STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of STATE OF HAWAII, DEPARTMENT OF EDUCATION, Hickam Elementary School Petitioner, and UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO Intervenor.	CASE NO.: DR-01-105 ORDER NO. 3008 ORDER REFUSING TO ISSUE A DECLARATORY RULING; OR ALTERNATIVELY, GRANTING INTERVENOR UNITED PUBLIC WORKER'S MOTION TO DISMISS

ORDER REFUSING TO ISSUE A DECLARATORY RULING; OR ALTERNATIVELY, GRANTING INTERVENOR UNITED PUBLIC WORKERS' MOTION TO DISMISS

The Hawaii Labor Relations Board (Board or HLRB) refuses to issue the declaratory ruling requested by the "PETITION FOR DECLARATORY RULING" (DR Petition), filed on February 24, 2014, by the Petitioner STATE OF HAWAII, DEPARTMENT OF EDUCATION (DOE), HICKAM ELEMENTARY SCHOOL (Employer or Petition). In the alternative, the Board grants Intervenor UNITED PUBLIC WORKERS, AFSCME, LOCAL 646's (UPW or Union) "MOTION TO DISMISS FOR LACK OF JURISDICTION" (UPW Motion to Dismiss) for the following reasons.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

Based on the record, the Board finds the relevant and undisputed facts are as follows.

A. The DR Petition

Bargaining Unit 01 (Unit 01) is comprised of "nonsupervisory employees in blue collar jobs," under Hawaii Revised Statutes (HRS) §89-6(a) (1). In accordance with HRS §89-8(a), the UPW is the certified exclusive representative of all employees in bargaining unit 01 (Unit 01).

Petitioner is the "public employer," under HRS §89-2, of the DOE employees, including those in Unit 01.

On February 24, 2014, Petitioner filed the DR Petition with the HLRB alleging, in paragraph 3.:

> The Employer disputes the arbitrability of the proceedings In the Matter of the Arbitration between UPW and DOE; Hickam Elementary School, BU 01; UPW Case #MH-11-13; Grievance of James Puu (Non-Selection) on the grounds that the grievance is not covered under the collective bargaining agreement and therefore the Arbitrator does not have jurisdiction to act upon the grievance.
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> Pursuant to HAR §12-42-9 and HRS §76-14 (c)(2), the Employer is petitioning the Hawaii Labor Relations Board for the declaratory ruling on whether the MAB has exclusive jurisdiction over the above described Grievance of James Puu as pursuant to HRS Sections 76-47(a) and 76-14(a)(1) and (b).
>
> Lastly, the Employer is requesting the Hawaii Labor Relations Board pursuant to HAR §12-42-8 put an immediate stay on any future arbitrations [sic] proceedings in the Matter of the Arbitration between UPW and DOE; Hickam Elementary School, BU 01; UPW Case #MH-11-13; Grievance of James Puu (Non-Selection) until the Hawaii Labor Relations Board has ruled on the Employer's petition. *(Tab No. 1)*

The DR Petition, paragraph 4 requests that the Petitioner designate the specific HRS Chapter 89 or Chapter 377 provision, or the Board's Administrative Rule or Order which is in question. Petitioner designated HAR §§12-42-8, and 12-42-9; HRS §§76-14(c) (2), 76-47(a), 76-14(a) (1) and (b); and a December 30, 2013 Judge Nishimura Order. *(Tab No. 1)*

On February 28, 2014, the Board issued a "NOTICE OF FILING OF PETITION FOR DECLARATORY RULING." This Notice set March 17, 2014 as the deadline to file Petitions for Intervention in the matter and scheduled a Board conference on March 31, 2014. *(Tab No. 2)*

On March 14, 2014, the UPW, by and through its counsel, filed a "PETITION FOR INTERVENTION." *(Tab No. 3)*

On March 17, 2014, the Board granted the UPW's Petition for Intervention by ORDER NO. 2968. *(Tab No. 4, Order No. 2968)*

B. UPW'S Filing of Its Motion to Dismiss for Lack of Jurisdiction

On March 24, 2014, the UPW filed the UPW Motion to Dismiss. *(Tab No. 5)*

At the March 31, 2014 status conference, UPW requested permission to file a supplemental memorandum in support of its motion to dismiss, which the Board granted. The Board then set dates for the UPW to file the supplemental memorandum; any responses to the UPW's Motion to Dismiss; the UPW's reply; and a tentative hearing date for the Motion to Dismiss, if necessary. On April 1, 2014, the HLRB issued a "NOTICE OF DEADLINES AND MOTION HEARING" confirming those dates. *(Tab No. 6)*

On April 25, 2014, the UPW filed "UPW'S SUPPLEMENT TO ITS MOTION TO DISMISS FOR LACK OF JURISDICTION DATED MARCH 24, 2014." (Supplemental Memorandum). *(Tab No. 7)*

On May 20, 2014, Petitioner filed "EMPLOYER'S MEMORANDUM IN OPPOSITION TO UPW'S MOTION TO DISMISS FOR LACK OF JURISDICTION DATED MARCH 24, 2014." (Employer Opposition) *(Tab No. 8)*

On June 10, 2014, the UPW filed "UPW'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS."(Reply Brief) *(Tab No. 9)*

On June 19, 2014, the Board issued a "NOTICE OF NO HEARING ON INTERVENOR UPW'S MOTION TO DISMISS."

C. Events Leading Up To and Including The Arbitration Proceedings

The DR Petition and the UPW Motion to Dismiss arose from the following undisputed facts.

On April 21, 2011, Grievant James Puu (Grievant or Puu), a Unit 01 part-time custodian at Pope Elementary School, interviewed with the Employer for a full-time Custodian II position at Hickam Elementary School. On April 25, 2011, the Employer notified the Grievant that he was not given the position. *(Tab No. 1, Complaint, Attachment 2, Ex. 1)*

On May 12, 2011, UPW filed a grievance on behalf of Puu in UPW Case No. #MH-11-13 (Puu grievance). The grievance, which alleged violations of the UPW Unit 01 Agreement (UPW CBA) §§ 1, 14, and 16, proceeded through the grievance procedure but was not resolved. *(Tab No. 1, Ex. 2)*

Accordingly, on July 27, 2012, the parties selected Michael A. Marr (Marr or Arbitrator) as the arbitrator for this case. *(Tab No. 3, Ex. E)*

By a January 17, 2013 letter, Marr confirmed stipulations and agreements made in a pre-arbitration telephone conference held on the previous day. That letter stated in relevant part:

1. the parties agreed that the arbitrator has jurisdiction over the above-referenced grievance dispute;

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2. the parties agree that the grievance is procedurally and substantively arbitrable;

3. the issues to be resolved are as follows:

   a. Did the State of Hawaii, Department of Education (Employer) misinterpret or misapply Sections 1, 14, and 16 of the collective bargaining agreement by failing to select James Puu for the position School Custodian II?
   b. If so, what is the appropriate remedy?

(Tab No. 7, Ex. V-55)

During the period October 1-11, 2013, the Arbitrator held five days of hearings on the matter. On October 11, 2013, the UPW rested its case. *(Tab No. 1, Ex. F)*

The Employer made an oral and then filed a written "MOTION TO DISMISS FOR LACK OF JURISDICTION" on October 11, 2013. (Employer Motion to Dismiss). In that Motion, the Employer "dispute[d] the arbitrability of the instant grievance on the grounds that the grievance is not covered under the collective bargaining agreement and therefore the Arbitrator does not have jurisdiction to act upon the grievance." The Employer then urged the Arbitrator to dismiss the grievance as nonarbitrable. In support, the Employer argued, among other things, that the arbitrator had no authority to hear the grievance because: 1) the Merit Appeals Board (MAB) had exclusive jurisdiction to hear appeals relating to recruitment and examination pursuant to §76-14; and 2) the nature and contents of examinations are excluded from subjects of negotiations; and therefore, are not covered by the CBA. The Employer further contended that the UPW CBA contained no provisions of any kind requiring the employer to negotiate examination criteria because HRS §89-9(d) (2) precluded the parties from agreeing to proposals interfering with the rights and obligations of public employers to determine qualifications and the nature and contents of examinations. *(Tab No. 1, Ex.4)*

On October 14, 2013, the UPW filed the "UNION'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION." The UPW responded, among other things, that: 1) the UPW established the existence of an agreement to arbitrate and that the subject matter was arbitrable; 2) the Employer failed to overcome the "presumption" of arbitrability of the grievance; and 3) MAB had no jurisdiction over a grievance filed by a Unit 01 employee grievable under Section 89-10.8, HRS. *(Tab No. 5. Ex. O)*

On October 16, 2013, the Employer filed an "EMPLOYER'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION." The Employer submitted, among other things, that: 1) the grievance was not a promotion grievance subject to arbitration; and 2) HRS §§76-14(a) (1), 76-47(a), and 89-9(d) (2) specifically prohibit arbitral jurisdiction because MAB has exclusive jurisdiction over the examination claim in this grievance. *(Tab No. 1. Ex. 5)*

By an October 18, 2013 letter, the Arbitrator requested further written arguments from the parties to clarify the issues raised by the pleadings. *(Tab No. 5, Ex. P)* On October 25, 2013, the UPW submitted "UPW'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DISMISS FOR LACK OF JURISDICTION," reiterating, among other things, some of the arguments made in its prior October 14, 2013 Memorandum. *(Tab No. 5, Ex. Q)* On November 1, 2013, the Employer filed "EMPLOYER'S 2ND REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF JURISDICTION," also reasserting, among other things, its contentions set forth in its October 16, 2013 Reply. *(Tab No. 1, Ex. 6)*

Following the submission of these pleadings, on December 17, 2013, the Arbitrator issued an "ORDER DENYING EMPLOYER'S MOTION TO DISMISS FOR LACK OF JURISDICTION." (Marr Order) The Arbitrator concluded, among other things, in that Order:

> Given the foregoing, the Arbitrator finds that the Grievant has the right to file his grievance as alleged under the CBA; that the Grievant's non-selection arose out of the Employer's failure to promote him to the position of Custodian II under Section

16.06 of the CBA; that a non-selectee covered by a collective bargaining agreement may file a grievance using the grievance process under the CBA and, if the non-selectee does so, the Merit Appeals Board lacks jurisdiction over the non-selectee's grievance;... and that Chapter 89-9(d) does not render the Puu grievance non-arbitrable.

Id. at 5. *(Tab No. 3, Ex. G at 91)*

On December 27, 2013, the UPW filed a "MOTION TO SET ADDITIONAL HEARING DATES AND FOR IDENTIFICATION OF WITNESSES" with the Arbitrator. *(Tab No. 3, Ex. H)* By a January 3, 2014 letter, the Arbitrator scheduled a telephone conference on the Motion for January 24, 2014. *(Tab No. 3 Ex. I)* On the day of this telephone conference, the Employer sent a letter to the Arbitrator stating that the December 17, 2013 Order was "not well reasoned and is inconsistent with your prior orders" and requesting that the Arbitrator remove himself as the arbitrator. *(Tab. No. 1, Ex. 8)* In a letter dated that same day, the Arbitrator stated that "Mr. Petricevic refused to commit to future arbitration hearing dates." The Arbitrator further noted that, "Since Mr. Petricevic refused to commit to future arbitration hearing dates and continued to press the Arbitrator for a response to his untrue allegations and continued to ask the Arbitrator if he would remove himself from the case the Arbitrator terminated the telephone conference call." *(Tab No. 3, Ex. J)* The Employer has not scheduled further hearings. By a March 14, 2014 letter, the Arbitrator notified the parties that, "The Arbitrator shall close the Arbitrator's files pending a review by the Hawaii Labor Relations Board." *(Tab No. 8, Ex. 8)*

On April 21, 2014, the UPW filed a "MOTION TO CONFIRM ARBITRATION DECISION AND AWARD, TO ENTER JUDGMENT AND FOR OTHER APPROPRIATE RELIEF, S.P. No. 14-1-0181 JHC." (Motion to Confirm) In that proceeding, the Union moved the First Circuit Court under HRS §§658A-5 and 658A-22 for confirmation of Marr's December 17, 2013 arbitration decision. *(Tab No. 7, Ex. V)* On May 16, 2014, Petitioner filed "EMPLOYER'S MEMORANDUM IN OPPOSITION TO UNION'S MOTION TO CONFIRM ARBITRATION DECISION AND AWARD, TO ENTER JUDGMENT, AND FOR OTHER APPROPRIATE RELIEF FILED ON APRIL 21, 2014." This Motion was scheduled for hearing before Judge Castagnetti on June 25, 2014. *(Tab No. 8, Ex. 10 in the hard copy file)*

II. LEGAL STANDARD FOR MOTIONS TO DISMISS

When considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the complaint, which are deemed to be true. However, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Haw. 330, 337, 13 P.3d 1235, 1242 (2000), *aff'd in part, vacated and remanded in part, on other grounds,* 108 Haw. 411, 121 P.3d 391 (2005) (Casumpang); Right to Know Committee v. City Council, City and County of Honolulu, 117 Haw. 1, 7, 175 P.3d 111, 117 (Haw. Ct. App. 2007).

Further, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). "Dismissal is warranted

only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Haw. 104, 108, 253 P.3d 665, 669 (Haw. Ct. App. 2011), *citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983).

"Jurisdiction is a 'base requirement'" for this Board to resolve "a dispute because without jurisdiction," the Board "has no authority to consider the case." The Board has subject matter jurisdiction "if it is vested with the power to hear a case." State of Hawai'i v. Kaluna, 106 Haw. 198, 203, 103 P.3d 358, 363 (2004); County of Kauai v. Baptiste, 115 Haw. 15, 25, 165 P.3d 916, 926 (2007), *citing* State v. Kaluna, 106 Hawaii 198, 203, 103 P.3d 358, 363 (2004). Under Hawaii case law, when there is a lack of jurisdiction, the only appropriate remedy is dismissal of the case. Housing Finance & Development Corp. v. Castle, 79 Haw. 64, 76, 898 P.2d 576, 588 (1995); Pele Legal Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 69 n. 10, 881 P.2d 1210, 1215 n. 10 (1994).

Finally, in considering a motion to dismiss for lack of subject matter jurisdiction, the Board must adhere to the well-established principle that consideration of a motion to dismiss is strictly limited to the allegations of the complaint, and deem these allegations to be true and construe in the light most favorable to the plaintiff. Ah Mook Sang v. Clark, 130 Haw. 282, 290, 308 P.3d 911, 919 (2013); Yamane v. Pohlson, 111 Haw. 74, 81, 137 P.3d 980, 987 (2006); Casumpang, 94 Haw. at 337, 13 P.3d at 1242; Hawaii State Teachers Ass'n. v. Abercrombie, 129 Haw. 105, 294 P.3d 1091 (Haw. Ct. App. 2013), *citing* Casumpang.

III. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Good Cause Exists for the Board to Refuse to Issue a Declaratory Ruling in Accordance with Hawaii Administrative Rule §12-42-9(f).

In its Supplemental Memorandum, UPW asserts that the Board has good cause to refuse to issue a declaratory order in this case under Hawaii Administrative Rules (HAR) § 12-42-9(a) and (f) because: 1) the DR Petition does not meet the basic requirements of HAR §12-42-9(a) requiring designation of a Chapter 89, HRS, provision; Board rule; or Board order applicable to the present case and controversy[1]; 2) the controversy regarding Marr's December 17, 2013

[1] Based on its finding that the Board has good cause to refuse to issue the declaratory ruling requested in the DR Petition on other grounds, the Board is not compelled to address this particular issue. However, for the reasons set forth below in Section B.2., the Board must conclude that there is no merit to the UPW's contention regarding this ground. HAR §12-42-9(a) states in relevant part:

> (a) Any...public employer...may petition the board for a declaratory order as to the applicability of any statutory provision or of any rule or order of the board.

(emphasis added) Accordingly, the plain language of this rule does not restrict the Board's declaratory order authority to Chapter 89 statutory provisions. Further, based on the DR Petition's designation of HRS §76-14(c) (2)

position that the Employer's reliance on the Circuit Court's "ORDER REMANDING INTERVENORS-APPELLANTS STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY'S AGENCY APPEAL FILED APRIL 12, 2013," dated December 31, 2013 (Nishimura Order) rendered in United Public Workers, AFSCME, Local 646 and Merit Appeals Board, State of Hawaii, Civil No. 13-1-1108-04 (RAN) (Agency Appeal) (Consolidated) (MAB), vacating Order No. 2902 in Merit Appeals Board and Deborah Taylor, Case No. DR-00-103 (2013) regarding §76-14(c), HRS, is speculative.

The Board agrees with the UPW's contention that the question presented by the DR Petition is speculative, hypothetical, and does not involve existing facts.

First, the Board concurs that the Nishimura Order was based on distinguishable facts. Unlike the case before Judge Nishimura, in which the affected employees brought a MAB appeal, in this case, neither the Union nor the Grievant have sought a MAB appeal from his failure to get the Custodian II position. Accordingly, the Nishimura Order is not dispositive of the Board's authority to issue the declaratory ruling requested by the DR Petition for the reasons discussed below and incorporated fully herein regarding the MAB jurisdiction issue. Absent a controversy on appeal before MAB, the issue of "whether the MAB has exclusive jurisdiction over the above described Grievance of James Puu as pursuant to HRS Sections 76-47(a) and 76-14(a)(1) and (b)" requested in the DR Petition is speculative. *See, e.g.*, University of Hawaii Professional Assembly v. Hawaii State Teachers Ass'n., et. als., Case No. DR-07-51, Decision No. 304, 4 HLRB 712, 717, (6/25/90) (The Board refused to issue a declaratory ruling under HAR §12-42-9(f)(1) regarding the applicable time line for a strike finding that no instant controversy involving the time line questions existed or could possibly arise until the contract expired.)

Moreover, as fully discussed below, Arbitrator Marr issued his December 17, 2013 Order resolving the precise issues presented in this DR Petition. The Marr Order is presently before the circuit court based on the UPW'S Motion to Confirm, filed in accordance with HRS Chapter 658A procedure. Consequently, the matter is moot; and the question presented in the DR Petition is both speculative and hypothetical, and not based on existing fact.

For these reasons, as well, the Board finds that good cause exists for its refusal to issue a declaratory ruling based on HAR§12-42-9(f) (1).

B. The Board Has No Jurisdiction Over This Matter

In support of its Motion to Dismiss, UPW argues that the HLRB lacks jurisdiction to issue a ruling on the DR Petition because: 1) the question of arbitrability of a promotional grievance is for the arbitrator to determine; and arbitral rulings regarding the issue of arbitrability are subject to judicial, not administrative review, under the Revised Uniform Arbitration Act [HRS Chapter 658A]; 2) there is no controversy regarding MAB authority for the HLRB to determine under HRS §76-14(c) (2) because neither Puu or the UPW has filed a MAB appeal regarding the denial of Puu's promotion; 3) the Board has no authority to order an immediate stay of future arbitration proceedings before the Arbitrator; [6] and 4) HLRB's declaratory ruling

[6] In the DR Petition, the Employer requested that the HLRB "pursuant to HAR §12-42-8 put an immediate stay on any future arbitrations [sic] proceedings in the Matter of Arbitration between UPW and DOE; Hickam

authority is limited to HRS Chapter 89 and its administrative rules and does not extend to issuance of declaratory rulings regarding MAB under HRS Chapter 76.

In opposition, the Petitioner relies on United Public Workers, AFSCME, Local 646 v. Abercrombie, 2014 Haw. LEXIS 103 (2014) (Abercrombie) and §76-14(c) (2), HRS, and contends that: 1) the Board has primary jurisdiction regarding MAB jurisdiction controversies; and 2) MAB jurisdiction is not "electable" by the Grievant.

Although the Board refuses to issue a declaratory ruling for good cause, the Board also agrees with the UPW's contentions that the Board has no jurisdiction over the DR Petition. Hence, alternatively, the Board declines to issue a declaratory ruling pursuant to HAR §12-42-9(f) (4) and/or grants the UPW's Motion to Dismiss in accordance with HAR §12-42-8(g) (3) (B) for the jurisdictional reasons set forth below.

1. Arbitrability Issue

The DR Petition states on its face:

> The Employer disputes the arbitrability of the proceedings In the Matter of the Arbitration between UPW and DOE; Hickam Elementary School, BU 01; UPW Case #MH-11-13; Grievance of James Puu (Non-Selection) on the grounds that the grievance is not covered under the collective bargaining agreement and therefore the Arbitrator does not have jurisdiction to act upon the grievance.

(emphasis added)

UPW CBA § 15.19 ARBITRABILITY. states:

> 15.19 a. A grievance may not be arbitrated unless it involves an alleged violation, misinterpretation, or misapplication of a specific section of this Agreement.
>
> 15.19 b. In the event the Employer disputes the arbitrability of a grievance the Arbitrator shall determine whether the grievance is arbitrable prior to or after hearing the merits of the grievance. If the arbitrator decides the grievance is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

(emphasis added)

Elementary School, BU 01; UPW Case #MH-11-13; Grievance of James Puu (Non-Selection) until the Hawaii Labor Relations Board has ruled on the Employer's petition." Petitioner takes the position that its request is now moot based on the March 12, 2014 letter from the Arbitrator staying all future arbitration proceedings pending a ruling by the Board. While the Board agrees that the request is moot, we also concur with the UPW that the Court in Hawaii State Teachers Ass'n. v. University Laboratory School, et. als., 132 Haw. 426, 429 n. 6, 322 P.3d 966, 969 n. 6, specifically ruled that the HLRB has no authority to stay a pending arbitration.

decision and order falls within the exclusive jurisdiction of the courts under HRS Chapter 658A;[2] 3) the HRS §76-14(c) (2) issue presented in the DR petition is speculative, hypothetical and not based on existing fact under HAR §12-42-9(f); 4) the Employer's interest is not of the type which would give it "standing" in an action for judicial relief;[3] and 5) the issuance of a DR may adversely affect the Board's interest in pending litigation.[4]

The Board notes that the UPW is correct that the Employer has not addressed this particular issue of "good cause" for refusal to issue a declaratory order in this case.

The Board's authority to issue a declaratory ruling comes from §91-8, HRS, stating:

> §91-8 Declaratory **rulings by agencies.** Any interested person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

§ 89-5, HRS (2012), states, in relevant part:

> (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
> ***
>
> (3) Resolve controversies under this chapter;
> ***
>
> (9) Adopt rules relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91; and
> ***

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providing the Board with the authority to issue a declaratory ruling on "any controversy regarding its [MAB's] authority to hear the appeal" and the Nishimura Order that broadly construed this provision, the Board finds that the Petition meets the HAR §12-42-9(a) requirements and should not be dismissed for this particular reason.

[2] This specific argument will be addressed in Section B. regarding the Board's jurisdiction.

[3] The Board need not reach this argument because of its conclusion that there is "good cause" based on other grounds to refuse to issue the declaratory ruling requested and/or for dismissal of the DR Petition based on jurisdictional grounds in this case. However, as further discussed below, given that there is no MAB appeal raising a MAB jurisdictional issue for Board determination and that the DR Petition issues were addressed in the Marr Order, now before the circuit court under HRS Chapter 658A on a motion to confirm arbitration award, it does not appear that the Petitioner would have the requisite interest in the outcome of this case for standing to maintain an action if it were to seek judicial relief.

[4] Similarly, the Board does not need to reach this issue because of its refusal to issue the declaratory ruling on other grounds. However, on June 2, 2014, the Board issued Order No. 2993, a declaratory ruling in consolidated cases DR-00-103 and DR-00-104 on remand from Judge Nishimura's decision in Civil No. 13-1-1108-04. While UPW appealed that Order, the appeal is confined to the issue of the Board's denial of the UPW's First Amended Petition for Intervention. Accordingly, the Board is of the opinion that the issuance of the declaratory ruling requested in this case would likely not adversely affect the Board's interest in this pending litigation.

Under §91-8 and 89-5, HRS, the HLRB has promulgated HAR §12-42-9, stating in relevant part:

> **§12-42-9 Declaratory rulings by the board.** (a) Any public employee, employee organization, public employer, or interested person or organization may petition the board for a declaratory order as to the applicability of any statutory provision or of any rule or order of the board.
> ***
> (e) Any party may intervene subject to the provisions of section 12-42-8(g) (14) insofar as they are applicable.
>
> (f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:
>
> (1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the future.
>
> (2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.
>
> (3) The issue of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.
>
> (4) The matter is not within the jurisdiction of the board.

(emphases added)

Under HAR §12-42-9, this Board is authorized to refuse to issue a declaratory order for good cause. Based on the grounds set forth in this rule, the Board finds that good cause exists for refusal to issue an order for the following reasons.

1. The Board Will Not Overturn An Arbitrator's Decision

Regardless of the framing of the issues presented in DR Petition, the Board finds that the Employer is requesting the Board to determine the same issues raised in its Employer Motion to Dismiss for Lack of Jurisdiction, which were resolved by Arbitrator in his December 17, 2013 Order. Both the DR Petition and the Employer Motion to Dismiss similarly state on their face that the Employer is disputing the arbitrability of the Puu grievance "on the grounds that the grievance is not covered under the collective bargaining agreement and therefore the Arbitrator does not have jurisdiction to act upon the grievance." Moreover, there is no dispute that the issue requested for declaratory ruling "whether the MAB has exclusive jurisdiction over the above described Grievance of James Puu as pursuant to HRS Sections 76-14(a)(1) and (b)" was raised before the Arbitrator as part of the arbitrability issue. Based on the record, there is also no dispute that the Marr Order addressed and resolved these issues; and that the UPW has moved the circuit court to confirm that Order under Chapter 658A, HRS. Accordingly, through the DR Petition, the Employer is essentially seeking to have the Board review and overturn Marr Order. The Board refuses to do so for good cause.

When the result would be to overturn an arbitration award, the Board has long declined for good cause to issue a declaratory ruling. In Petition for Declaratory Ruling by the Board of Education and Hawaii State Teachers Ass'n., Case No. DR-05-11, Decision No. 56, 1 HPERB 523, 525-526 (11/26/74) (BOE), this Board refused to grant the declaratory ruling requested in that case based on §89-5, HRS, and the version of HAR §12-42-9 (f) in effect at that time[5], reasoning that:

> As clearly demonstrated by the above, this Board may decline to issue a declaratory order for good cause. We believe, in the instant case that there is good cause to decline to issue an order.
>
> Any way the BOE casts its prayer for relief, it is coming to this Board with a request that this Board overturn at least that part of the *Kagel* award which triggers the mechanism he set up for resolution of " impasses". If this Board were to overturn the *Kagel* award, ..., it would be acting in a manner completely contrary to the spirit, intent and basic purpose of Chapter 89, HRS, and the mission of this Board which are to promote harmonious and cooperative relations between government and its employees, and encourage parties to any labor dispute to voluntarily settle their differences. Senate Standing Committee Report No. 745-70.

Id. at 525-526.

Similarly, based on the BOE decision, in Frank F. Fasi and Hawaii Government Employees' Ass'n., Local 152, Case No. DR-02-30, Decision 107, 2 HPERB 236, 239-240 (4/19/79) (Fasi), the Board declined to issue a declaratory ruling requesting the Board to overturn an arbitration award rendered by Arbitrator Thomas L. Mui for good cause.

Finally, in a case involving an interpretation of HRS §89-9(d), the Board likewise declined to issue a declaratory ruling for good cause, in a case already before the arbitrator. Eileen R. Anderson, Mayor, City and County of Honolulu, Case No. DR-01-46, Decision No. 198, 3 HPERB 557, 560-562, (2/19/84) (Anderson). The Board reasoned:

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[5] The version of the declaratory ruling administrative rule applicable in Decision No. 56 is virtually the same as HAR §12-42-9(f) and stated in relevant part:

> 1.09 Declaratory Ruling by Board.
>
> (a) WHO MAY FILE. Any public employee, employee organization, public employer or interested person or organization may petition the Board for a declaratory order as to the applicability of any statutory provision or of any rule or order of the Board.
>
> ***
>
> (f) REFUSAL TO ISSUE DECLARATORY ORDER. The Board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the Board may so refuse where:
>
> (1) The question is speculative or purely hypothetical and does not involve the existing facts; or facts which can reasonably be expected to exist in the near future.
>
> (2) The petitioner's interest is not of the type which would give him standing to maintain an action if he were to seek judicial relief.
>
> (3) The issuance of the declaratory order may adversely affect the interests of the Board or any of its officers or employees in a litigation which is pending or may reasonably be expected to rise.
>
> (4) The matter is not within the jurisdiction. (emphasis added)

> The Board thus finds good cause to defer to the arbitration process and declines to issue a declaratory ruling on the instant Petition. In deciding to refrain from rendering a decision, the Board cites several factors. First, Board intervention in this case does not seem advisable where both competing parties are already in arbitration before a competent third party arbitrator. Given that the arbitrator has the authority to entertain questions involving contract interpretations and relevant law, the Board is not impelled to infringe on that authority on the basis that it constitutes a more appropriate forum. Secondly, we believe that it would be procedurally inappropriate for the Board to inject itself into the controversy at this stage of the case. For the Board to now entertain the Petition would be to disrupt the contractual grievance process. Moreover, there is no indication that the grievance process entered into by the parties generating the proposed issue is not moving smoothly to a fair resolution or that the arbitrator lacks the authority to render a definitive ruling on the grievance.

Id. at 561-562. (emphasis added, citations omitted)

Based on its reasoning in the BOE and Anderson decisions, the Board must conclude that declining to issue a declaratory ruling in this case is appropriate, as well. If the Board issues the declaratory ruling requested by the Petitioner, the result would not only disrupt the arbitration proceeding but could result in overturning Arbitrator Marr's December 17, 2013 Order. Applying the Anderson reasoning, the Board finds in this case that: 1) the parties have already been before a competent third party arbitrator and are now before the circuit court pursuant to Chapter 658A, HRS; 2) as will be fully discussed below, the Arbitrator had the authority to determine arbitrability of the dispute under the UPW CBA; and 3) it would be procedurally improper for the Board to inject itself into the controversy at this stage of the arbitration process. In addition, as in Anderson, there is simply no indication that the grievance process entered into by the parties in this case regarding the proposed issue is not moving smoothly to a fair resolution, or that the Arbitrator lacked the authority to render a definitive ruling. To the contrary, the record shows that the Employer orally and in its Motion to Dismiss for Lack of Jurisdiction filed in the arbitration proceedings raised the same issues presented in the DR Petition. Both parties filed extensive and thorough Memoranda on the jurisdictional issues; and the Arbitrator definitively ruled on these issues in his December 17, 2013 Order. This Order is now before the circuit court through the Union's Motion to Confirm. As will be discussed more fully below, Chapter 658A, HRS, provides the proper mechanism for the parties to obtain any warranted review and relief on these disputed issues.

Consequently, the Board, in the exercise of its discretion, finds that under HAR §12-42-9(f), good cause exists in this case to refuse to issue a declaratory ruling requesting the Board to review and overturn the Marr Order.

2. The Question Is Speculative or Purely Hypothetical and Does Not Involve Existing Facts or Facts Which Can Reasonably Be Expected to Exist in The Future.

Based on HAR §12-42-9(f) (1), UPW asserts that the Employer's contention that the Marr Order is in direct violation of §76-14(c) (2), HRS, is speculative; and, at best, a hypothetical question, not based on existing fact. In support of that contention, UPW takes the

Although arising out of a slightly different context of motions to compel arbitration under HRS Chapters 658 and 658A,[7] the Hawaii appellate courts have consistently held that where an arbitrability clause in a collective bargaining agreement "clearly and unmistakably" vests authority in the arbitrator to determine arbitrability of the subject matter, arbitration should be compelled. For example, Bronster v. United Public Workers, AFSCME, Local 646, 90 Haw. 9, 975 P.2d 766 (1999) (Bronster), was a case arising out of the Attorney General's (AG) request for a declaratory judgment that the AG's Office was not subject to arbitration based on a Unit 10 collective bargaining agreement between UPW and the State of Hawaii involving an arbitrability clause analogous to the one in this case. The circuit court denied, among other things, the UPW's motion to compel arbitration. On appeal, the UPW asserted that the circuit court erred because the agreement, like the one in this case, expressly provided that the arbitrator determines disputes regarding arbitrability. In reversing the circuit court on this issue, the Court relied on two prior cases Bateman Construction, Inc. v. Haitsuka Bros, Ltd., 77 Haw. 481, 485-486, 889 P.2d 58, 62-63 (1995) (Bateman) and University of Hawaii Professional Assembly v. University of Hawaii, 66 Haw. 207, 659 P.2d 717, 719-720 (1983) (UHPA). The Court noted that Bateman carved out an exception to the general rule that courts should determine whether a dispute is subject to arbitration. This exception provided that parties are free to agree to vest sole authority in an arbitrator to determine the arbitrability of a particular subject matter so long as they do so "clearly and unmistakably." Noting that UHPA further held that when the exception applies, the court should compel arbitration, the Court then found that, "Without question, here, as in *UHPA*, the agreement calls 'clearly and unmistakably' for the arbitrator to decide the arbitrability of a grievance." *Id.* at 14-15, 975 P.2d at 771-772.

Based on Bateman and Bronster, in a subsequent decision Hawaii State Teachers Ass'n. v. University Laboratory School, 132 Haw. 426, 431-432, 322 P.3d 966, 971-972 (2014) (ULS), the Court similarly held that the parties may contract to leave questions of arbitrability to the arbitrator, reasoning:

> Here, it is uncontested that there was an arbitration agreement between the parties. Using similar language to that in *Bronster*, the agreement in the instant case "clearly and unmistakably" left the issue of arbitrability to the arbitrator. Therefore, because the question of whether there was a valid arbitration agreement between the parties was uncontested, the circuit court should have granted the HSTA's motion to compel arbitration.

Id. at 432, 322 P.3d at 372. Further, the Court ruled that the question of arbitrability left to the arbitrator includes the issue of whether the HSTA's claim constitutes a grievance subject to the arbitration provisions of the agreement. Accordingly, the Court found that it was unnecessary for the circuit court to determine whether the HSTA's claim constituted a grievance before granting the motion to compel. *Id.*

Both prior to and following the foregoing appellate court decisions, the Board has adhered to a similar approach. When the collective bargaining agreements involved had clauses specifically providing for arbitrability to be determined by the arbitrator, the Board has left such

[7] HRS Chapter 658 was repealed and replaced by HRS Chapter 658A in 2001 by Act 265. 2001 Haw. Sess. Laws Act 265, §§1 and 5.

determinations to the arbitrator. *See, e.g.*, State of Hawaii Organization of Police Officers and Frank F. Fasi, Case No. CE-12-29, Decision No. 79, 1 HPERB 715, 720 (7/29/77); State of Hawaii Organization of Police Officers (SHOPO) and Frank F. Fasi, Case No. CE-12-66, Decision No. 161, 3 HPERB 23, 45 (6/7/82); Eileen Anderson and State of Hawaii Organization of Police Officers, Case No. DR-12-44, Decision No. 167, 3 HPERB 109, 110 (10/26/82).

Like the clauses at issue in Bronster[8] and ULS, [9] Unit 01 CBA §15.19b "clearly and unmistakably" vests the arbitrator with the authority to determine arbitrability. Based on the decisions discussed above, the Board concludes that the issue requested for determination in the DR Petition is one of arbitrability that should be left to the Arbitrator because: 1) the UPW CBA §15.19b "clearly and unmistakably" calls for the arbitrator to decide the arbitrability of the Puu grievance; 2) the question of whether the Puu grievance constitutes a grievance subject to the UPW CBA arbitration provisions is for the Arbitrator; 3) the issue of whether there was an arbitration agreement was uncontested and does not implicate HLRB expertise; and 4) the Arbitrator has already rendered a ruling during the arbitration proceedings that the Puu grievance was arbitrable under the UPW CBA.

Finally, in the BOE case discussed above, the Board further noted:

> Although we rest our refusal to grant the requested declaratory order herein on the grounds stated above, we also take cognizance of the HSTA's argument that the proper forum to which the BOE should have taken its request for what is, in effect, a vacation or modification of the Kagel award is the Circuit Court under Chapter 658, HRS (Arbitration and awards). The BOE is aware that the Circuit Court has in the past taken jurisdiction over a case involving an arbitration award rendered under Chapter 89, HRS. *Hawaii State Teachers Association v. Board of Education*, S.P. 3505 (May 30, 1974). Certainly, if the BOE felt it had grounds for a modification or vacation of the Kagel award, it should have moved the Circuit Court under Section 658-11, HRS, for relief. This it did not attempt to do.
>
> ***
>
> In view of the foregoing this Board concludes that it has good cause to refuse to grant the requested declaratory order.

1 HPERB at 526-527. (emphasis added)

Similarly, the Board notes that in this case, the Union has already invoked the proper procedure for judicial confirmation of the Marr Order through its filing of the Motion to Confirm

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[8] Subsection 15.26 of the Unit 10 collective bargaining agreement at issue in that case stated:

> If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision on its merits.

[9] The Master Agreement and the Supplemental Agreement contained identical provisions regarding the grievance process in HSTA that stated in relevant part:

> e) If the Employer disputes the arbitrability of any grievance submitted to arbitration, the arbitrator shall first determine the question of arbitrability. If the arbitrator finds that it is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

under HRS §§658A-5 and 658A-22. A review of pertinent provisions of Chapter 658A, HRS,[10] shows that an established statutory procedure exists for both parties to seek judicial enforcement,

[10] The pertinent provisions regarding judicial review of or relief from arbitration pre-awards and awards are set forth below.

§658A-3 (c) (Supp. 2013), HRS, provides that, "After June 30, 2004, this chapter governs an agreement to arbitrate whenever made."

§658A-5 (a), HRS (Supp. 2013), states, in relevant part:

> **[§658A-5] Application for judicial relief.**
>
> (a) Except as otherwise provided in section 658A-28, an application for judicial relief under this chapter shall be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

§658A-6 (Supp. 2013), HRS, states:

> **[§658A-6] Validity of agreement to arbitrate.** (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> (b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
>
> (d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

(emphasis added)

Based on the above-stated statutory provision, the arbitrator and then the court, not the Board, is the appropriate forum to resolve whether a controversy is subject to arbitration.

§658A-18 (Supp. 2013), HRS, states:

> **[§658A-18] Judicial enforcement of pre-award ruling by arbitrator.** If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under section 658A-19. A prevailing party may make a motion to the court for an expedited order to confirm the award under section 658A-22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under section 658A-23 or 658A-24.

§658A-20 (Supp. 2013) states in pertinent part:

> **[§658A-20] Change of award by arbitrator**. (a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:
> ***
> (2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) shall be made and notice given to all parties within twenty days after the movant receives notice of the award.

(c) A party to the arbitration proceeding shall give notice of any objection to the motion within ten days after receipt of the notice in subsection (b).

(d) If a motion to the court is pending under section 658A-22, 658A-23, or 658A-24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

***

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to sections 658A-19(a), 658A-22, 658A-23, and 658A-24.

§658A-22 (Supp. 2013) provides:

[§658A-22] Confirmation of award. After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 658A-20 or 658A-24 or is vacated pursuant to section 658A-23.

§658A-23 (Supp. 2013), HRS, states in pertinent part:

[§658A-23] Vacating award. (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

***

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 658A-15(d) not later than the beginning of the arbitration proceeding.

***

(b) A motion under this section shall be filed within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c)...If the award is vacated on a ground stated in subsection (a) (3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as that provided in section 658A-19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

§658A-26 (Supp. 2013), HRS, states:

[§658A-26] Jurisdiction. (a) A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this chapter.

§658A-28 (Supp. 2013) states:

review, or relief from arbitration awards or pre-awards. The Employer has several ways under HRS Chapter 658A to challenge the Marr Order. First, under §658A-20, HRS, the Employer may request that the Arbitrator modify or correct an award. Second, under HRS §§ 658A-5 and 658A-6 (b), the Employer may apply to the court to decide "any issue regarding whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." HRS §658A-6(b) specifies that only the court has the authority to decide the issue regarding whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. Third, under 658A-5(a), HRS, the Employer may also apply for judicial relief from an award by requesting the court to vacate that award under the grounds set forth in §658A-23(a), HRS.[11] In short, there are statutorily created avenues for the Petitioner to challenge and have the Marr Order reviewed. On the other hand, HRS Chapter 658A provides a mechanism for UPW to enforce and enter judgment on the Marr Order. Based on the UPW CBA §15.19 and HRS §658A-26, HRS, the circuit court has the "exclusive jurisdiction... to enter judgment on an award under this chapter. The UPW may also attempt to enforce the Marr Order as a pre-award ruling under HRS§658A-18 or by seeking post-award confirmation under §658A-22, HRS. Finally, under §658A-28, appeals may be taken from various orders enumerated in that section and from a final judgment entered under HRS Chapter 658A. Hence, there is no question under Chapter 658A, HRS, that there is a statutory mechanism for both parties to obtain enforcement, review, and relief from arbitration awards through the court.

Based on a finding that the UPW CBA provides "clearly and unmistakably" that the issue of arbitrability is for the Arbitrator, the Board finds good cause to decline to issue a declaratory ruling under §12-42-9(f)(4); and/or the Board dismisses the DR Petition because this claim is clearly without merit because the disclosure of the facts necessarily defeats this claim.

2. Board Jurisdiction over the Issue Presented in the Declaratory Ruling Petition.

§89-5. Hawaii labor relations board.

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
***
(3) Resolve controversies under this chapter;
***

[§658A-28] Appeals. (a) An appeal may be taken from:
(1) An order denying a motion to compel arbitration;
(2) An order granting a motion to stay arbitration;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A final judgment entered pursuant to this chapter.
(b) An appeal under this section shall be taken as from an order or a judgment in a civil action.

[11] Specifically, HRS §658A-23(a) authorizes the court to vacate an arbitration award for various reasons, including if an arbitrator exceeded his or her powers or there was no agreement to arbitrate.

The UPW further contends that this DR Petition should be dismissed because the Board's jurisdiction to issue a declaratory ruling is limited to Chapter 89, HRS, and its implementing rules.

Based on past Board and court decisions, the UPW's argument would be persuasive. *See, e.g.*, Frank F. Fasi v. State of Hawaii Public Employment Relations Board, et. als., 60 Haw. 436, 442-443, 591 P.2d 113, 117-118 (1979); United Public Workers, AFSCME, Local 646 and Abercrombie, 131 Haw. 142, 150-153, 315 P.3d 768, 776-779 (Haw. Ct. App. 2013); Fasi, 2 HPERB at 242.

However, after the addition of HRS §76-14(c) by 2000 Hawaii Session Laws, Act 253 and Judge Nishimura's interpretation of this statutory provision, the UPW's position is not sustainable. That subsection states:

> (c) The rules adopted by the merit appeals board shall provide for the following:
> (1) The merit appeals board shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement;
> (2) The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board;

In Civil No. 13-1-1108-04 (RAN), the issue of the scope of the Board's declaratory ruling jurisdiction regarding MAB appeals under §76-14, HRS, was raised before Judge Nishimura. Judge Nishimura interpreted HRS §76-14(c), HRS, very broadly, stating, "this Court's plain reading of §76-14(c) (2), HRS is that the HLRB is to resolve any controversy regarding the MAB's authority to hear the appeal." (emphasis added) Based on the plain language of the Nishimura Order, the HLRB's declaratory ruling jurisdiction regarding MAB's authority to hear the appeal under §76-14(c)(2), HRS, is not limited to those implicating Chapter 89, HRS, and its implementing administrative rules but extends to "any controversy regarding the MAB's authority to hear the appeal."

Although rejecting UPW's contention that the Board's declaratory ruling authority is limited to Chapter 89, HRS, and its implementing rules, the Board finds this determination is not dispositive of the MAB jurisdictional issue presented by the DR Petition in this particular case.

3. MAB Jurisdiction

The Employer's opposition to this Motion rests entirely on HRS §76-14(c) (2) and United Public Workers v. Abercrombie, 2014 Haw. LEXIS 103 (Haw. 2014) (Abercrombie). Based on these authorities, the Employer asserts that HLRB has primary jurisdiction over MAB jurisdiction issues. Based on the Board's primary jurisdiction over MAB jurisdiction, the Employer contends that: 1) the Board, not the Arbitrator, is authorized to decide the MAB jurisdictional issue; and 2) the Union or the employee cannot elect to file a grievance, rather than a MAB appeal.

In its Reply Brief, the UPW responds that: 1) Abercrombie is not dispositive or conclusive because primary jurisdiction only applies to situations in which the court and administrative agency share concurrent jurisdiction over the matter in controversy, and the action was originally cognizable in a court; 2) the ULS decision held that primary jurisdiction is inapplicable to arbitrability questions; and 3) HRS §76-14(c) (2) is inapplicable because there is no controversy regarding a pending MAB appeal.

Based on a review of HRS §76-14(c) (2) and the Abercrombie and ULS decisions, the Board determines that the Petitioner's reliance on the primary jurisdiction doctrine for its opposition to the Motion is misplaced.

The Board must first address the Petitioner's key assertion based on Abercrombie that "**HLRB has primary jurisdiction over MAB jurisdiction issues** and HLRB is required to first pass on the MAB jurisdiction issues."

The Abercrombie case was a civil action brought in circuit court by the UPW against former Governor Lingle for alleged retaliation for filing a lawsuit opposing a statewide furlough plan. The case involved the issue of whether the primary jurisdiction doctrine applied to the UPW's retaliation and privatization claims, which raised prohibited practice controversies within the HLRB's exclusive jurisdiction. The Court determined that the primary jurisdiction doctrine applies where a claim is originally cognizable in the court but the enforcement of the claim requires the resolution of issues placed within the special competence of the administrative agency. Abercrombie, 2014 Haw. LEXIS at *27. The Court then specifically limited the primary jurisdiction doctrine to issues "inextricably intertwined with the question of whether the defendants engaged in a HRS §89-13(a) (4) prohibited practice." Finding that the retaliation claims essentially presented a prohibited practice controversy, the Court held that these claims raised 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 set forth in Chapter 89, HRS. *Id.* at *41-46. However, regarding the privatization claims, the Court found that such allegations may involve civil service and merit principle violations under HRS Chapter 76, which should be determined by the circuit court before the HLRB's specialized expertise regarding the prohibited practices was implicated. *Id.* at 56-58.

In the ULS case, urged by UPW, the HSTA filed a motion to compel arbitration of a dispute regarding whether a step placement chart for a salary schedule was part of a supplemental agreement between the parties. The ICA concluded that the HLRB had primary jurisdiction over the issues raised in the grievance, reasoning that the motion to compel issues were closely related to issues raised in ULS's prohibited practice complaint, which was within the HLRB's exclusive original jurisdiction. On appeal, the Court disagreed, stating:

> The ICA need not have reached the issue of the HLRB's possible primary jurisdiction over this dispute. Before a court, or an arbitrator, can apply the doctrine of primary jurisdiction, it must first determine that it has jurisdiction over the dispute. As discussed above, the only issue before the circuit court was whether an arbitration issue existed. This issue was uncontested and, regardless, it did not implicate the expertise of the HLRB. Thus, the ICA erred in applying the doctrine of primary jurisdiction to conclude that the HSTA's motion to compel arbitration was premature.

ULS, 132 Haw. at 433, 322 P.3d at 973. (emphases added) The Court then held that because it was undisputed that the Master and Supplemental Agreements contained arbitration clauses that "clearly and unmistakably" reserved questions of arbitrability for determination by the arbitrator, the circuit court erred in failing to grant the motion to compel arbitration. *Id.*

There is no dispute that only issue presented in both the DR Petition and the arbitration proceedings before Marr is the arbitrability of the Puu dispute. As discussed above, the Board has also found that UPW CBA §15.9b "clearly and unmistakably" reserved questions of arbitrability for determination by the arbitrator. Accordingly, the Board agrees with the UPW that this case is more analogous to ULS involving the issue of court or arbitrator jurisdiction regarding arbitrability of the dispute; rather than Abercrombie, involving court or HLRB jurisdiction over retaliation claims implicating prohibited practices and privatization claims implicating civil service or merit principle violations.[12] Applying the ULS ruling and reasoning, the Board is compelled to conclude that this issue regarding whether an arbitration agreement exists between the UPW and the Employer does not implicate the expertise of this Board. Thus, consistent with the Court's ruling in ULS, we need not reach the issue of the Board's possible primary jurisdiction over this dispute.

Even assuming that the primary jurisdiction doctrine applies, the Board finds that the Petitioner's reliance on HRS §76-14, the Nishimura Order, and the Abercrombie decision for its position that the Board is required to resolve the MAB controversy in this case is erroneous for several reasons.

First, based on a review of §76-14, HRS, and HAR 14-21.1-3 (a), (b), and (c), the Board acknowledges that resolution of MAB jurisdictional issues is within its authority. However, based on the plain language of these statutory and administrative provisions, the Board's authority regarding MAB jurisdiction is specifically limited to situations in which there is a controversy regarding MAB's jurisdiction on an appeal.

Under §76-11, HRS, "'Merit appeals board' means a jurisdiction's appellate body for purposes of section 76-14 regardless of whether it is named merit appeals board, civil service commission, or appeals board." (emphasis added)

§76-14, HRS (2012), states in pertinent 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 position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization;
>
> (3) Initial pricing of classes; and

[12] While the Employer asserts that HRS Chapter 76 is implicated in this case, the Board notes that as further discussed below, unlike in Abercrombie, there is no Chapter 76 violation alleged in this case. Further, in Abercrombie, the Court specifically determined that the primary jurisdiction doctrine did not apply to the privatization claim brought under §76-43, HRS.

(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.

(c) The rules adopted by the merit appeals board shall provide for the following:

(1) The merit appeals board shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement;

(3) The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board;

***

(emphases added)

HAR §14-21.1-3 (a), (b), and (c) (effective October 24, 2003) provides in relevant part:

§14.21.1-3 Limitation of jurisdiction. (a) Where the terms of collective bargaining agreements pursuant to chapter 89, Hawaii Revised Statutes, conflict with these rules, the terms of the agreements shall prevail; provided that the terms are not inconsistent with section 89-9(d), Hawaii Revised Statutes.

(b) The board shall defer action on an appeal, if there is controversy on whether the matter is within its jurisdiction or that of the Hawaii labor relations board. The Hawaii labor relations board shall determine which of these boards has jurisdiction in the appeal.

(c) The board shall not act on an appeal if the action complained of constitutes a prohibited action that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement.

(emphasis added) A review of the foregoing provisions shows that HRS §76-14 contains numerous references to "appeals." For example, HRS §76-14(a)(1) specifically provides that MAB is required to "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 these individuals" regarding, among other things, recruitment and examination. Under HRS §76-14(b), "[a]ny 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." (emphasis added) From the face of this statutory provision, there is no simply no question that HRS §76-14, HRS, provides

for the duties and jurisdiction of MAB, an appellate body established to decide appeals from HRS Chapter 76 actions.

Further, the plain language of §76-14, HRS, and the implementing administrative rules HAR §14-21.1-3 (a), (b), and (c), further clarify that HLRB's authority to resolve "any controversy" is limited to MAB's authority to hear an "appeal." HRS §76-14(c) (1) provides that "[t]merit appeals board shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act...." (emphasis added) HRS §76-14(c)(2) states that, "The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board." (emphases added) The implementing HAR requires that MAB "defer action on an appeal, if there is controversy on whether the matter is within its jurisdiction or that of the Hawaii labor relations board" and "not act on an appeal if the action complained of constitutes a prohibited practice that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement." (emphases added)

There is no dispute that in this case, there is neither a pending MAB appeal nor proceedings to hold in abeyance. Neither Puu nor the UPW have filed any claim or appeal from Puu's failure to obtain the Custodian II position at Hickam Elementary School under HRS Chapter 76. Nor has an appeal been filed from "any action" taken under Chapter 76 by "the chief executive, the director, an appointing authority, or a designee acting on behalf of those individuals relating to... [r]ecruitment and examination." Instead, the UPW filed a grievance over this matter under the UPW CBA, which is being processed through arbitration and pending in the circuit court under HRS §§658A-5 and 658A-22. Accordingly, the Board agrees with UPW's contention that absent an appeal pending before MAB, the Board is not required to resolve any controversy under §76-14 (c) (2), HRS.

Second, the Board further concurs with the Union that the lack of a MAB appeal further distinguishes this case from that before Judge Nishimura in the case of Deborah Taylor and Jacqueline Mulleitner. Unlike this case, Taylor and Mulleitner sought relief from MAB,[13] and the Department of Public Safety (PSD) disputed MAB's jurisdiction. MAB ruled for the individuals without referring the jurisdictional issue to HLRB in accordance with §76-14 (c) (2), HRS. PSD appealed the MAB decision to the circuit court, where Judge Nishimura granted the appeal and remanded the case to MAB for referral to the Board to resolve the jurisdictional controversy. MAB filed Petitions for Declaratory Rulings with the Board, which the Board denied in Order 2902 for lack of jurisdiction over the positions and the petitions for declaratory ruling. On the PSD appeal, Judge Nishimura vacated that Order based on the "plain reading" of Section 76-14 (c) (2), HRS, providing for the Board "to resolve the controversy regarding the MAB's authority to hear the appeal." Lacking a pending appeal before MAB as was present in the case before Judge Nishimura, however, the Board finds that the Nishimura Order would not be dispositive of the Board's jurisdiction in this case.

Finally, the Board finds that the Employer's other assertion based on the primary jurisdiction doctrine that "MAB jurisdiction is not 'electable' by either the Union or the grievant

[13] In the MAB case, the relief sought from the MAB involved the classification of their positions following their promotion to the adult correctional VI position with the Department of Public Safety.

and cannot be bypassed by simply choosing a different forum," is simply untenable. The Board has already disposed of the assertion regarding its primary jurisdiction over the arbitrability issues presented. Moreover, Petitioner has cited no authority for its position that the doctrine applies to the arbitral forum. As argued by the UPW, the primary jurisdiction doctrine may only apply to situations in which the court and the administrative agency share concurrent jurisdiction over the matter in controversy, and the action was originally cognizable in a court. As stated in Abercrombie, the primary jurisdiction doctrine "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," such as the Board's prohibited practice expertise. Abercrombie, 2014 Haw. LEXIS at *27, 38-41. Unlike Abercrombie, there is no prohibited practice claim at issue in this case. Even if the doctrine applies to the arbitral forum, as discussed above, the Abercrombie decision provides no authority or guidance requiring that the arbitrator apply the primary jurisdiction doctrine to MAB jurisdictional issues under HRS Chapter 76 arising from an issue regarding the arbitrability of the dispute[14] where there is no pending MAB appeal. While HRS §76-14(c) (2) has placed MAB jurisdictional issues within Board authority, this authority does not extend to situations in which the question before the Arbitrator is arbitrability, and there is no MAB appeal. As the Abercrombie Court noted, in applying the doctrine, no fixed formula exists, but "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." *Id.* at *32. Based on the fact that the Arbitrator has already resolved this issue and the Marr Order is before the court under HRS Chapter 658A, the Board finds that the purposes that the doctrine serves will not be aided by its application in this case. The Board will not interfere in that process or review or overturn that determination, particularly where there is no MAB appeal on this issue. Finally, as stated above, similar to the ULS case, the only issue before the Arbitrator and now the Board is whether an arbitration issue exists. As the ULS Court determined, this issue does "not implicate the expertise of this Board." ULS, 132 Haw. at 433, 322 P.3d at 973. The expertise on this issue has been placed by the UPW CBA with the Arbitrator. Consequently, the primary jurisdiction doctrine does not preclude the UPW or the Grievant from electing to pursue its dispute through the grievance and arbitration process.

For the reasons set forth above, the Board finds that there is good cause for the Board to decline to issue a declaratory ruling in accordance with §12-42-9(f) (4). Alternatively, the Board dismisses the DR Petition because this claim is clearly without merit because again deeming the allegations to be true and even construing the allegations in favor of the Petitioner, there is both an absence of law to support jurisdiction or of facts sufficient to make a good claim.

ORDER

For the reasons set forth above, the Board hereby refuses to issue a declaratory ruling for good cause in accordance with HAR §12-42-9. Alternatively, the Board dismisses the DR Petition pursuant to HAR §12-42-8(g) (30(B).

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[14] In fact, in Abercrombie, the Court determined that the primary jurisdiction doctrine did not apply to the HRS §76-43 privatization claims because they did not contain any issues which, under Hawaii's collective bargaining and civil service laws, had been placed within the special competence of the HLRB or MAB. *Id.* at *64.

DATED: Honolulu, Hawaii July 14, 2014.

HAWAII LABOR RELATIONS BOARD

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