and local government". However, the broad and vague language contained in this bill will work against the stated legislative goal.

Opposition to this bill is first to the broad and vague categories of complaints made by a public employee that become a statutorily protected activity under this bill. The previous testimony of the Department of Human Resources for the City and County of Honolulu before the Senate Committee on Judiciary and Government Operations, February 25, 2009, emphasized this defect of the bill:

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 S.B. 667, SD1. These terms must be defined in the measure or they will arguably be subject to a wide range of interpretation and potentially unnecessary litigation.

. . . . Without proper definition or references to specific statutes, regulations, and ordinances, individual employees will be empowered to assert causes of action based on their own interpretation and standards. An individual would also be able to raise his or her own personal agenda under the guise of the proposed protection addressing the health and safety of the individual public employee.

[Emphasis added.]

The use of vague categories such as "abuse of authority" creates the potential for turning a whole range of employee complaints into a new and unintended class of protected rights. Consequently, there is a danger that a public employer's responsibility to manage a governmental agency, for the public good, becomes subservient to an employee's personal workplace agenda.

The Senate Committee on Labor and Public Employment had also expressed this concern in its report:

Your Committee shares the concern expressed by the City and County of Honolulu's Department of Human Resources regarding the broad and vague categories of complaints for which public employees would be protected for reporting violations. These categories include "economically wasteful", "gross misconduct", "incompetence" and "inefficiency". Your Committee believes that these terms should be better defined as the Legislature further debates this matter.

Senate Standing Comm. Report No. 393, p. 2.

However, the present draft of this bill still has not sufficiently corrected that concern. The Senate Committee on the Judiciary and Government Operations had previously attempted to eliminate the vague language of the categories as follows:

Your Committee has amended this measure by:

- (1) clarifying that the public employee may report fraudulent activity, a gross waste of funds, gross misconduct, abuse of authority, or violation of a well-established, articulated, clear, and compelling public policy. . .

Senate Standing Comm. Report No. 784, p. 2.

But the present language continues to allow for the potential of an employee's personal agenda to disrupt the governmental agency's need to take legitimate personnel actions for the public's good. The previous testimony of the Department of Human Resources Development before the Committee on Judiciary and Government Operations, February 25, 2009, pp. 1-2 warned of this potential dilemma:

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.

Therefore, we urge that the bill limit the protected activity to reports by a public employee made for the purpose of remedying a matter of legitimate public concern. This limitation would ensure that the protected reporting directly supports the legislative goal of increasing efficiency and integrity of government. Furthermore, we urge that the categories of complaints such as "fraudulent activity", "gross waste of funds", "gross misconduct" and "abuse of authority" be defined in the statute.

Opposition to this bill is also to the bill's provision for awarding punitive damages against a governmental entity. The current whistleblower statute already provides adequate protections for all whistleblowers. In addition to the existing statute, state employees have ready access to redress through the grievance process based on the collective bargaining contract or an appeal process to the Merit Appeals Board, under chapter 76, Hawaii Revised Statutes (HRS), to challenge retaliatory actions of the employer such as disciplinary actions, demotions, or discharges. Given these sufficient protections, this bill now proposes to give public employees, and only public employees, the potential to receive punitive damages. This is particularly ill-advised for three reasons.

First, the existing whistleblower statute provides adequate compensatory relief for all employees harmed. Section 378-63(a), HRS, provides for the recovery of actual damages. Section 378-63(c), HRS,

provides for the recovery of reasonable attorney fees. Section 378-65, HRS, provides for civil fines to be imposed on an employer for each violation.

Second, the recovery of punitive damages against governmental agencies is not sound public policy because such awards burden the taxpayers and all citizens instead of the actual wrongdoer. In Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), a concert promoter sued the City of Newport, Rhode Island, and other parties for the cancellation of its license under federal statute. The federal district court awarded both compensatory and punitive damages against the municipality. The United States Supreme Court reversed the recovery of punitive damages against that governmental agency, holding that the recovery of punitive damages against governmental entities was contrary to sound public policy because "such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer is being chastised". Id. at 263.

Moreover, the award of punitive damages provides a benefit to the public employee over and above the reasonable compensation for the injury suffered and jeopardizes needed services to the public. In Feingold v. Southeastern Pennsylvania Transportation, 517 A.2d 1270, 1277 (Pa. 1986), a driver brought action against that state's transportation authority when he was injured because his car was hit by a bus. The driver was awarded both compensatory and punitive damages. The award of punitive damages was reversed. The court reasoned that the punitive damages imposed on a governmental entity was a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the "citizens footing the bill".

Third, the assessment of punitive damages against the State is a reversal of the Legislature's long standing protection of the public's treasury from this type of litigation award. Section 662-2, HRS, provides:

The State hereby waives its immunity for liability for torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
[Emphases added.]

We respectfully request that this bill be held.