STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-10-249 ORDER NO. 2406 ORDER GRANTING UPW'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION TO DISMISS
COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On June 15, 2006, Complainant DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or State) filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) with the Hawaii Labor Relations Board (Board). The PSD alleged the UPW filed a prohibited practice complaint with the Board in Case No. CE-10-620 alleging that the State was preventing Union stewards from attending arbitration hearings and thereby violated HRS § 89-8(c). PSD alleged that HRS § 89-8(c) provides that the number of participants from each bargaining unit with over 2,500 shall be limited to one member for each five hundred members of the bargaining unit. The PSD further alleged that according to HLRB Informational Bulletin No. 43, dated June 23, 2005, bargaining unit 10 has 2,808 members and therefore the UPW is entitled to a maximum of six shop stewards for the bargaining unit. The PSD also alleged that from May 8, 2006, the UPW submitted letters to PSD identifying approximately 44 shop stewards at the various correctional institutions. The PSD therefore contends that the UPW wilfully violated HRS § 89-13(b)(4) by refusing to comply with the limitation on the number of stewards imposed by HRS § 89-8(c).

On June 19, 2006, Respondent UPW filed a Motion to Dismiss with the Board for failure to state a claim for relief. The UPW contended that the same issue was raised in Case No. CU-10-244, and after hearing arguments on the UPW's motion to dismiss and the PSD's motion for summary judgment on January 18, 2006, the Board indicated it was inclined to grant the UPW's motion to dismiss. The UPW argued that this is the second complaint over a controversy regarding the number of Union stewards at PSD and it is barred

by Hawaii Administrative Rules ("HAR") § 12-42-42(f).[1] In addition, the UPW contends that the complaint fails to state a claim for relief because HRS § 89-8(c) does not limit the number of stewards. The UPW contends that the Board's ruling in Case No. CU-10-244 is the law of the case which the Board should adhere to in this case.

Thereafter, on June 26, 2006, the PSD filed a Memorandum in Opposition to Motion to Dismiss. The PSD contends that on May 26, 2006, the UPW filed a prohibited practice complaint against the PSD in Case No. CE-10-620 alleging that Union stewards were not allowed to attend arbitration hearings during regular working hours with pay in violation of HRS § 89-8(c). The PSD submits that UPW's counsel submitted an affidavit in Case No. CE-10-620 stating that on and after May 23, 2006, "Mielke and all union stewards were prohibited from participating in the collective bargaining process during regular hours without loss of regular salary and wages by [PSD]." Complainant argues that in this case, the UPW contends that the first sentence of HRS § 89-8(c) applies to Union stewards and the second sentence limiting the number of participants does not apply to stewards. Complainant also argues that HRS § 89-8(c) is non- negotiable and the Unit 10 agreement cannot authorize a violation of HRS § 89-8(c). In addition, PSD argues that the instant complaint is not barred by HAR § 12-42-42(f) because it is based on different facts from Case No. CU-10-244. The PSD also argued that the Board had not issued a ruling in Case No. CU-10-244 and law of the case, res judicata, or collateral estoppel doctrines are not applicable to require the dismissal of the instant complaint.

Also on June 26, 2006, the PSD filed a Motion for Summary Judgment with the Board. Similar to its Memorandum in Opposition to the UPW's Motion to Dismiss, the PSD contended that UPW's counsel represented in Case No. CE-10-620 that PSD violated HRS § 89-8(c) by not permitting Union stewards to attend arbitration hearings during working hours but here, contends that the statutory limitation on the number of participants is not applicable to stewards. The PSD also argues that Section 5.05 of the Unit 10 contract cannot authorize a violation of HRS § 89-8(c).

On July 3, 2006, the UPW filed a Memorandum in Opposition to Motion for Summary Judgment with the Board. The UPW contended that there were numerous issues of material fact which remain disputed in this case since the PSD's counsel's affidavit is insufficient to support a summary judgment determination. The UPW further argued that PSD's contention that Section 5.03 of the Unit 10 collective bargaining agreement is contrary to public policy because it is prohibited by statute is wrong. The UPW contends that "time off with pay" for employees who participate in collective bargaining is covered by the term

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[1]HAR § 12-42-42(f) provides as follows:

> Only one complaint shall issue against a party with respect to a single controversy.

"wages" and "hours" in HRS § 89-9(a) and is a negotiable subject. On July 5, 2006, the UPW filed a Supplement to its Motion to Dismiss with the Board.

Thereafter, on July 14, 2006, the Board conducted a hearing on UPW's Motion to Dismiss filed on June 19, 2006 and PSD's Motion for Summary Judgment filed on June 26, 2006. The parties were given full opportunity to present evidence and arguments to the Board.[2] Based upon a review of the record and consideration of the arguments presented, the Board hereby issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. PSD is an agency that represents the governor with respect to Unit 10 employees in the department and is an "employer" within the meaning of HRS § 89-2.

2. The UPW is an "employee organization" and the "exclusive representative" of Unit 10 within the meaning of HRS § 89-2.

3. Unit 10 is composed of institutional employees at various correctional facilities and hospitals.[3] According to the HLRB Informational Bulletin

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[2]During argument before the Board, PSD's counsel stated that "[w]hat the state is seeking is a consistent interpretation of the statute and have the Board rule that HRS Section 89-8(c) applies only to employees participating at the bargaining table and that that is our interpretation of 89-9(c), and we've argued this before...." Tr. 7/14/06; p. 4.

[3]In Decision No. 254, Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, IV HLRB 296 (1987), the Board certified bargaining unit 10 as consisting of supervisory and nonsupervisory Nonprofessional Hospital and Institutional Workers, including:

> All supervisory and nonsupervisory hospital and institutional workers, including Licensed Practical Nurses, Adult Corrections Officers II through Lieutenants, House-Parents, Juvenile Detention Officers, Paramedical Assistants, Central Supply Aides, Respiratory Therapy Technicians III's, IV's and V's, Occupational Therapy Assistants, Youth Corrections Officers, Institution Sewing Instructors, Institution Carpentry Instructors, Emergency Medical Technicians II's through IV's, Ambulance Service Support Technicians, Health Services Assistants and Prosecutor (sic) Assistants.

No. 43, dated June 23, 2005, there are 2,808 employees in bargaining unit 10.[4] Exhibit E, Complainant's Motion for Summary Judgment, filed on June 26, 2006.

4. On May 8, 2006, the UPW, by its State Director Dayton Nakanelua ("Nakanelua"), submitted a letter to PSD listing the UPW Units 01 and 10 shop stewards for Halawa Correctional Facility (9 for Unit 10), Training & Staff Development (1), Oahu Community Correctional Center (12), Womens Community Correctional Center (4) and Waiawa Correctional Facility (4). Exhibit A, Complainant's Motion for Summary Judgment, filed on June 26, 2006.

5. Also on May 8, 2006, the UPW submitted a letter to PSD listing the Units 01 and 10 stewards for Hawaii Community Correctional Center (4) and Kulani Correctional Facility (3). Exhibit D, Complainant's Motion for Summary Judgment, filed on June 26, 2006.

6. On May 12, 2006, the UPW submitted a letter to PSD listing 2 Units 01 and 10 shop stewards for the Kauai Community Correctional Center. Exhibit C, Complainant's Motion for Summary Judgment, filed on June 26, 2006.

7. Also on May 12, 2006, the UPW submitted a letter to PSD listing 5 Units 01 and 10 shop stewards for Maui Community Correctional Center. Exhibit B, Complainant's Motion for Summary Judgment, filed on June 26, 2006.

8. On May 30, 2006, the UPW filed a prohibited practice complaint against James Propotnick, Acting Director, PSD and Marie Laderta, Director, Department of Human Resources Development, State of Hawaii in Case No. CE-10-620, alleging that a long-time UPW steward at Halawa Correctional Facility was informed that Union stewards were prohibited from participating in the collective bargaining process during regular hours without a loss of regular salary and wages. The UPW alleged that Respondents, inter alia, failed to comply with HRS § 89-8(c).

In Order No. 2381 issued on June 30, 2006, a Board majority held that the complaint was time-barred because the UPW was aware of any alleged prohibited practices on or about October 19, 2005 when the Union filed a class grievance because of the Employer's refusal to permit stewards time-off with

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[4]According to Informational Bulletin No. 43, supra, the State of Hawaii employs 1,560 Unit 10 employees, the City and County of Honolulu employs 204, the Department of Education employs 25, the Judiciary employs 31, the University of Hawaii ("UH") employs 2, and the Hawaii Health Systems Corporation ("HHSC") employs 986 employees.

pay to attend arbitration hearings to discuss and/or to resolve grievances. The Board thereupon dismissed the complaint for lack of jurisdiction.

9. The gravamen of PSD's instant complaint is that the UPW violated HRS § 89-8(c) by appointing approximately 44 shop stewards for various PSD facilities.

10. The Union stewards serve as the eyes and ears of the UPW at the job sites and are regularly consulted by bargaining unit members about contractual and statutory rights without loss of wages or salary. Declaration of Dayton M. Nakanelua, dated July 3, 2006, attached to Supplement to UPW's Motion to Dismiss Filed on June 19, 2006, filed on July 5, 2006.

11. Currently, all Union stewards are elected by the members on a regular basis according to department, geographic location, work area or other subsidiary category of work location. Id. As the elections are conducted and completed Nakanelua provides written notice of the election of Union stewards to the various State and county departments as required by Section 5.06 of the Unit 10 agreement. Id.

12. PSD officials have known for many years that the number of UPW stewards has ranged well over 26 bargaining unit employees statewide. Id. Other than the filing of Case No. CU-10-244, United Public Workers, AFSCME, Local 646, AFL-CIO, the State of Hawaii or any of its departments, including PSD, never indicated concern over the number of designated UPW stewards for Unit 10 or sought to restrict the number of stewards through consultation under Section 5.05. Id. On January 27, 2006, the UPW and PSD entered into an amended settlement agreement regarding the attendance of union stewards at pre-disciplinary hearings and PSD did not express any concerns about the number of stewards. Id.

13. Nakanelua stated that limiting the number of stewards to five or six persons for Unit 10 would have an extremely detrimental effect on the Union's ability to enforce and implement the terms and conditions of the Unit 10 collective bargaining agreement and it would be impossible to provide coverage for the Unit 10 members. Id.

14. HRS § 89-8(c) provides as follows:

> Recognition and representation; employee participation.
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> * * *
>
> (c) Employee participation in the collective bargaining process conducted by the exclusive representative of

the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections.

15. When enacted in 1970, HRS Chapter 89 did not contain a provision which provided employees the right to participate in the collective bargaining process during regular working hours with pay. Act 171, SLH 1970; UPW's Motion to Dismiss Filed on June 15, 2006, pp. 2-61 - 2-64. Thereafter, in 1971, subsection (c) was added to HRS § 89-8. Act 212, SLH 1971; UPW's Motion to Dismiss Filed on June 15, 2006, pp. 2-65 - 2-67.

16. The Joint Select Committee of Kauai, Maui, Oahu and Hawaii Representatives amended the original bill, H.B. No. 124, with the following purpose:

> The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable time off during working hours to carry out the duties of their office without loss of pay or benefits.
>
> In the collective bargaining process, Act 171 Session Laws of Hawaii 1970, provides various grievance procedures in order to resolve disputes and disagreements between employer and employees. The State should do its utmost to avoid costly strikes by employees, and your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreements, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits.
>
> Upon further consideration of the matter, your Committee believes that in addition to such representatives, if an employee can contribute to the fact finding, arbitration, mediation, and

other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged. Accordingly, your Committee has amended the bill to permit at least one employee for each five hundred employees from a bargaining unit to participate in the collective bargaining process, provided such participation will not interfere with the operations of government.

* * *

Standing Committee Report No. 609, 1971 House Journal 948.

17. Thereafter, the S.C. Rep. 678 from the House Finance Committee provides, in part, as follows:

> The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable amount of time off during working hours to carry out the duties of their offices without loss of pay or benefits.
>
> Your Committee concurs with the findings of your Committees on Public Employment and Joint Select Representatives in Stand. Com. Rep. Nos. 117 and 609, respectively, which are hereby incorporated herein by reference.

18. The Senate Committee on Ways and Means stated, in part, in Standing Committee Report No. 729 on H.B. No. 124, H.D. 2, as follows:

> The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable amount (sic) time off during working hours to carry out the duties of their offices without loss of pay or benefits.
>
> Your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreements, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits.

Your Committee believes that in addition to such representatives, if an employee can contribute to the fact finding, arbitration, mediation, and other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged.

Upon consideration of the bill, your Committee has found that the five hundred to one ratio for participation in the collective bargaining process, creates inequities in several of the existing bargaining units. Accordingly your Committee has amended the bill to provide that in bargaining units of less than twenty-five hundred members, there shall be at least five participants one of whom shall reside on each of the counties. By applying this method for the smaller bargaining units, it assures the employees for the purpose of negotiations, the same number of representatives as provided for the employer in Section 89-6(b), Hawaii Revised Statutes. The requirement that at least one participant reside in each of the counties however does not apply to the unit established by Section 89-6(a)8 (University non-faculty) as such requirement may conflict with normal operations and service of the neighbor island programs of the University of Hawaii system. [Emphasis added.]

Standing Committee Report No. 729, 1971 Senate Journal 1122.

19. The parties have negotiated provisions in the Unit 10 collective bargaining agreement pertaining to stewards, which state in part as follows:

Section 5 UNION STEWARDS AND UNION REPRESENTATIVES.

5.01 RECOGNITION.

The Employer recognizes and shall work with Union stewards and representatives in all matters in this Agreement.

5.02 DUTIES.

In addition to the primary responsibilities as an Employee, Union stewards are recognized as participants in maintaining meaningful Employee-Employer working relations.

5.03 TIME OFF.

Stewards shall be permitted time off with pay during working hours to investigate complaints and resolve grievances that have arisen, and ascertain whether or not this Agreement is being observed within their respective work area of coverage as a steward, and attend meetings between the Employer and the Union to discuss and/or resolve complaints and grievances.

5.04 MEETING.

In the event the Employer is unable to arrange a meeting to discuss and/or resolve complaints or grievances at the steward's respective work area, the Employer shall endeavor to provide the steward with transportation to and from the meeting.

5.05 NUMBER.

5.05a. The election or appointment of Union stewards is the function of the Union provided, that the number of stewards shall be selected according to department, geographic location, work area or other subsidiary category of work location.

5.05b. The number of stewards shall be a subject of consultation between the Union and the Employer.

5.06. LIST

The Union shall provide the Employer with a list of Union stewards and their assigned coverage and maintain its currency.

UPW's Motion to Dismiss, filed on June 19, 2006, pp. 2-26 - 2-27.

20. According to Article 5.05b of the Unit 10 agreement above, the number of stewards is subject to consultation between the union and the employer. Based upon the record, PSD or any other employer has not engaged in consultation with the UPW to restrict the number of Unit 10 stewards statewide.

21. There is also no evidence that any other public employer has objected to the number of designated stewards for any other bargaining unit.

22. Based upon the foregoing, viewing the allegations in the complaint as true and in the light most favorable to the PSD, there is no dispute that UPW's State

Director notified the various employing departments, including PSD of the stewards upon election. There is also no dispute that the number of stewards for PSD has ranged well over 25 bargaining units statewide and that the PSD has not sought to restrict the number of stewards through consultation with the UPW under Section 5.05 of the Unit 10 agreement.

23. HRS § 89-8(c) provides that elected officers of the union, employee representatives or shop stewards are entitled to reasonable time off during working hours to perform their Union duties without loss of pay or benefits. While the statute can be read literally to specifically limit the number of participants to one member for each five hundred members where the bargaining unit is composed of 2,500 members, the literal application of this ratio to limit the number of shop stewards[5] in Unit 10 as argued by Complainant would lead to an absurd result. Based upon the composition of Unit 10, five or six shop stewards would then be responsible for assisting the diverse group of 2,808 correctional and hospital workers across the State of Hawaii and other employing jurisdictions in their grievances and resolving workplace concerns. The stewards are the eyes and ears of the Union who are regularly consulted by bargaining unit members about their contractual and statutory rights. The Board majority accepts Nakanelua's statement that limiting the number of stewards to five or six persons for Unit 10 would have an extremely detrimental effect on the Union's ability to enforce and implement the terms and conditions of the Unit 10 collective bargaining agreement as well a provide coverage for the Unit 10 members. After reviewing the relevant legislative history to determine the legislative intent and resolve this ambiguity, the Board concludes that the Legislature intended that the ratio of participants to employees in the bargaining unit referenced in HRS § 89-8(c) applies to participation in the collective bargaining negotiations process and does not limit the number of shop stewards in Unit 10.

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[5]A shop steward is defined as:

> A representative of the union who carries out the responsibilities of the union at the department level. The steward generally handles grievances in their first stage, may collect dues, and performs other duties as required by the union. A steward is usually elected by the other members in the plant (or may be appointed by the union officers). The steward is protected while holding that position under the superseniority provisions with regard to layoff and frequently is paid for the time spent in handling grievances. The shop steward is also sometimes known as the union steward. Roberts' Dictionary of Industrial Relations, 4th Edition, 1994, p. 716.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

2. The UPW contends that the instant complaint should be dismissed because it violates HAR § 12-42-42(f) and fails to state a claim for which relief can be granted. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See Yamane v. Pohlson, 111 Hawai`i 74, 81, 137 P.3d 980, 987 (2006). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.

3. HAR § 12-42-42(f) provides that, only one complaint shall issue against a party with respect to a single controversy. Similarly, HRS § 377-9(b) provides in part, that only one complaint shall issue against a person with respect to a single controversy.

4. In Case No. CU-10-244, the PSD contended that the UPW committed a prohibited practice by designating stewards in excess of the number permitted in HRS § 89-8(c). In that case, the PSD relied on UPW's letters from 2004 designating the stewards. In Order No. 2378 issued on June 30, 2006, the Board dismissed the complaint as time-barred since PSD knew or should have known about the violations in 2004. Alternatively, the Board granted UPW's motion for summary judgment finding that HRS § 89-8(c) did not limit the number of stewards in Unit 10 statewide.

5. In the present case, the PSD contends that UPW's designation of stewards in 2006 violated HRS § 89-8(c). As the Board dismissed the complaint in Case No. CU-10-244 for lack of jurisdiction, the Board's finding of summary judgment for the UPW may be considered dictum by a reviewing court preventing judicial review of the Board's alternative grounds for disposing of the case. Accordingly, the Board finds that the instant complaint arises from a different set of facts which falls within the Board's applicable 90-day statute of limitations and hereby denies the UPW's motion to dismiss the complaint on the basis of an alleged violation of HAR § 12-42-42(f).

6. The UPW also moved to dismiss the complaint for failure to state a claim for relief contending that HRS § 89-8(c) does not limit the number of stewards to be designated by the Union, relying upon the Board's findings and conclusions in Order No. 2378 in Case No. CU-10-244.

7. A motion seeking dismissal of a complaint is transformed into a Hawaii Rules of Civil Procedure (HRCP) Rule 56 motion for summary judgment when the circuit court considers matters outside the pleadings. Au v. Au, 63 Haw. 210, 213, 626 P.2d 173, 176 (1981). The court may enter summary judgment for the nonmoving party, and the supreme court is likewise empowered to do so. Flint v. MacKenzie, 53 Haw. 672, 501 P.2d 357 (1972).

8. Summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter, 83 Hawaii 378, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

9. Here, the PSD alleges that the UPW violated HRS § 89-8(c) by naming 44 stewards for PSD facilities in 2006. The issue raised by Complainant requires the interpretation of HRS § 89-8(c). Statutory construction is guided by established rules. The Hawaii Supreme Court stated in State v. Naititi, 104 Hawai`i 224, 232, 87 P.3d 893 (2004):

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in

> determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai`i at 148, 931 P.2d at 590 (*quoting State v. Toyomura,* 80 Hawai`i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning." HRS § 1-15(2)(1993). "Laws *in pari materia,* or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

State v. Kaua, 102 Hawai`i 1, 7, 72 P.3d 473, 479 (2003) (quoting *Rauch,* 94 Hawai`i at 322-23, 13 P.3d at 331-32) (quoting *State v. Kotis,* 91 Hawai`i 319, 327, 984 P.2d 78, 86 (1999) (quoting *State v. Dudoit,* 90 Hawai`i 262, 266, 978 P.2d 700, 704 (1999) (quoting *State v. Stocker,* 90 Hawai`i 85, 90-91, 976 P.2d 399, 404-05) (1999) (quoting *Ho v. Leftwich,* 88 Hawai`i 251, 256-57, 965 P.2d 793, 798-99) (1998) (quoting *Korean Buddhist Dae Won Sa Temple v. Sullivan,* 87 Hawai`i 217, 229-30, 953 P.2d 1315, 1327-28 (1998) (ellipsis points and brackets in original).

> "[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *State v. Griffin,* 83 Hawai`i 105, 108 n. 4, 924 P.2d 1211, 1214 n. 4 (1996) (quoting *State v. Mollify,* 80 Hawai`i 126, 137, 906 P.2d 612, 623 (1995) (citations and internal quotation marks omitted)) (brackets and internal quotation marks omitted). *See also* HRS § 1-15(3) (1993) ("*Every construction which leads to an absurdity shall be rejected.*").

Gray, 84 Hawai`i at 148, 931 P.2d at 590. *State v. Hagen,* 104 Hawai`i 71, 76-77, 85 P.3d 178, 182-183 (2004) (quoting *State v. Cordelia,* 84 Hawai`i 476, 484, 935 P.2d 1021, 1029 (1997) (emphases added)) (some brackets added and some in original).

In Southern Foods Group, L.P. v. State, Dept. of Educ., 89 Hawai`i 443, 453, 974 P.2d 1033 (1999), the Court stated:

> "The starting point in statutory construction is to determine the legislative intent from the language of the statute itself. *State v. Kaakimaka,* 84 Hawai`i 280, 289, 933 P.2d 617, 626, *reconsideration denied* 84 Hawai`i 496, 936 P.2d 191 (1997) (quoting *State v. Ortiz,* 74 Haw. 343, 351-52, 845 P.2d 547, 551-52 (citations omitted), *reconsideration denied,* 74 Haw. 650, 849 P.2d 81 (1993)).
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> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(10) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. *Gray v. Administrative Dir. of the Court,* 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997)] (quoting *State v. Toyomura,* 80 Hawai`i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning." HRS § 1-15(2) (1993). "Laws in *pari materia,* or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).
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> *Korean Buddhist Dae Won Sa Temple of Hawaii,* 87 Hawai`i at 229-30, 953 P.2d at 1327-28 (quoting *State v. Cullen,* 86

Hawai`i 1, 8-9, 946 P.2d 955, 963-64 (1997) (some brackets in original and some added)).

> "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses." *State v. Toyomura,* 80 Hawai`i 8, 19, 904 P.2d 893, 904 (1995) (citing 2A N. Singer, *Sutherland Statutory Construction,* § 45.02, at 6 (5th ed.1992)) (internal quotation marks omitted). "[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable[.]" *State v. Jumila,* 87 Hawai`i 1, 9, 950 P.2d 1201, 1209 (1998) (quoting *Keliipuleole v. Wilson,* 85 Hawai`i 217, 221-22, 941 P.2d 300, 304-05 (1997) (brackets, internal quotation marks, and citations omitted)). "The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." *State v. Arceo,* 84 Hawai`i 1, 19, 928 P.2d 843, 861 (1996) (citation and internal quotation marks omitted).

Kim v. Contractor's License Bd., 88 Hawai`i 264, 269-70, 965 P.2d 806, 811-12 (1998) (some brackets added and some in original).

10. Based on the record in this case and viewing the facts in the light most favorable to the nonmoving party, the Board finds that there is no material fact in dispute and concludes that the statutory limitation on the number of collective bargaining participants in HRS § 89-8(c) does not limit the number of shop stewards Unit 10 is entitled to. There is an ambiguity in the statute because a literal reading of the statute would limit the number of shop stewards representing the 2,808 employees in Unit 10 to five or six which would be an absurd result, having each steward veritably representing possibly scores of unfamiliar employees in grievances or complaints in unfamiliar hospitals and correctional facilities on each island. The Board majority concludes that the literal interpretation of the statute, urged by the Complainant is unreasonable and impractical and would produce an unjust result. Therefore, the Board majority concludes the literal construction is clearly inconsistent with the purposes and policies of the statute. In reviewing the legislative history of HRS § 89-8(c) it becomes clear that the Legislature intended the employer to give the shop stewards and union officers reasonable time off to perform their union duties and the limitation on the number of participants in the process referred to the negotiating team involved in mediation, fact finding and arbitration. In its committee report, the Legislature specifically ensured that in the smaller units, there would be at least one

participant from each county paralleling the representation of the employer's negotiating team. Accordingly, the Board majority concludes that it appears beyond doubt that Complainant can prove no set of facts in support of the claim which would entitle it to relief, i.e., that the UPW violated HRS § 89-8(c) by designating more than six Unit 10 shop stewards for the PSD facilities, and therefore Complainant fails to state a claim for which relief can be granted and the complaint should be dismissed. As the Board majority also considered Nakanelua's affidavit which is outside of the pleadings, the UPW as the nonmoving party is entitled to summary judgment.

ORDER

Based on the foregoing, the Board hereby grants Respondent's motion to dismiss the instant complaint and/or for summary judgment.

DATED: Honolulu, Hawaii, October 25, 2006.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

CONCURRING OPINION

Concurring in the judgment:

In my opinion, HRS §89-8(c), by its plain language, is not applicable to union stewards attending grievance arbitration proceedings, and accordingly I concur with the Board majority in dismissing the Complaint filed by the Employer alleging violation of HRS § 89-8(c); however, I respectfully disagree with the Majority's apparent ruling that portions of HRS § 89-8(c) apply to union stewards involved in grievance proceedings but the specific portion limiting the number of participants does not apply because it would lead to an absurd result.

I. The Difference Between Interest Arbitration and Grievance Arbitration

The Complaint filed by the Employer does not differentiate between interest arbitration and grievance arbitration. Based upon the record in this case, and the record in

Case No. CE-10-620, which is referenced in the present Complaint, it appears that this dispute concerns grievance arbitration proceedings.

"Interest arbitration" is the result of a statutorily-created process under HRS § 89-11(e), and is used for certain bargaining units in place of the right to strike. The phrase "interest arbitration" refers generally to the submission of disputes over the terms of a new collective bargaining agreement to an independent third party who determines what the terms of the new collective bargaining agreement will be. This is distinguishable from "grievance arbitration," which involves the submission of disputed interpretations of an existing agreement to an independent third party, who determines what construction the existing term should be given. See, e.g., American Postal Workers Union v. Runyon, 185 F.3d 832, 834, n.2 (1999); International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. M & B Railroad, L.L.C., 65 F.Supp.2d 1234, 1238 (M.D. Ala. 1999).

Pursuant to HRS § 89-11, mediation and interest arbitration are utilized when an impasse exists between a public employer and the exclusive representative of bargaining units 2, 3, 4, 6, 8, 9, 10, 11, 12, or 13. The term "impasse" is defined in HRS § 89-2 as the "failure of a public employer and an exclusive representative to achieve agreement in the course of collective bargaining"; in turn, the term "collective bargaining" is defined as "the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment[.]" Thus, interest arbitration may, if an impasse exists, be included as part of the collective bargaining process which results in a written collective bargaining agreement.

By contrast, grievance arbitration involves the interpretation or application of an existing written agreement (HRS § 89-10.8(a)).

For the reasons discussed below, I believe that HRS § 89-8(c) may be applicable to interest arbitration proceedings, as such proceedings may become part of the collective bargaining process that results in a written collective bargaining agreement. However, I believe HRS § 89-8(c) is not applicable to grievance arbitration because those proceedings are not part of the collective bargaining process as defined in HRS §89-2. Accordingly, because the present Complaint appears to involve the selection of Union stewards to participate in grievance arbitration proceedings, HRS § 89-8(c) is not applicable and the Complaint should be dismissed.

II. The Plain Language of HRS § 89-8(c)

The intent of the Legislature is to be obtained primarily from the language of the statute itself. State v. Ribbel, 111 Hawai`i 426, 431, 142 P.3d 290, 295 (2006)

("Ribbel"). The statute at issue here, HRS § 89-8, provides in relevant part (emphasis added):

> Recognition and representation; employee participation.
>
> * * *
>
> (c) Employee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections.

Accordingly, by its plain and unambiguous language, HRS § 89-8(c) governs employee participation "in the collective bargaining process." The term "collective bargaining" as used throughout Chapter 89, HRS, is defined in HRS § 89-2:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession. For the purposes of this definition, "wages" includes the number of incremental and longevity steps, the number of pay ranges, and the movement between steps within the pay range and between the pay range on a pay schedule under a collective bargaining agreement.

Thus, the "collective bargaining" process governed by HRS § 89-8(c) is the performance of mutual obligations to meet, confer and negotiate in good faith, and execute a written collective bargaining agreement.

The grievance arbitration process, on the other hand, is invoked in the event of a dispute concerning the interpretation or application of an existing written agreement (HRS § 89-10.8(a)). This process is not part of the definition of "collective bargaining" provided for in HRS § 89-2, and accordingly is not governed by HRS § 89-8(c) by its plain language. The parties to a collective bargaining agreement may, and indeed are required by HRS § 89-10.8(a), to negotiate a grievance procedure to govern the grievance process.

Because HRS § 89-8(c) on its face does not apply to union stewards involved in grievance arbitration proceedings, it does not apply in the present case and the Complaint should be dismissed.

III. The Legislative History of HRS § 89-8(c)

Because HRS § 89-8(c) is clear and unambiguous on its face, it is not necessary to delve into its legislative history. Courbat v. Dahana Ranch, Inc., 111 Hawai`i 254, 261, 141 P.3d 427,434 (2006) (may only resort to the use of legislative history when interpreting an ambiguous statute). However, because the analysis by the Board majority involves the statute's legislative history, it is briefly discussed here.

The legislative history of HRS § 89-8(c) shows that the Legislature was concerned with avoiding costly strikes by employees, and explained that,

> In the collective bargaining process, Act 171 Session Laws of Hawaii 1970, provides various grievance procedures in order to resolve disputes and disagreements between employer and employees. The State should do its utmost to avoid costly strikes by employees, and your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreement, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits. Standing Committee Report No. 609, 1971 House Journal 948 (emphasis added).

The term "collective bargaining" process as used in Act 171, Session Laws of Hawaii 1970, is similar to its present definition. Act 171 defined that term as "the performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, and other terms and conditions of

employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession." 1970 Haw. Sess. L. Act 171, §2 at 308.

Accordingly, while the Standing Committee Report No. 609 refers generally to allowing reasonable time off for elected officers, employee representatives, or shop stewards to perform their duties and for the "resolution of any disputes or disagreement," when read in context, it is clear that those duties and the "disputes or disagreement" refer to those arising during the collective bargaining, i.e., the negotiation, process.

In addition to elected officers, employee representatives, or shop stewards, the Legislature also provided that "if an employee can contribute to the fact finding, arbitration, mediation, and other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged." Standing Committee Report No. 609, 1971 House Journal 948 (emphases added). Again, the Legislature appeared concerned with employee participation in the "collective bargaining process." It should be noted that the terms used in Report No. 609 - "fact finding," "arbitration," and "mediation" – are all part of the "impasse" schedule provided for by Act 171, Session Laws of Hawaii. The term "impasse" was defined in Act 171 as the "failure of a public employer and an exclusive representative to achieve agreement in the course of negotiations." 1970 Haw. Sess. L. Act 171, §2 at 309 (emphasis added).

The House Finance Committee's Standing Committee Report No. 678 "concurs with the findings of [the] Committees on Public Employment and Joint Select Representatives in Stand. Com. Rep. Nos. 117 and 609, respectively, which are hereby incorporated herein by reference." Finally, the Senate Committee on Ways and Means in Standing Committee Report No. 729
uses language similar to that in Standing Committee Report No. 609, 1971 House Journal at 948. The Senate Committee on Ways and Means stated in part:

> The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable amount (sic) time off during working hours to carry out the duties of their offices without loss of pay or benefits.
>
> Your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreements, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits.

> Your Committee believes that in addition to such representatives, if an employee can contribute to the fact finding, arbitration, mediation, and other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged.
>
> Standing Committee Report No. 729, 1971 Senate Journal 1122.

In summary, the legislative history of the statute shows a concern for avoiding strikes, and while the standing committee reports may refer generally to allowing reasonable time off for elected officers, employee representatives, or shop stewards to perform their duties and for the "resolution of any disputes or disagreement," when read in context, it is clear that those duties and the "disputes or disagreement" refer to those arising during the collective bargaining process. Moreover, the intent of the Legislature is to be obtained primarily from the language of the statute itself. Ribbel, 111 Hawai`i at 431, 142 P.3d at 295. The plain language of HRS § 89-8(c) indicates that the scope of its application is limited to the "collective bargaining process," which involves mutual obligation to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement. The legislative history of the statute is in accord with its plain language.

For all the reasons discussed above, HRS § 89-8(c), by its plain language, and supported by its legislative history, is not applicable to union stewards attending grievance arbitration proceedings, because the statute only applies to the collective bargaining process as defined in HRS § 89-2. Accordingly, I concur with the Board majority in dismissing the Complaint filed by the Employer alleging violation of HRS § 89-8(c); however, I respectfully disagree with the Majority's apparent ruling that portions of HRS § 89-8(c) apply to union stewards involved in grievance proceedings but the specific portion limiting the number of participants does not apply because it would lead to an absurd result. Rather, it appears that HRS § 89-8(c) on its face does not apply to stewards involved in grievance proceedings, and thus the statute can be wholly applied as written without absurd result; it simply does not apply in the present case.

SARAH R. HIRAKAMI, Member

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