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Electronically Filed Supreme Court SCWC-12-0000505 28-FEB-2014 01:35 PM

IN THE SUPREME COURT OF THE STATE OF HAWAI#I

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UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Petitioner/Plaintiff-Appellant,

vs.

NEIL ABERCROMBIE,1 Governor, State of Hawai#i; Kalbert K. Young, Director, Department of Budget and Finance, State of Hawai#i; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawai#i; Ted Sakai, Director, Department of Public Safety, State of Hawai#i,2 Respondents/Defendants-Appellees.

SCWC-12-0000505

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CAAP-12-0000505; CIV. NO. 09-1-2145-09 PWB)

FEBRUARY 28, 2014

RECKTENWALD, C.J., NAKAYAMA, AND McKENNA, JJ., WITH ACOBA, J., CONCURRING AND DISSENTING, WITH WHOM POLLACK, J. JOINS

1 During the pendency of this appeal, Neil Abercrombie, Governor of the State of Hawai #i, succeeded Linda Lingle. Thus, pursuant to Hawai #i Rules of Appellate Procedure (HRAP) Rule 43(c), Abercrombie has been substituted automatically for Lingle in this case.

2 Kalbert K. Young, Director, Department of Budget and Finance, State of Hawai #i; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawai #i; and Ted Sakai, Director, Department of Public Safety, State of Hawai #i have been substituted as parties to this appeal pursuant to HRAP Rule 43(c). UPW also listed Linda Lingle's Chief Policy Advisor, Linda

Smith, as a Defendant. This title does not exist in Governor Abercrombie's current cabinet.

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OPINION OF THE COURT BY McKENNA, J.

I. Introduction

This case concerns the application of the primary jurisdiction doctrine by the Intermediate Court of Appeals ("ICA") to a lawsuit filed in circuit court by the United Public Workers, AFSCME, Local 646, AFL-CIO ("UPW"), on behalf of the employees ("Employees") it represents. UPW presents the following question: "Whether the ICA erred by ordering the circuit court to stay this case under the doctrine of 'primary jurisdiction' even though the claims are within the original jurisdiction of the circuit courts and do not present issues committed to the specialized administrative expertise of the Hawai#i Labor Relations Board."

UPW sought relief in the Circuit Court of the First Circuit ("circuit court") alleging that then-Governor Lingle and members of her administration retaliated against UPW members for filing a lawsuit opposing her 2009 statewide furlough plan. In addition, UPW alleged that the State was unlawfully privatizing positions historically and customarily performed by civil

servants under the merit system. UPW's retaliation claims were

brought under (1) the Hawai#i Whistleblowers' Protection Act

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("HWPA"),3 and (2) article I, section 4 of the Hawai#i

Constitution ("Free Speech Clause" or "Free Speech retaliation

claim")4. UPW's privatization claims were brought under (1)

article XVI, section 1 of the Hawai#i Constitution,5 and (2)

Hawai#i Revised Statutes ("HRS") § 76-43 (Supp. 2010).6

We hold that UPW's retaliation claims are originally

cognizable in the circuit courts; however, the ICA correctly

ruled that pursuant to the doctrine of primary jurisdiction, the

enforcement of UPW's retaliation claims requires the resolution

of issues that have been placed within the special competence of

3 In relevant part, the HWPA prohibits an employer from discharging, threatening, or otherwise discriminating against an employee regarding the employee's compensation, terms, conditions, location, or privileges because: (1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of . . . [a] law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States[.]

HRS § 378-62 (2011).

4 "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Haw. Const. art. I, § 4.

5 "The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle." Haw. Const. art. XVI, § 1.

6 "When it is necessary to release employees due to lack of work, lack of funds, or other legitimate reasons, employees with permanent appointments in civil service positions shall have layoff rights. Layoffs shall be made in accordance with procedures negotiated under chapter 89 or established under chapter 89C, as applicable." HRS § 76-43.

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the Hawai#i Labor Relations Board ("HLRB") under HRS Chapter 89.

The ICA also correctly ruled that the circuit court should have

stayed rather than dismissed the UPW's retaliation claims pending

the HLRB's determination of issues within UPW's claims that were

within the HLRB's special competence. We hold that pursuant to

Konno v. County of Hawai#i, 85 Hawai#i 61, 937 P.2d 397 (1997),

however, the primary jurisdiction doctrine does not apply to

UPW's privatization claims.

Accordingly, we affirm the ICA's judgment on appeal

vacating the circuit court's "Order Granting Defendants' Second

Motion to Dismiss Plaintiff's Complaint Filed September 16, 2009"

and May 15, 2012 Final Judgment. We disagree, however, with the

ICA's remand instructions to the extent that it ordered the

circuit court to stay UPW's privatization claims. We agree that

the circuit court must stay the retaliation claims pursuant to

the primary jurisdiction doctrine, but the primary jurisdiction doctrine does not apply to UPW's privatization claims; therefore, we instruct the circuit court to proceed consistent with this opinion.

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II. Background

A. Factual Background7

1. Attempted Furlough and Injunction

On June 1, 2009, then-Governor Linda Lingle announced that state employees would be furloughed three days per month for two years to allow the state to avoid having to lay off employees. On June 16, 2009, UPW filed a complaint in the circuit court ("Furlough Lawsuit") "for violations of state law under Article XIII, Section 2,8 and other State Constitution provisions," and sought injunctive relief to enjoin the state from implementing the furloughs.9 On July 2, 2009, the circuit court10 concluded that the defendants had violated the State Constitution by attempting to impose the furloughs without collective bargaining, and granted UPW's injunction, enjoining the unilateral statewide furloughs.

2. Reduction in Force Announcement

Soon thereafter, on July 17, 2009, Marie Laderta

(Defendant Laderta), Director of the Department of Human

7 These facts are from UPW's complaint to the circuit court and are undisputed by the Defendants.

8 "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." Haw. Const. art. XIII, § 2.

9 On June 18, 2009, UPW amended its complaint restating its claims for violations of the state constitution.

10 The Honorable Karl K. Sakamoto presided.

Resources Development, notified various public employees that

their names would be included on layoff lists. Approximately 216

UPW employees were on the list. On July 23, 2009, Clayton Frank

("Defendant Frank"), Director of the Department of Public Safety,

notified UPW of an impending layoff due to the closure of the

Kulani Correctional Facility. On August 4, 2009, Defendant

Lingle announced a decision to implement a reduction in force

("RIF") that would discharge approximately 1,100 State employees.

3. Privatization

UPW alleged that on June 8, 2009, UPW requested that

Defendants Lingle and Laderta terminate all contracts for

services that have historically and customarily been performed by

civil servants in bargaining units 1 and 10. UPW alleged that

the Defendants refused.11

UPW also alleged that Defendants refused to negotiate

over the (1) decision to close Kulani Correctional Facility, and

(2) implementation of that decision. On August 3, 2009,

Defendant Frank informed the inmates at Kulani of their

relocation by the end of September 2009. UPW alleged that the

Department of Public Safety then subcontracted with private

11 UPW does not provide any examples of Defendants' alleged unlawful privatization of civil service positions other than Kulani Correctional Facility.

contractors to house approximately 2,000 Hawai#i inmates on the

mainland.

B. Procedural History

1. HLRB Prohibited Practice Complaint

On August 27, 2009, UPW filed an amended complaint with

the HLRB ("HLRB Complaint") against Defendants Laderta, Lingle,

and Frank ("Defendants").12 The HLRB Complaint alleged a number

of violations under HRS § 89-13(a) ("prohibited practice

violations"). In relevant part, the HLRB Complaint alleged that the Defendants: (1) violated HRS § 89-13(a)(1) when Defendant Lingle interfered, restrained, and coerced employees in their exercise of statutory and constitutional rights by threatening mass layoffs and the shutdown of programs; (2) violated HRS § 89-13(a)(3) when Defendants discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of RIF, layoffs, and discharges; (3) violated HRS § 89-13(a)(5) by refusing to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for RIF displacements, and discharges of bargaining unit employees; (4) violated HRS § 89-13(a)(7) by refusing to comply with provisions of Chapter 89, including HRS

12 The original complaint contained "prohibited practice" allegations against Defendant Laderta only.

§§ 89-313 and 89-9(a)14, (c)15, and (d)16; and (5) violated HRS § 13 HRS § 89-3 (Supp. 2008) states: Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion.

An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

14 HRS § 89-9(a) (Supp. 2008) states: The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund or voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement as specified in section 89-10, but the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

15 HRS § 89-9(c) (Supp. 2008) states: Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

16 HRS § 89-9(d) (Supp. 2008) prohibits negotiation of matters of classification, reclassification, benefits of but not contributions to the Hawai #i employer-union health benefits trust fund or voluntary employees' beneficiary association trust; recruitment; examination; initial pricing; and retirement benefits except as provided in HRS § 88-8(h) (Supp. 2008). In addition, this section prohibits agreeing on any proposals that would be inconsistent with the merit principle, the principle of equal pay for equal (continued...)

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89-13(a)(8) by violating the terms of the unit 1 and 10

collective bargaining agreements.

The HLRB entered its Findings of Fact and Conclusions

of Law on October 23, 2009. In relevant part, the HLRB found:

(1) the record indicated that the State at all relevant times was facing a severe fiscal crisis that required it to balance its budget in the face of ever-increasing revenue shortfalls; (2) Defendant Lingle's consideration of layoffs of public employees as a means of addressing the predicted revenue shortfall preceded the filing of grievances or civil lawsuits by UPW; (3) the State had presented a legitimate, non-discriminatory, and non-retaliatory reason for its decision to lay off workers, and the Union had not presented evidence to rebut the State's assertions (the decline of revenues) or demonstrated that the stated reason was merely pretextual.

2. Circuit Court Complaint

Before the HLRB had issued its findings, UPW filed a complaint in the circuit court ("First Circuit Complaint") on September 16, 2009, alleging that Defendants' actions: (1) constituted acts of retaliation, reprisal, and intimidation in violation of the HWPA; (2) violated Employees' rights guaranteed

16 (...continued) work pursuant to section 76-1, or agreeing on proposals that would interfere with a number of rights and obligation of a public employer listed in HRS §§ 89-9(d)(1)-(d)(8).

by the Free Speech Clause; (3) violated the merit principle17

mandated by article XVI, section 1 of the Hawai#i Constitution;

and (4) violated Employees' rights under HRS § 76-43 by "refusing

to negotiate the criteria, procedures, timing, and manner of

handling mass layoffs for reasons other than 'lack of work' or

'lack of funds' with UPW prior to unilateral implementation of

the layoffs, reductions in force, and discharges of unit 1 and 10

17 UPW alleged the following regarding Defendants' violations of merit principles:

89. In Konno v. County of Hawai#i, 85 Hawai #i 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil servants represented by UPW violates the merit principle.

90. On November 20, 2002 in the Matter of the Arbitration Between the United Public Workers, AFSCME, Local 646, AFL-CIO v. County of Hawaii, contracting out or privatization of bargaining unit work was found to violate, inter alia, the constitutional merit principle. Said award was confirmed by the circuit court in S.P. No. 02-1-0514 and constitutes a final judgment which is binding on all public employers who are parties to the unit 1 and 10 collective bargaining agreements.

91. The services performed by bargaining unit 1 and 10 employees in positions which are being abolished by the Defendants have historically and customarily been performed by civil servants under the merit system.

92. On June 8, 2009 Defendants Lingle and Laderta were requested by UPW to terminate all contracts for services which have historically and customarily been performed by civil servants in bargaining units 1 and 10 no later than June 30, 2009, and to cease and desist from undermining the job security of civil servants contrary to the merit principle.

93. On and after June 30, 2009 Defendants have refused to terminate contracts which are contrary to public policy in contravention of Article XVI, Section 1 of the Hawaii State Constitution.

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employees."18 18 UPW alleged the following regarding Defendants' violations of civil service laws:

96. HRS Chapters 76 and 77 require that all blue collar, non-supervisory positions and institutional, health and correctional positions within the State of Hawaii, to be governed by the merit principles and that employees be hired and retained in accordance with the provisions thereof, unless specifically exempt under HRS § 76-16.

97. It is a fundamental requirement of the merit principle under Section 76-1, HRS, that civil servants be afforded reasonable job security.

98. HRS § 76-16 defines the merit system as follows: §76-16 Civil service and exemptions. . . . (b) The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter established and embrace all personal services performed for the State, except the following: . . . (2) Positions filled by persons employed by contract where the director of human resources development has certified that the service is special or unique or is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform the service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year; . . .

99. At no time has Defendant Laderta certified pursuant to Section 76-16(b)(2), HRS, for exemption the services performed by private contractors or otherwise authorized contracting out in units 1 and 10.

100. The contracting out and privatization of corrections work by Defendants is not justified under Section 76-16, HRS, when unit 1 and 10 employees are laid off, displaced, discharged, and subject to other adverse actions by Defendants.

101. Section 76-43, HRS, affords to employees with permanent appointments in civil service positions rights under the civil service laws as follows: Whenever it is necessary to release employees due to lack of work, lack of funds, or other legitimate reasons, employees with permanent appointments in civil service positions shall have layoff rights. Layoffs shall be made in accordance with procedures negotiated under chapter 89 or established under chapter 89C, as applicable.

102. Defendants violated the rights of employees under (continued...)

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Defendants then filed a Motion to Dismiss the First

Circuit Complaint on the grounds that: (1) UPW did not identify any "employees" protected by HWPA, and UPW is not an employee itself; (2) UPW's complaints did not include any facts that could "underlie a freestanding constitutional claim premised on access to the courts"; (3) this court in Konno v. County of Hawai#i, 85 Hawai#i 61, 70, 937 P.2d 397 , 406 (1997) had already held, "the Hawai#i Constitution does not establish an independently enforceable right to the protection of merit principles"; and (4) UPW's allegations under HRS § 76-43 are premised on the requirements of Chapter 89, Hawaii's collecting bargaining law; therefore, the HLRB had exclusive original jurisdiction over such complaints. The circuit court19 denied Defendants' motion in its entirety.

Two years later, on September 14, 2011, Defendants filed a second Motion to Dismiss in the circuit court on the basis that this court had recently clarified that the HLRB had

18 (...continued) Section 76-43, HRS, by refusing to negotiate the criteria, procedures, timing, and manner of handling mass layoffs for reasons other than "lack of work" or lack of "funds" with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees.

103. Defendants, by the foregoing acts, have abrogated the Civil Service Laws of the State of Hawaii.

19 The Honorable Derrick H.M. Chan presided.

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"exclusive original jurisdiction over the controversy" in Hawai#i Government Employees Association v. Lingle ("HGEA"), 124 Hawai#i 197, 239 P.3d 1 (2010).20 On January 17, 2012, this court published Hawai#i State Teachers Association v. Abercrombie ("HSTA"), 126 Hawai#i 318, 271 P.3d 613 (2012),21 which further clarified and affirmed our decision in HGEA.

On February 15, 2012, the circuit court22 granted Defendants' second Motion to Dismiss and dismissed all claims based on its conclusion that the circuit court lacked jurisdiction. The circuit court found that the underlying facts in UPW's First Circuit Complaint essentially mirrored those alleged by UPW in the "prohibited practice" claims before the HLRB. It concluded that HRS § 89-14 provided HLRB with exclusive original jurisdiction over controversies implicating prohibited practices, and therefore, "it would be wholly inconsistent with

20 In HGEA, two unions sought relief under both statutory and constitutional provisions to enjoin the Governor from unilaterally imposing furloughs or new layoff procedures on public employees. This court held that the HLRB had exclusive original jurisdiction over the statutory issues raised in the unions' complaint, and that the circuit court had erred in addressing the constitutional issues without first giving the HLRB the opportunity to address the statutory questions.

21 In HSTA, the teachers union brought an action alleging that the governor's furlough plan violated

state constitutional rights. This court held that the dispute concerning whether the state constitutional provision granting public employees the right to unionize permitted the Governor to unilaterally impose furloughs, was within the exclusive jurisdiction of the HLRB.

22 The Honorable Patrick W. Border presided.

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HLRB's exclusive, original jurisdiction for the First Circuit to

hear the same underlying factual disputes and allegations and

create the possibility of inconsistent judgments."

The circuit court also concluded that the statutory

scheme required that HLRB be given the opportunity to address the

allegations in UPW's prohibited practice complaint. The circuit

court would then review HLRB's decision in its appellate

capacity. The circuit court also concluded that the additional

claims raised in the First Circuit Complaint, not included in the

HLRB complaint, were essentially prohibited practices, and stated

that it lacked "primary subject matter jurisdiction" over those

claims because exclusive, original jurisdiction rested with the

HLRB.

Finally, to the extent that the First Circuit Complaint

raised constitutional and statutory claims over which the HLRB

lacked subject matter jurisdiction, the circuit court concluded

that under HGEA, the HLRB had to be given the opportunity to

resolve the claims within its jurisdiction before a court could

consider the constitutional claims in its appellate capacity.23

The circuit court further concluded that the claims could be

rendered moot if HLRB ruled against UPW on the key factual and

23 The circuit court did not comment on whether its decision was based on the primary jurisdiction doctrine or exhaustion of administrative remedies.

legal questions of whether the Governor's reason for instituting

layoffs were: (1) premised upon a true fiscal exigency, and were

within her unilateral management powers under HRS Chapter 89, or

2) premised upon an improper desire to retaliate against UPW

members for engaging in conduct specifically protected by HRS

Chapter 89.

As for the "statutory claims," the circuit court

concluded that "allowing parallel litigation in the circuit court

while the HLRB proceeding was ongoing would both undercut the

HLRB's exclusive original jurisdiction and create a risk of

inconsistent judgments." The circuit court then dismissed all of

UPW's claims based on a lack of jurisdiction.

D. ICA Memorandum Opinion

The ICA issued a Memorandum Opinion vacating the circuit court's judgment dismissing UPW's First Circuit Complaint, and remanded the case with instructions to stay the action pursuant to the primary jurisdiction doctrine, so that the parties could pursue appropriate administrative remedies before the HLRB. UPW v. Lingle, No. CAAP-12-0000505 (Haw. App. June 18, 2013) (mem.).

The ICA essentially agreed with the circuit court that the controversy presented to the circuit court raised issues within the HLRB's exclusive jurisdiction over prohibited practice

controversies. The ICA concluded that UPW's statutory claims could be raised directly in the circuit court, but that the matter should be referred to the HLRB under the doctrine of primary jurisdiction. UPW, mem. op. at 4. Therefore, the ICA concluded that the circuit court had erred in dismissing the action because a stay, rather than dismissal without prejudice, was appropriate under the circumstances.

The ICA concluded that UPW's First Circuit Complaint

alleged conduct that was specifically defined as prohibited practices under HRS § 89-13. UPW, mem. op. at 8. The ICA concluded that UPW's layoff and privatization claims were based on allegations that Defendants had engaged in the prohibited practices of: (1) discriminating against UPW by laying off employees in retaliation for engaging in protected union activities and filing the Furlough Lawsuit; (2) discriminating against UPW members by failing to take corrective action to terminate current private contractors while implementing the layoff of UPW members; and (3) refusing to bargain collectively regarding the layoff procedures and the privatization. Id. The ICA thus reasoned that UPW's layoff and privatization claims were essentially prohibited practice claims. Id.

The ICA reasoned that this court's decisions in HGEA and HSTA reflect a concern that, "when a plaintiff presents to

the circuit court a controversy that is identical to one which could have and should have been presented to the HLRB, the circuit court's exercise of jurisdiction necessarily involves a risk of interfering with the HLRB's exclusive jurisdiction over

prohibited practice controversies." Id.

The ICA concluded, "UPW correctly asserts that its statutory claims could be raised directly in the circuit court." The ICA cited Konno for this assertion, indicating that it was referring to the civil service claims under HRS Chapter 76. Id. The ICA held that the doctrine of primary jurisdiction applies when a court and an agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency; therefore, the doctrine of primary jurisdiction applied to UPW's "statutory claims." UPW, mem. op. at 9. The ICA concluded that under the doctrine of primary jurisdiction, however, dismissal is only appropriate if the parties would not be unfairly disadvantaged. Id. Because the statute of limitations could prevent UPW from refiling its claims at the conclusion of the HLRB proceedings, the ICA concluded that the proper remedy was to stay the case pending the outcome of the administrative process. Id.

III. Standard of Review

The existence of jurisdiction is a question of law that

we review de novo under the right/wrong standard. HGEA, 107 Hawai#i at 183, 111 P.3d at 592. Accordingly, a court's decision to invoke the primary jurisdiction doctrine is reviewed de novo as well. Pac. Lightnet, Inc. v. Time Warner Telecom, Inc., No. SCWC-28948, slip op. at 38 (Haw. Dec. 18, 2013). "If the court determines that the primary jurisdiction doctrine applies, the court, in its discretion, may determine whether to stay the litigation or dismiss without prejudice." Id.

IV. Discussion

A. The Primary Jurisdiction Doctrine

UPW asserts in its Application that HLRB's exclusive original jurisdiction is limited to prohibited practices related to collective bargaining: "HGEA v. Lingle and HSTA v. Abercrombie decisions were narrow rulings that related only to the constitutional right to collective bargaining, which is implemented by HRS Chapter 89." UPW argues that the decisions "did not set out a broad rule that any claim that involves facts that could also make out a 'prohibited practice' must be presented to the HLRB even if the plaintiff is not alleging a prohibited practice but a violation of other statutory or constitutional provisions."

We agree with UPW to the extent that it argues that

HGEA and HSTA were narrow rulings relating only to claims

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alleging violations of the rights to collective bargaining. In

HGEA, the plaintiffs based their request for relief on HRS

Chapter 89 and the constitutional right to collective bargaining

under article XIII, section 2 of the Hawai#i Constitution. 124

Hawai#i at 200, 239 P.3d at 4 . We concluded that although the

plaintiffs' complaint did not expressly use the words "prohibited

practice," a prohibited practice could be logically inferred

because the plaintiffs' complaint essentially alleged that in

instituting a unilateral statewide furlough plan, Defendant

Lingle had committed a prohibited practice when she refused to

bargain collectively in good faith as required by HRS Chapter 89.

Accordingly, we held that the HLRB had exclusive jurisdiction

over the plaintiffs' claims pursuant to HRS § 89-14.

Unlike the plaintiffs in HGEA, the plaintiffs in HSTA

deleted all references to HRS Chapter 89 in their complaint and

based their request for relief solely on the constitutional right

to collective bargaining under article XIII, section 2 of the

Hawai#i constitution. HSTA, 126 Hawai#i at 322, 271 P.3d at 617 .

Nonetheless, we reiterated our holding in HGEA and emphasized

that the legislative purpose of having the administrative agency

with expertise in these matters decide them in the first instance

is "frustrated if the HLRB's jurisdiction can be defeated by

characterizing issues that fall within the scope of HRS Chapter

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89 as constitutional claims and then addressing them directly to

the circuit court." HSTA, 126 Hawai#i at 322, 271 P.3d at 617

(citing HGEA, 124 Hawai#i at 208, 239 P.3d at 12).

In the instant case, however, UPW's claims are based on

the HWPA and the Free Speech Clause, both of which are within the

original jurisdiction of the circuit court and do not facially

involve violations of the constitutional or statutory rights to

collective bargaining. Thus, HGEA and HSTA do not control the

narrow question presented in the instant application, which

essentially requires that we determine whether the primary

jurisdiction doctrine applies to UPW's claims.

1. History of the Primary Jurisdiction Doctrine

The primary jurisdiction doctrine originated from the

United States Supreme Court's decision in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co. ("Abilene"), 204 U.S. 426 (1907).

In Abilene, a shipper sued a carrier in state court claiming that a carrier's interstate freight rate was "unjust and unreasonable." 204 U.S. at 433 . The United States Supreme Court considered whether, consistent with the Interstate Commerce Act, the court had power "to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be

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unreasonable by the Interstate Commerce Commission." Abilene, 204 U.S. at 432 .

The Court opined that if the power to originally hear complaints on the subject existed in both courts and the Commission, there might be a divergence between the action of the Commission and the decision of a court. 204 U.S. at 441 . The Court stated, "the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus, a conflict would arise which

would render the enforcement of the act impossible." 204 U.S. at 441 . Accordingly, the Court held, "a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule[.]" 204 U.S. at 448 (emphasis added).

In United States v. Western Pacific Railroad Company ("Western Pac. R.R."), 352 U.S. 59 (1956), the United States Supreme Court further refined the doctrine of primary jurisdiction. Presented with the question of whether the Court of Claims had correctly allocated the issues in a suit between the jurisdiction of the Interstate Commerce Commission and that

of the court, i.e., whether the court properly applied the primary jurisdiction doctrine, the Court explained that the primary jurisdiction doctrine was concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties. 352 U.S. at 63-64 . The Court

held that unlike the exhaustion principle, which applies when a

claim is cognizable in the first instance by an administrative

agency alone, primary jurisdiction:

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views .

Western Pac. R.R., 352 U.S. at 63-64 (citing General Am. Tank Car

Corp. v. El Dorado Terminal Co., 308 U.S. 422 , 433 (1980)

(holding that the District Court had jurisdiction over the action

in assumpsit; however, in light of the provisions of the

Interstate Commerce Act, "it should not have proceeded to

adjudicate the rights and liabilities of the parties" in the

absence of a decision by the Interstate Commerce Commission with

respect to the validity of the practice involved)).

Thus, the doctrine of primary jurisdiction arose from a

concern that an established rate schedule could be found

reasonable by the agency tasked with this determination, but

unreasonable by a court, thereby triggering a conflict that could

render the enforcement of the Interstate Commerce Act impossible.

Abilene, 204 U.S. at 441 . The doctrine was later refined to include the principle that in cases raising issues of fact not within the conventional experience of judges or requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. Western Pac. R.R., 352 U.S. at 77 ; Far East Conference v. United States, 342 U.S. 570 , 574 (1952) (holding that the Federal Maritime Board's primary jurisdiction over matters concerning the Shipping Act of 1916 precluded the District Court for New Jersey from passing on the merits of the lawsuit, which was brought under the Sherman Anti-Trust Act).

2. Primary Jurisdiction in Hawai#i

This court adopted the doctrine of primary jurisdiction directly from Western Pac. R.R., holding that primary jurisdiction applied "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81 , 93, 734 P.2d 161 , 168 (1987) (citing Western Pac. R.R., 352 U.S. at 63-64). We concluded, "[w]hen this happens,

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the judicial process is suspended pending referral of such issues

to the administrative body for its views." Id. (citing Western

Pac. R.R., 352 U.S. at 64). We opined, "[i]n effect, the courts

are divested of whatever original jurisdiction they would

otherwise possess. And 'even a seemingly contrary statutory

provision will yield to the overriding policy promoted by the

doctrine.'" 69 Haw. at 93, 734 P.2d at 168-69 (citing B.

Schwartz, Administrative Law § 8.24, at 488 (2nd ed. 1984)

(emphasis omitted)).

In Kona Old, the plaintiffs' invoked the circuit

court's jurisdiction pursuant to HRS §§ 91-14(a),24 205A-6,25 and

24 HRS § 91-14(a) (1985) stated: Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

25 HRS § 205A–6 (1985) read in pertinent part: (a) Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency: (1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or (2) Has failed to perform any act or duty required to be performed under this chapter; or (3) In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter. Kona Old, 69 Haw. at 86, 734 P.2d at 165 .

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603-21,26 seeking a ruling that the director had violated the Coastal Zone Management Act ("CZMA") in issuing a special management area ("SMA") minor use permit, and an order voiding the permit and enjoining an authorized construction of real property situated within the special management area of Kailua-Kona. 69 Haw. at 89, 734 P.2d at 166 . We concluded that the issuance of a SMA minor permit and its enforcement required the resolution of issues which, under CZMA's regulatory scheme, had been placed within the special competence of the county planning department. Id. at 93, 734 P.2d at 169 . We held, "the request for judicial intervention in the administrative process should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in issuing the minor permit was proper." Id. Accordingly, this court applied the doctrine of primary jurisdiction and affirmed the circuit court's dismissal of the case. Id.

We have similarly applied the doctrine of primary jurisdiction to claims originally cognizable in the circuit court but containing issues that first require a determination by an administrative agency. See Chun v. Emps. Ret. Sys. of State of

Haw., 73 Haw. 9 , 13, 828 P.2d 260 , 262 (1992) (holding that the

26 "HRS § 603–21 formerly defined the jurisdiction of circuit courts." Kona Old, 69 Haw. at 89, 734 P.2d at 166 .

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considerations of uniformity and consistency in a specialized

agency's administration of the Employees' Retirement System,

mandated suspension of the judicial process pending an initial

review of the issues by the administrative body). See also Jou

v. Nat'l Interstate Ins. Co. of Haw., 114 Hawai#i 122, 128, 157

P.3d 561 , 567 (App. 2007) (applying the primary jurisdiction

doctrine and referring the question of whether a workers'

compensation carrier acted unreasonably or in bad faith to the

Director of the Department of Labor and Industrial Relations

before proceeding with a bad faith tort claim in circuit court).

But see Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai#i 192,

202, 891 P.2d 279 , 289 (1995) (holding that the doctrine did not

apply where (1) a pure question of law is at issue and technical

matters calling for the special competence of the administrative

expert are not involved; and (2) cases in which the

constitutionality of the agency's rules and procedures is

challenged and questions are raised as to whether the agency has

acted within the scope of its authority).

Notwithstanding, "[n]o fixed formula exists for

applying the doctrine of primary jurisdiction. In every case the

question is whether the reasons for the existence of the doctrine

are present and whether the purposes it serves will be aided by

its application in the particular litigation." Western Pac.

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R.R., 352 U.S. 59 , 64.

B. UPW's Retaliation Claims

1. Framework for the Application of the Primary Jurisdiction Doctrine

As discussed above, this court adopted the doctrine of

primary jurisdiction directly from the United States Supreme

Court's opinion in Western Pac. R.R., 352 U.S. 59 . The

plaintiffs in Western Pac. R.R. had brought suit in the Court of

Claims under the Tucker Act27 to recover money from the United

States. 352 U.S. at 60 n.1. The United States Supreme Court was

specifically presented with the question of whether the Court of

Claims had properly applied the doctrine of primary jurisdiction;

that is, whether it had correctly allocated the issues in the

suit between the jurisdictions of the Interstate Commerce

Commission and that of the court. 352 U.S. at 64 . We are

similarly presented in the instant case with the question of

whether the ICA properly applied the doctrine of primary

jurisdiction to UPW's claims, even when the circuit court had

original jurisdiction over those claims. Accordingly, the

27 The Tucker Act governed the adjudication of money claims against the United States. Gregory C. Sisk, The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States, 71 Geo. Wash. L. Rev. 602 , 608 (2003). It conferred the Court of Claims jurisdiction over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and also expanded that court's authority to hear suits based upon the Constitution. Id. "Moreover, the Tucker Act granted the then-circuit courts (today the District Courts) concurrent jurisdiction with the Court of Claims over monetary claims not exceeding $10,000 in amount." Id.

Court's reasoning in its application of the doctrine is

particularly instructive to the instant case.

In Western Pac. R.R., the Court explained that the

determination of whether a lower court had properly applied the

doctrine of primary jurisdiction required an examination of

whether the Act conferring jurisdiction upon the Interstate

Commerce Commission, the Interstate Commerce Act, required the

agency to first pass on the issue in dispute, which in turn

depended on whether the controversy in dispute raised "issues of

transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." 325 U.S. at 65. Based on these factors, the Court held that the issues presented in the claim were initially matters for the Commission's determination, even if the suits had been brought under the Tucker Act, and not the Interstate Commerce Act. Id. at 70.

UPW's retaliation claims are unquestionably cognizable in the circuit court. UPW alleges, however, that Defendant Lingle retaliated against UPW members for filing the Furlough Lawsuit. The Furlough Lawsuit was an assertion of the Employees' right to collective bargaining, alleging that Defendant Lingle violated collective bargaining laws by unilaterally imposing

statewide furloughs. Although UPW's retaliation claims do not specifically assert the right to collective bargaining, prohibited practice claims under HRS § 89-13 nevertheless appear to be implicated by virtue of UPW's allegation that Defendants implemented the layoffs in retaliation for the Furlough Lawsuit.

An examination of the law governing the HLRB's

jurisdiction under HRS Chapter 89, therefore, is necessary to

determine whether the doctrine of primary jurisdiction applies.

Specifically, HRS Chapter 89 must be examined to determine

whether it requires the HLRB to first pass on the controversy,

which in turn depends on whether the controversy raises policy

issues concerning matters that ought to be considered by the HLRB

in the interests of a uniform and expert administration of the

regulatory scheme laid down by HRS Chapter 89.

a. The Regulatory Scheme of HRS Chapter 89, Collective Bargaining in Public Employment

HRS Chapter 89 is titled "Collective Bargaining in

Public Employment." HRS § 89-1(a) outlines the following

legislative findings:

[J]oint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public

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employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.

HRS § 89-1(a). HRS § 89-1(b) states in part, "it is the

public policy of the State to promote harmonious and

cooperative relations between government and its employees

and to protect the public by assuring effective and orderly

operations of government." HRS § 89-1(b). HRS § 89-1(b)

also notes that this policy is best effectuated by:

(1) Recognizing the right of public employees to organize for the purpose of collective bargaining; (2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to section 76-1; and (3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

The Committee on Human Resources explained that the

legislature had created the HLRB, formerly the Hawai#i Public

Employment Relations Board, "to administer the provisions of

Chapter 89 in an effort to promote cooperative relations between

the government and its employees and to protect the public by

ensuring orderly government operations." HGEA, 124 Hawai#i at

204, 239 P.3d at 8 (citing S. Stand. Comm. Rep. No. 597–82, in

1982 Senate Journal, at 1202). Thus, the policy motivating

Chapter 89 was the promotion of cooperative relations between

government and its employees, and the HLRB was specifically

created to administer this policy.

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The retaliation claims in the instant case clearly involve relations between the government and its public sector employees. The crux of UPW's allegation is that, because it exercised its right to collective bargaining by filing a lawsuit opposing unilateral statewide furloughs, Defendants retaliated against UPW members by laying off these members. If UPW's allegations are true, Defendants have violated the employees' right to collectively bargain by retaliating against them for asserting such rights by filing the Furlough Lawsuit. HRS Chapter 89 specifically protects the rights of public employees to exercise collective bargaining. Pursuant to HRS § 89-1, the HLRB was created to administer the provisions of Chapter 89. In addition, HRS § 89-14 specifically supports the conclusion that UPW's retaliation claims raise issues of public employment policy that ought to be considered by the HLRB. As we explained in HGEA, HRS § 89-14 was amended in 1982 in response to the ICA opinion in Winslow v. State, 2 Haw. App. 50 , 625 P.2d 1046 (1981), which conferred concurrent jurisdiction to the HLRB and circuit court over public employee prohibited practice complaints. 124 Hawai#i at 203, 239 P.3d at 7 . The legislature

explained that the purpose of the bill was to make the

jurisdiction of the HLRB exclusive in controversies relating to

prohibited practices. S. Stand. Comm. Rep. No. 597-82, in 1982

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Senate Journal, at 1202. In a Report issued by the Committee on

Public Employment and Government Operations, the committee

explained that the phrase, "exclusive original jurisdiction" may

also be referred to as "exclusive primary or initial

jurisdiction." H. Stand. Comm. Rep. No. 134-87, in 1982 House

Journal, at 944. The committee explained that under the bill as

amended:

[A] person with a prohibited practice complaint must first file with the HLRB which would then conduct proceedings on the complaint and issue a decision or order. The complainant would not have the option of either filing the prohibited practice complaint with HLRB or in the circuit court or of filing the same complaint concurrently with both the HRLB and the court.

Id. In the report issued by the Committee on Human Resources,

the committee stated that it believed that the original intent of

HRS § 89-14 was to allow the HLRB to have primary jurisdiction of

prohibited practice complaints because the HLRB was "the

administrative agency with the expertise in public employment

relations."28 S. Stand. Comm. Rep. N. 597-82, in 1982 House

Journal, at 1202 (emphasis added).

Accordingly, as amended, HRS § 89-14 provides: "Any

controversy concerning prohibited practices may be submitted to

the board in the same manner and with the same effect as provided

28 We recognize that the legislature's use of the term "primary" in connection with the term "jurisdiction" is not synonymous with the primary jurisdiction doctrine. The legislature's use of the term was clearly intended to confer the HLRB with "exclusive original jurisdiction" over prohibited practice complaints.

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in section 377-9; provided that the board shall have exclusive

original jurisdiction over such a controversy[.]" Thus, HRS

§ 89-14 expressly requires that the HLRB first pass on prohibited

practice controversies.

UPW alleges that Defendants violated the HWPA by

retaliating against UPW and its members for filing and pursuing

the Furlough Lawsuit in circuit court. Pursuant to HRS § 89-

13(a)(4), it is a prohibited practice to: "Discharge or otherwise

discriminate against an employee because the employee has signed

or filed an affidavit, petition, or complaint or given any

information or testimony under this chapter, or because the

employee has informed, joined, or chosen to be represented by any

employee organization." Viewing UPW's allegations in light of HRS § 89-13(a)(4), UPW essentially presents a prohibited practice controversy.

Thus, UPW's retaliation claims raise issues of public employment policy that ought to be considered by the HLRB in the interest of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89. Moreover, the legislature explicitly conferred exclusive or "initial jurisdiction" to the HLRB over prohibited practices, such as discharging employees for filing complaints, because it recognized that the HLRB possessed expertise in matters concerning public employment. Therefore,

HRS Chapter 89 requires the HLRB to first pass on UPW's retaliation claim, thus triggering the primary jurisdiction doctrine.

b. The ICA Properly Applied the Primary Jurisdiction Doctrine to UPW's Retaliation Claims

The circuit court has original jurisdiction over UPW's HWPA and Free Speech retaliation claims, and therefore, UPW has a right to pursue claims under these laws. Based on the reasons above, however, we hold that the primary jurisdiction doctrine is

applicable to UPW's retaliation claims. Thus, pursuant to Kona Old, UPW's right to have these claims considered by the courts yields to the overriding policy promoted by the doctrine of primary jurisdiction. 69 Haw. at 93, 734 P.2d at 168 (citing B. Schwartz, Administrative Law § 8.24, at 488 (2nd ed. 1984)). The mere fact that the issues were phrased in UPW's complaint as HWPA and free speech claims are not determinative on this issue. See Western Pac. R.R., 352 U.S. at 68-69 ("[T]he mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue."). As the United States Supreme Court stated, such would make the doctrine of primary jurisdiction an "abstraction to be called into operation at the whim of the pleader." 352 U.S. at 59 .

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The United States Supreme Court expressly rejected such an approach in General American Tank, when it held that, while the action was an ordinary one in assumpsit on a written contract, "[w]hen it appeared in the course of the litigation

that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination[.]" 308 U.S. at 433. The Court concluded that the policy of the Act was that reasonable allowances and practices were to be fixed and settled after full investigation by the Commission. Id. at 432-33. Thus, the Court held that although the District Court had jurisdiction of the subject matter and of the parties, the issues before the District Court, the reasonableness and legality of the practices of the parties, raised questions that were subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. Id.

The dissent argues that it is well-established that the agency and the court must have concurrent jurisdiction over a claim in order for the primary jurisdiction doctrine to apply. Dissenting Opinion at 10 (citing Aged Hawaiians, 78 Hawai#i at 202, 891 P.2d at 289). Respectfully, we disagree. The primary jurisdiction doctrine does not presume that a claim must be

originally cognizable by both the court and the agency. The

agency and the court need not have concurrent jurisdiction over the claims, as long as the agency and the court have concurrent jurisdiction over issues presented in the claims. In Aged Hawaiians and in Kona Old, we held that the doctrine of primary jurisdiction applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Aged Hawaiians, 78 Hawai#i at 202, 891 P.2d at 289 ; Kona Old, 69 Haw. at 93, 734 P.2d at 168-69 (emphasis added). Accordingly, we recognized that the emphasis in the application of the doctrine of primary jurisdiction was on the issues raised by the claim, rather than the claim itself.

The retaliation allegations in UPW's complaint provide a basis for both a prohibited practice claim and claims under the HWPA and Free Speech Clause; however, one issue is determinative of all these claims, namely, whether Defendants' decision to lay off government employees was motivated by the Furlough Lawsuit. Thus, the question of whether Defendants violated the HWPA and Free Speech Clause are inextricably intertwined with the question of whether Defendants engaged in a HRS § 89-13(a)(4) prohibited

practice. Under these circumstances, we conclude that the HLRB

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must be the first to pass on the motivations for Defendants' decision to implement the layoffs. Cf. In re United Pub. Workers, 131 Hawai#i 142, 315 P.3d 768 , 777 (App. 2013) ("The HLRB's jurisdiction clearly extends to determining whether, in a particular instance, specified employer conduct constitutes a 'prohibited practice' under HRS § 89–13.").

This is consistent with the reasons for the existence of the primary jurisdiction doctrine, avoiding the risk of divergent decisions between an administrative agency and a court on certain administrative questions. Moreover, it is consistent with the purposes the primary jurisdiction doctrine serves, that of (1) uniformity which would obtain if a specialized agency initially passed on certain types of administrative questions, and (2) deference to the expert and specialized knowledge of administrative agencies specifically created by the legislature for regulating certain subject matter. Thus, as stated in Western Pac. R.R., 352 U.S. at 64-65:

Uniformity and consistency in the regulation of business entrusted to a particular agency are

secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure .

(Citing Far East Conference, 342 U.S. at 574-75).

The regulatory scheme laid down by HRS Chapter 89

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specifically contemplates that issues concerning governmental and

employee relations ought to be considered by the HLRB in the

interest of uniform and expert administration. Moreover,

HRS § 89-14 expressly requires that the HLRB first pass on the

issues presented in UPW's complaint because UPW's allegations

raise a prohibited practice controversy.

Accordingly, we hold that the ICA properly applied the

doctrine of primary jurisdiction to UPW's retaliation claims.

2. A Stay Is Appropriate Under the Circumstances

Under the doctrine of primary jurisdiction, a court has

discretion either to retain jurisdiction or, if the parties would

not be unfairly disadvantaged, to dismiss the case without

prejudice. Reiter v. Cooper, 507 U.S. 258 , 268-69 (1993).

In Reiter, the United States Supreme Court rejected the

defendant's argument that the primary jurisdiction doctrine required plaintiffs to initially present their claims to the administrative agency, rather than the court. 507 U.S. at 268 . On the contrary, the Court held that the doctrine was specifically applicable to "claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative

ruling." Id. The Court further held that "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Id. at 268-69 .

The dissent states that our conclusion that UPW's retaliation claims concerns prohibited practices conflicts with our conclusion that the court may decide whether to stay or dismiss the action because HRS § 89-14 expressly provides that the HLRB has "exclusive original jurisdiction" over prohibited

practices. See Dissenting Opinion at 23. As discussed supra, application of the primary jurisdiction was necessary because UPW's claims were brought under the HWPA and the Hawai#i Constitution over which the circuit court has jurisdiction. Subsumed within these claims, however, were prohibited practice controversies; therefore, under HRS Chapter 89's regulatory scheme, the HLRB was required to make an initial determination before the circuit court could adjudicate claims over which it has jurisdiction.

In the instant case, the ICA concluded that UPW's First Circuit Complaint alleged that Defendants had essentially engaged in prohibited practices by implementing the layoffs and privatization, but that UPW's statutory claims could be raised

directly in the circuit court. The ICA held, therefore, that pursuant to the primary jurisdiction doctrine, a stay rather than a dismissal of UPW's claims was appropriate because the statute of limitations could prevent UPW from refiling its claims at the conclusion of the HLRB's proceedings. As to UPW's retaliation claims, we agree.

Therefore, we affirm the ICA's judgment staying UPW's retaliation claims pending the outcome of the administrative process.

C. UPW's Privatization Claims

UPW alleged in its First Circuit Complaint that Defendants privatized public work in violation of civil service merit principles protected by article XVI, section 1 of the Hawai#i Constitution and Hawaii's civil service laws, HRS Chapters 76 and 77,29 "by contracting out civil service work – for example, work at the Kulani Correctional Facility – to private companies at the same time that public employees who were available to perform that work were being subjected to layoffs." UPW asserts in its Application that in Konno, 85 Hawai#i 61, 937 P.2d 397 , this court "expressed no doubt that these claims were properly cognizable in an original suit before the circuit court." UPW argues, therefore, that the ICA erred in concluding

29 HRS Chapter 77 was repealed in its entirety in 2000 by Act 253.

that UPW's privatization claims, which UPW asserts are identical to the claim brought in Konno, contained issues within the

specialized expertise of the HLRB.

1. Hawaii's Civil Service Laws

In Konno, the central issue was the privatization of public services, namely the validity of a contract entered into by the County of Hawai#i to privatize the operation of a landfill. 85 Hawai#i 61, 64, 937 P.2d 397 , 400. We held that the County violated civil service laws and merit principles but had not violated collective bargaining laws. Id.

We explained in Konno that article XVI, section 1 of the Hawai#i Constitution provides, "[t]he employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle." We concluded that by its express terms, article XVI, section 1 simply means that "civil service," however defined, was to be governed by merit principles. 85 Hawai#i 61, 70, 937 P.2d 397 , 406. We stated, however, that article XVI, section 1 of the Hawai#i Constitution did not define the precise scope of the civil service, i.e., the particular job positions that are within civil service. We explained: "Instead, article XVI, section 1 expressly refers to other sources for a definition of 'civil service.' It states:

'civil service, as defined by law . . . .'" Id. (emphasis in original) (ellipsis in original).

We held that in order to determine the scope of the term "civil service," statutory and case law had to be examined; therefore, the constitution did not establish an independently enforceable right to the protection of merit principles. We concluded, however, that civil service positions were also subject to the civil service statutes contained within HRS Chapters 76 and 77. 85 Hawai#i 61, 70, 937 P.2d 397 , 406 (1997). Thus, we concluded that HRS Chapters 76 and 77 provided civil servants with an enforceable right to the protection of merit principles guaranteed by article XVI, section 1 of the Hawai#i constitution.

We then concluded that under HRS § 76-77,30 landfill worker positions were within the civil service under the "nature of the services test."31 85 Hawai#i at 74, 937 P.2d at 410 . Accordingly, we held that the County violated civil service laws and merit principles, and instructed the circuit court to fashion

30 HRS § 76-77 states in relevant part: "The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county . . . [.]" HRS § 76-77 then lists a number of exemptions to

these civil service positions.

31 According to this approach, "services that have been 'customarily and historically provided by civil servants' cannot be privatized, absent a showing that civil servants cannot provide those services." Konno, 85 Hawai #i at 69, 937 P.2d at 405 (citing Wash. Fed'n of State Emps., AFL-CIO v. Spokane Cmty Coll., 90 Wash.2d 698 , 585 P.2d 474 , 477 (Wash. 1978) (en banc)).

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injunctive relief requiring the landfill to be transferred from

private to County operation, and also to monitor the transition

and impose sanctions for non-compliance. Id. at 79, 937 P.2d at

415 . We expressed no doubt that the issues raised in the

privatization claims were within the original jurisdiction of the

circuit court, and not the HLRB.

At the time Konno was decided, HRS § 76-1 (1985) stated

that it was the policy of the State that the personnel system be

applied and administered in accordance with certain merit

principles.32 Act 253 of 2000 ("Act 253") repealed numerous

sections of HRS Chapter 76 and repealed Chapter 77 in its

entirety. In addition, Act 253 established a Merit Appeals Board

32 HRS § 76-1 (1985), before it was amended, provided the following merit principles: (1) Equal opportunity for all regardless of race, sex, age, religion, color, ancestry, or politics. No person shall be discriminated against in any case because of any disability, in examination, appointment, reinstatement, reemployment, promotion, transfer, demotion, or removal, with respect to any position the duties of which, in the opinion of the director of human resources development may be efficiently performed by a person with such a disability; provided that the employment will not be

hazardous to the appointee or endanger the health or safety of the appointee's co-workers or others; (2) Impartial selection of the ablest person for government service by means of competitive tests which are fair, objective, and practical; (3) Just opportunity for competent employees to be promoted within the service; (4) Reasonable job security for the competent employee, including the right of appeal from personnel actions; (5) Systematic classification of all positions through adequate job evaluations; and (6) Proper balance in employer-employee relations between the people as the employer and employees as the individual citizens, to achieve a well-trained, productive, and happy working force.

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("MAB") and amended the definition of "merit principle" in HRS

§ 76-1. HRS § 76-1, as amended, defines the merit principle as

"the selection of persons based on their fitness and ability for

public employment and the retention of employees based on their

demonstrated appropriate conduct and productive performance."

HRS § 76-1 (Supp. 2000).

Defendants argue that after the enactment of Act 253,

UPW and the State have apparently argued over "whether original

jurisdiction over claimed violations of HRS § 76-16(b),[33] as it

relates to contracting out claims[34] rests with the HLRB

pursuant to HRS §§ 89-5 and 89-9(d), or with the various merit

appeals boards pursuant to HRS §§ 76-16(a),[35] 76-14(a), (b) and

33 HRS § 76-16(b) is the State counterpart to HRS § 76-77, the statute governing civil service positions in the county, as interpreted in Konno, 85 Hawai #i 61, 937 P.2d 397 . HRS § 76-16(b) states: "The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter established and embrace all personal services performed for the State . . . [.]" HRS § 76-16(b)

then provides a number of exemptions to these civil service positions, none of which apply here.

34 Defendants use the term "contracting out" claims interchangeably with "privatization" claims.

35 HRS § 76-16(a) states: (a) The state constitution mandates that the employment of persons in the civil service, as defined by law, be governed by the merit principle. The legislature declares that the public policy of the State is that all positions in the civil service systems of the respective jurisdictions shall be filled through civil service recruitment procedures based on merit and that the civil service system of the respective jurisdictions shall comprise all positions, whether permanent or temporary, in the jurisdiction now existing or hereafter established and embrace all personal services performed for the jurisdiction, except employees or positions exempted under this section, or sections 46-33 and 76-77.

(e),[36] and 76-47."37 Accordingly, we address whether UPW's

privatization claims require the resolution of issues placed

within the special competence of either the HLRB or the MAB.

2. Civil Service Laws Do Not Require Privatization Claims to be Determined by the HLRB

HRS § 89-5(a) (2012) states that the HLRB was created

to ensure that (1) collective bargaining is conducted in

accordance with HRS Chapter 89, and (2) the merit principle under

HRS § 76-1 is maintained. However, we concluded in Konno that,

pursuant to HRS § 89-9(d), "The employer and the exclusive

representative shall not agree to any proposal which would be

inconsistent with the merit principle[.]" Thus, we held that the

County and UPW were barred from bargaining over both the

privatization decision and its effects because we concluded that County's privatization effort violated civil service laws and merit principles. 85 Hawai#i at 78, 937 P.2d at 414 ("It would be absurd for us to hold that the County violated collective bargaining laws by refusing to negotiate with the UPW when both parties were expressly barred from negotiating [the County's privatization effort] by statute.").

36 HRS § 76-14 provides the duties and the jurisdiction of the MAB.

37 HRS § 76-47 provides the appointment, authority, and the procedures of the MAB.

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The HLRB, therefore, only has jurisdiction over issues related to HRS Chapter 89, such as collective bargaining and prohibited practice controversies, to the extent they do not violate merit principles. UPW alleged in its First Circuit Complaint that Defendants unlawfully abolished civil service positions and contracted out positions that have historically and customarily been performed by civil servants under the merit system. These allegations may constitute violations of civil service laws and merit principles. Pursuant to Konno and HRS § 89-9(d), UPW and Defendants were expressly barred from

bargaining over either the decision to privatize or its effect if privatization violated civil service laws or merit principles. Thus, the question of whether privatization violated civil service laws and merit principles is a threshold question that must be determined by the circuit court before the HLRB's specialized expertise in addressing prohibited practices is implicated.

Moreover, the purpose of Act 253 was "to reform the public employment laws that were enacted to implement two constitutional mandates -- that there be civil service based on merit and that public employees have the right to bargain collectively." 2000 Haw. Sess. L. Act 253, § 1 at 853. Act 253 sought to repeal Hawaii's civil service and collective bargaining

laws and to create a new comprehensive public employment law. S. Stand. Comm. Rep. No. 2686, in 2000 Senate Journal, at 1104. The Joint Labor and Environmental and Ways and Means Standing Committee Report states: "Public employment is governed by two often contradictory set of laws – those for civil service and those for collective bargaining. While these laws once clearly

delineated the difference between the two, changes over many

years have blurred the lines of responsibility and authority."

Id. The report further states "that one of the keys to

successful modernization and a more responsive, adaptive

government, is to restore the 'bright line' – the clear

delineation between civil service and collective bargaining."

Id. Thus, the legislative history of Act 253 reflects an intent

to distinguish issues related to civil service and merit

principles from collective bargaining.

Therefore, we hold that HRS Chapter 89 does not require

that the HLRB first pass on controversies related to

privatization. The ICA erred in staying UPW's privatization

claims to pursue administrative remedies before the HLRB under

the primary jurisdiction doctrine.38

38 Defendants argue that UPW's privatization claims are within the HLRB's jurisdiction because the claims were bound up with its central claim that Lingle was retaliating against UPW members. Defendants also argue that UPW is alleging that Lingle was privatizing civil service positions in retaliation for the Furlough Lawsuit. In Konno, plaintiffs also argued that the privatization of the landfill was to "punish" the plaintiffs for endorsing (continued...)

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3. The Merit Appeals Board's Jurisdiction Over Civil Service Laws

Defendants also argue that original jurisdiction over

claimed violations of HRS § 76-16 as it relates to "contracting

out claims" rests with the HLRB or in the alternative, the

various merit appeals boards pursuant HRS §§ 76-14, 76-16, and

76-47. This assertion lacks merit.

HRS § 76-47 requires that each jurisdiction39

"establish a merit appeals board that shall have exclusive

authority to hear and decide appeals relating to matters set

forth in section 76-14 concerning the civil service of the

jurisdiction." HRS § 76-14 then provides in relevant part:

§ 76-14. Merit appeals board; duties, and jurisdiction

(a) The merit appeals board of each jurisdiction shall decide appeals from any action under this chapter taken by the chief executive, the director, an appointing authority, or a designee acting on behalf of one of these individuals, relating to: (1) Recruitment and examination; (2) Classification and reclassification of a particular

38 (...continued) former Mayor Inouye in the 1992 primary election. 85 Hawai #i at 74 n.10, 937 P.2d at 410 n.10. We concluded that the County violated constitutionally mandated merit principles and civil service statutes; therefore, it was unnecessary for us to address this argument. Similarly, in this case, the court may resolve UPW's claim that Defendants' privatization actions violated merit principles and civil service laws without having to make a determination on the issue of retaliation. However, if the court concludes that the privatization is not in violation of merit principles or civil service laws, any retaliation allegations would appear to implicate the HLRB's specialized expertise in addressing prohibited practices.

39 "Jurisdiction" is defined by HRS § 76-11 to mean "the State, the city and county of Honolulu, the county of Hawaii, the county of Maui, the county of Kauai, the judiciary, the department of education, the University of Hawaii, and the Hawaii health systems corporation."

position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization; (3) Initial pricing of classes; and (4) Other employment actions under this chapter, including disciplinary actions and adverse actions for failure to meet performance requirements, taken against civil service employees who are excluded from collective bargaining coverage under section 89-6.

(b) Any person suffering legal wrong by an action under subsection (a)(1) or aggrieved by such action shall be entitled to appeal to the merit appeals board. Any employee covered by chapter 76 suffering legal wrong by an action under subsection (a)(2) or (3) shall be entitled to appeal to the merit appeals board. Only employees covered by chapter 76, who are excluded from collective bargaining, suffering legal wrong by an action under subsection (a)(4) shall be entitled to appeal to the merit appeals board. Appeals under this section shall be filed within time limits and in the manner provided by rules of the merit appeals board.

Although "any person" can appeal HRS § 76-14(a)(1) "recruitment

and examination" issues to a MAB under HRS § 76-14(b)(1), only

"employees" can bring appeals under subsections (a)(2) to (a)(4),

and UPW is not an employee. In any event, privatization issues

do not relate to "recruitment and examination."

In addition, privatization does not relate to

"classification and reclassification of a particular position,

including denial or loss of promotional opportunity or demotion

due to reclassification of positions in a reorganization," or

"initial pricing of classes" under HRS §§ 76-14(a)(2) and (a)(3).

Even if privatization could, under HRS § 76-14(a)(4), be

characterized as "other employment actions under this chapter,

including disciplinary actions and adverse actions for failure to

meet performance requirements, taken against civil service employees who are excluded from collective bargaining coverage under section 89-6," this is an issue we need not and do not address. This is because UPW would not be able to bring privatization claims under HRS §§ 76-16, 76-14, or 76-47 to a merit appeals board because under HRS § 76-14(b), claims under HRS § 76-14(a)(4) can only be brought by "employees covered by chapter 76, who are excluded from collective bargaining." (Emphasis added). HRS § 76-11 provides that an "'Employee' or 'public employee' means any person holding a position in the service of a jurisdiction, irrespective of status or type of appointment; provided that, if the context clearly applies only to an employee who is a member of the civil service, 'employee' means a civil service employee." To repeat, UPW is not an "employee."

Finally, HRS § 76-16 requires all positions in the civil service systems be filled through civil service recruitment procedure based on merit principles, and includes public employees within civil service unless specifically excluded or exempted; however, it contains no reference to the merit appeals

boards. Having determined that UPW's privatization claims are not subject to HRS § 76-14, Defendants' alternate argument that the primary jurisdiction doctrine requires referral of UPW's

privatization claims to Chapter 76 merit appeals board is devoid of merit.

IV. Conclusion

We hold that the primary jurisdiction doctrine was applicable to UPW's retaliation claims because the claims required the resolution of issues that have been placed within the special competence of the HLRB under HRS Chapter 89's regulatory scheme. In addition, we hold that a stay, rather than a dismissal, was appropriate under the circumstances.

We also hold that the primary jurisdiction doctrine was not applicable to UPW's privatization claims because they did not contain any issues which, under Hawaii's collective bargaining and civil service laws, had been placed within the specialized competence of either the HLRB or the MAB. Therefore, the circuit court erred in dismissing UPW's privatization claims, and the ICA erred in referring the claims to the HLRB.

Accordingly, we affirm the ICA's judgment on appeal to

the extent that it vacated the circuit court's order dismissing

UPW's complaint, and agree with the ICA's remand instructions to

the extent that it ordered the circuit court to stay UPW's

retaliation claims pursuant to the primary jurisdiction doctrine.

We disagree, however, that the primary jurisdiction doctrine

applies to UPW's privatization claims, and therefore, instruct

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the circuit court to proceed with the privatization claims

consistent with this opinion.

Rebecca Covert, /s/ Mark E. Recktenwald Herbert R. Takahashi, and Davina W. Lam, /s/ Paula A. Nakayama for petitioner /s/ Sabrina S. McKenna Richard H. Thomason, for respondent

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