EFiled: Sep 22 2016 03:20PM HAST
Transaction ID 59600049
Case No. 16-CE-01-882

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and COUNTY OF MAUI; ALAN ARAKAWA, Mayor, County of Maui; and THOMAS KOLBE, Deputy Corporation Counsel, Department of the Corporation Counsel, County of Maui, Respondents.	CASE NO.: 16-CE-01-882 ORDER NO. 3190 ORDER GRANTING RESPONDENTS COUNTY OF MAUI, ALAN ARAKAWA, AND THOMAS KOLBE'S MOTION TO DISMISS DEPUTY CORPORATION COUNSEL THOMAS KOLBE FROM THIS ACTION; DENYING UNION'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING RESPONDENTS COUNTY OF MAUI, ALAN ARAKAWA, AND THOMAS KOLBE'S MOTION FOR SUMMARY JUDGMENT ON THE PROHIBITED PRACTICE COMPLAINT

ORDER GRANTING RESPONDENTS COUNTY OF MAUI, ALAN ARAKAWA, AND THOMAS KOLBE'S MOTION TO DISMISS DEPUTY CORPORATION COUNSEL THOMAS KOLBE FROM THIS ACTION; DENYING UNION'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING RESPONDENTS COUNTY OF MAUI, ALAN ARAKAWA, AND THOMAS KOLBE'S MOTION FOR SUMMARY JUDGMENT ON THE PROHIBITED PRACTICE COMPLAINT

For the reasons discussed below, the Hawaii Labor Relations Board (Board) issues its findings of fact, conclusions of law, and order granting Respondents' COUNTY OF MAUI (County), ALAN ARAKAWA, Mayor, County of Maui (Arakawa or Mayor), and THOMAS KOLBE (Kolbe), Deputy Corporation Counsel, Department of the Corporation Counsel, County of Maui (collectively, Respondents) Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion to Dismiss Deputy Corporation Counsel Thomas Kolbe from this Action; denying Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO's (Union or UPW) Union's Motion for Summary Judgment; and granting Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion for Summary Judgment on Prohibited Practice Complaint.

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. FINDINGS OF FACT

A. Factual Background

The UPW is an employee organization within the meaning of Hawaii Revised Statutes (HRS) § 89-2. The County of Maui and Mayor Arakawa are "employers" or "public employers" within the meaning of HRS § 89-2. Mr. Kolbe is not an "employer" or "public employer" within the meaning of HRS § 89-2, and at all times relevant to this acted in his capacity as legal counsel for the County and not as an individual who represents a public employer or acts in a public employer's interest "in dealing with public employees."[1]

The UPW is the exclusive bargaining representative of employees in bargaining unit 1, consisting of non-supervisory employees in blue collar positions.

Since January 1, 1972, the UPW and the County have been parties to successive Unit 1 collective bargaining agreements (Agreement or CBA) containing a grievance procedure. At all relevant times, the Unit 1 Agreement contains a grievance procedure in Section 15, which provides in relevant part:

> **SECTION 15. GRIEVANCE PROCEDURE.**
>
> **15.01 PROCESS.**
> A grievance that arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement, its attachments, exhibits, and appendices shall be resolved as provided in Section 15.

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[1] HRS § 89-2 provides in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.
>
> "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

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15.16 STEP 3 ARBITRATION.
In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

15.17 SELECTION OF THE ARBITRATOR.
Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

15.17 a. By mutual agreement from names suggested by the parties.

15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:

15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.

15.17 b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

15.18 ISSUES TO BE ARBITRATED.

15.18 a. Within five (5) calendar days after the Arbitrator has been selected each party may submit a statement of its view as to the issue(s) to the Arbitrator with a copy to the other party.

15.18 b. The Arbitrator shall determine the issue(s) at the hearing.

15.18 c. The date, time and place of the hearing fixed by the Arbitrator shall be within twenty (20) calendar days from the selection of the Arbitrator.

15.19 ARBITRABILITY.

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.

On September 28, 2007, the UPW filed a Step 1 Grievance with the County, DMN-07-08, alleging the County unlawfully continued to privatize certain services customarily and historically performed by Unit 1 employees. On March 15, 2008, Arbitrator Francis Yamashita (Yamashita) was selected by the parties as the Arbitrator. The parties brought a discovery dispute to the Arbitrator, and on December 1, 2008, Arbitrator Yamashita issued his Order Denying Motion to Compel Answers to Interrogatories and Production of Documents, for Admissions Due to Lack of Responses and for Discovery Sanctions: Leave to Propound Discovery. Arbitrator Yamashita also attached a cover letter which stated in part, "When would a status/scheduling conference be appropriate in this matter? We could try to arrange a conference telephone call."

On December 4, 2008, the UPW responded to the Arbitrator in part, "The union wants the opportunity to review the grievance based on what additional information is provided by Maui County. Accordingly, we believe a pre-arbitration conference at this stage would be premature." On December 15, 2008, the County also responded, stating "The County of Maui agrees with the Union that a telephone conference is not necessary until after the recently approved discovery is completed."

The UPW submitted to Arbitrator Yamashita a Motion to Compel Answers to Request for Admissions, and/or Order that Outstanding Requests Be Admitted, and Attorney's Fees, dated January 15, 2009. The County then submitted Employer County of Maui's Memorandum in Opposition to United Public Workers, AFSCME, Local 646, AFL-CIO's Motion to Compel Answers to Request for Admissions, and/or Order that Outstanding Requests Be Admitted, and Attorney's Fees Dated January 15, 2009, dated February 6, 2009.

Thereafter, there is no further communication between the parties and/or Arbitrator Yamashita in the record until a letter dated August 1, 2014, from Lance T. Hiromoto (Hiromoto), Director of Personnel Services, entitled "Subject: Interpretation of Hawaii Revised Statutes § 76-77(16)," in which Director Hiromoto notified the UPW that, *inter alia*, he would be entering into contracts with a vendor for building, custodial, and grounds maintenance service, with no single contract exceeding $850,000 or for a term longer than one year. On August 19, 2014, the UPW responded, requesting certain information from the County; and on September 15, 2014, the County responded to that request.

On October 1, 2014, counsel for the UPW wrote to Corporation Counsel for the County, entitled "UPW L. 646 v. County of Maui (improper privatization); DMN-07-08; Our file no: 2007-033," and inquiring as to "who has been assigned to the above-entitled case" and requesting that "assigned counsel call the undersigned so we can discuss the case status and proceed with the arbitration of the class grievance in DMN-07-08."

On January 25, 2016, counsel for the UPW wrote to Corporation Counsel for the County, stating in part:

> The union would like to proceed with arbitration and discovery. Accordingly, please advise who is the deputy corporation counsel assigned to this matter and have that individual contact the undersigned.

On March 25, 2016, Mr. Kolbe responded to counsel for the UPW, stating the following:

> I am writing regarding your January 25, 2016 letter in which you asked for the attorney assigned to this 2007 UPW grievance. In January or early February, I called your office in response to the letter. I told Louise that I was the assigned deputy and requested that you return my call. I never received a response, so am writing to inquire if the letter was sent in error. If you would like to discuss this matter, please call me at your convenience. Otherwise I will not be taking any further action.

On April 4, 2016, counsel for the UPW responded to Mr. Kolbe, stating in part that "I don't think the arbitrator issued a ruling on the pending motion" and requesting an update to the County's prior responses to the UPW's July 18, 2007, request for information as well as an update to the information requested in connection with HRS § 76-77(16) as contained in communications between Director Hiromoto and the UPW.

On April 18, 2016, Mr. Kolbe wrote to Arbitrator Yamashita, requesting a telephone conference.

In an undated letter, Arbitrator Yamashita responded to the parties, indicating his availability for a status conference, and stating:

> For Counsels' information, I intended to inform the parties at that time that I withdraw as the arbitrator in this matter. I retired fully in 2014. I assumed this matter had been resolved since there has been no activity in this matter for five years at that time and that there was no longer any need for my services as arbitrator.

On April 21, 2016, counsel for the UPW wrote to the Board, stating:

> We have been informed that Arbitrator Francis Yamashita has been fully retired since 2014.
>
> Accordingly, please provide the parties with a new list of five names from which to select another arbitrator. Thank you.

On April 22, 2016, the Board responded to the UPW's counsel with a list of five names, and sent a copy to the UPW and to Mr. Kolbe.

On April 26, 2016, counsel for the UPW wrote to Mr. Kolbe, requesting Mr. Kolbe to call him to begin the selection process. On April 27, 2016, Mr. Kolbe responded, stating in part:

> The County finds it highly irregular that the Union would request to resurrect a stale grievance and therefore will not agree to selection of a second arbitrator for the above-captioned grievance on the grounds that it was abandoned and is no longer timely. By copy of this letter, I am withdrawing my request for a teleconference with Mr. Yamashita, and will be taking no further action as to this matter.

On April 30, 2016, counsel for the UPW responded, stating, *inter alia*, that the dispute over privatization was not stale; that the issue of arbitrability is for the arbitrator to determine, not the courts or the Board; and requesting the parties select an arbitrator forthwith or the UPW would take legal action.

On May 2, 2016, Mr. Kolbe responded, stating, *inter alia*, that the County's position "was and is, that there is no pending arbitration because you abandoned DMN-07-08: and "have not filed another grievance regarding improper privatization." Mr. Kolbe further stated, "if you can point me to a settlement agreement, decision, order or other written agreement between the parties that Arbitrator Yamashita would retain judgment indefinitely over this matter, the County will certainly reconsider its position on the grievance's abandonment."

On May 9, 2016, counsel for the UPW responded, enclosing a copy of Board Order No. 2499, and stating in part that "[w]e believe Maui County is willfully violating Section 15.17 again in this case." The letter further stated, "[w]e also believe the union can file a motion to compel arbitration and have a court order the selection of the arbitrator under HRS Chapter 658A." The letter requested "cooperation" and that the County "call to select an arbitrator from the list provided by HLRB."

On May 16, 2016, Mr. Kolbe responded, stating, *inter alia*, that "the County views this arbitration as stale"; "the County responded to the *Union's First Request for Admissions* and *UPW's First Request for Answers to Interrogatories and Production of Documents* which included 665 pages of documentation"; "Nothing further happened in the case for seven years"; "the County does not believe that it is in violation of the Konno v. County of Hawaii, 85 Haw. 61 (1997) decision, but if you wish to engage in discussions regarding a specific 'violation, misinterpretation, or misapplication' of the Agreement as it relates to private contracts, the County is willing to do so"; and "if you believe we need to, we can reach out again to Arbitrator Yamashita."

On May 24, 2016, the County filed with the Second Circuit Court, Plaintiff County of Maui's Complaint for Declaratory Relief (DR) in Civil No. 16-1-0278(1). The DR petition requested the Second Circuit Court to exercise jurisdiction pursuant to HRS §§ 603-21.5, 632-1, and 658A-6[2].

On May 25, 2016, the UPW filed with the First Circuit Court a Motion for Appointment of an Arbitrator and to Compel Arbitration in S.P. No. 16-1-0168 KKS. The motion requested an order from the First Circuit Court requiring the County to select a successor arbitrator in grievance DMN-07-08 and pursuant to HRS § 658A-7[3], for an order compelling arbitration against the County.

On July 19, 2016, the First Circuit Court heard arguments in S.P. No. 16-1-0168 on the Motion for Appointment of an Arbitrator and to Compel Arbitration, and Employer County of Maui's Motion to Dismiss Special Proceedings. The First Circuit Court granted the County's Motion to Dismiss the special proceeding, holding that the motion should have been made in the circuit in which the adverse party resides.

On July 25, 2016, the UPW filed with the Board a Prohibited Practice Complaint (Complaint) against Respondents.

On August 26, 2016, counsel for the UPW wrote to Mr. Kolbe, stating in part, "I understand you are now ready to select from the HLRB list dated April 22, 2016 as requested on April 26, 2016" and suggesting a method to determine who will strike first.

On August 26, 2016, Mr. Kolbe responded via email that he would call UPW's counsel the following Monday.

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[2] HRS § 658A-6 governs "Validity of agreement to arbitrate."

[3] HRS §658A-7 governs "Motion to compel or stay arbitration."

On August 30, 2016, the Second Circuit Court heard arguments in Civil No. 16-1-0278(1), and granted the UPW's motion to dismiss, holding that the County failed to effectuate proper service, and that Section 15.19(b) of the Agreement vests authority to the arbitrator to determine arbitrability, and the County may present its laches, abandonment, and other arbitrability arguments to the arbitrator.

The parties, through their legal counsel, selected Edward Yuen as the arbitrator in grievance DMN-07-08.

B. Procedural History

On July 25, 2016, the UPW filed with the instant Complaint against Respondents. The gravamen of the Complaint is that the UPW and County are parties to a Unit 1 Agreement which contains in Section 15 a grievance procedure culminating in the arbitration of grievances over misinterpretations, misapplications, and violations of the terms of the Agreement; that Section 15.19b of the Agreement provides that 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; that pursuant to Section 15 the UPW filed class grievance DMN-07-08 alleging unlawful and improper privatization of bargaining unit work; that on March 15, 2008, Francis Yamashita was selected as the arbitrator in the Grievance; that Arbitrator Yamashita issued an order regarding discovery on December 1, 2008; that when the responses from the County were incomplete, the UPW filed a second motion to compel discovery and requested attorney's fees; that Arbitrator Yamashita did not rule on the second motion to compel; that on April 18, 2016, Mr. Kolbe, counsel for the County, wrote to Arbitrator Yamasaki [sic] requesting a telephone call; that on or about April 21, 2016, Arbitrator Yamashita informed the parties of his retirement; that on April 21, 2016, counsel for the UPW requested another list of five names of arbitrators from the Board from which to select another arbitrator; that on April 26, 2016, counsel for the UPW wrote to Mr. Kolbe to begin the selection process; that on April 27, 2016, Mr. Kolbe wrote that Respondents would not agree to select a second arbitrator on the ground that the Grievance was abandoned and is no longer timely; that Respondents continued to refuse to proceed with selection of a successor arbitrator; that on May 24, 2016, the County filed with the circuit court a complaint for declaratory relief and requesting the court to declare that the County "is not obligated to arbitrate the subject grievance on the basis it has been abandoned"; that at least three Hawaii appellate court opinions involving language contained in Section 15 of the Agreement required the parties to arbitrate challenges to arbitrability with the arbitrator; that the County's claim of laches and abandonment is not sufficient explanation for refusing to select an arbitrator; and that Respondents' actions were willfull [sic].

The Complaint alleges that by rejecting the UPW's request to select a replacement arbitrator, Respondents were trying to modify or amend the Unit 1 Agreement by unilaterally incorporating into Section 15 a new provision to exclude from arbitration grievances the employer considered abandoned or stale, thus interfering with an agreement on how to resolve disputes through the grievance process. The Complaint alleges a prohibited practice under HRS § 89-13(a)(1) by interfering with the rights of employees and the UPW to resolve a grievance through arbitration.

The Complaint also alleges that Respondents knew of or should have been familiar with labor relations, collective bargaining agreements, the grievance process, and Sections 89-10(a) and 89-10.8, HRS. The Complaint alleges prohibited practice under HRS § 89-13(a)(5) by unilaterally changing the terms of Section 15 of the Agreement.

The Complaint alleges Respondents violated Sections 89-3, 89-10(a), and 89-10.8 by refusing to select an arbitrator and instead seeking to litigate the issue of laches and abandonment, in violation of HRS § 89-13(a)(5) and (7).

The Complaint further alleges Respondents violated Section 15 of the Agreement when it failed to select an arbitrator and instead sought to litigate the issue of laches and abandonment, in violation of HRS § 89-13(a)(8).

On August 16, 2016, Respondents filed Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion to Dismiss Deputy Corporation Counsel Thomas Kolbe from this Action, asserting, *inter alia*, that attorneys cannot be substituted in for the actions or liabilities of their clients.

On August 16, 2016, the UPW filed Union's Motion for Summary Judgment, asserting, *inter alia*, that there are no genuine issues of material fact in dispute and the UPW is entitled to judgment as a matter of law; that the failure and refusal to select an arbitrator under Section 15 of the Agreement and the subsequent filing of a complaint for declaratory relief in state court undermines the fundamental purpose of the grievance procedure, deprives the affected employee and the UPW of arbitration to resolves disputes as intended by Section 15; and that such violation is willful in nature and appropriate relief including attorney's fees and costs should be assessed against the employer.

On August 22, 2016, Respondents filed County of Maui, Alan Arakawa, and Thomas Kolbe's Answer to Prohibited Practice Complaint and Counterclaims (Answer), asserting, *inter alia*, that on March 15, 2008, the parties selected Arbitrator Yamashita; that on October 1, 2008, the UPW propounded discovery requests to the County; that by letter dated October 22, 2008, counsel for the County informed counsel for the UPW that the County would not respond on the

basis that the UPW had not first sought permission from the Arbitrator to propound the discovery, pursuant to HRS § 658A-17; that on November 8, 2008, the UPW moved to compel responses; that on December 1, 2008, Arbitrator Yamashita denied the motion to compel but granted the UPW leave to propound its discovery requests, and also inquired into when the parties would like a status/scheduling conference; that on December 4, 2008, the counsel for UPW advised the Arbitrator that a pre-arbitration conference was premature until it had an opportunity to review the County's discovery responses; that on January 13, 2009, the County provided discovery responses; that on January 15, 2009, the UPW filed a Motion to Compel Further Admissions, and on February 6, 2009, the County responded with its Memorandum in Opposition to the Motion; that on January 25, 2016, the UPW notified the County that it wanted to proceed with arbitration and discovery; that the County responded in subsequent correspondence that it viewed the 2007 grievance stale and planned to take no further action; and that when contacted by the County, Arbitrator Yamashita informed the parties that he had retired in 2014, and that he believed the matter was resolved and that there was no further need for his services. The Answer further asserts that the UPW's failure to pursue its claims for more than seven years amounts to inexcusable delay which prejudices the County's ability to respond to the allegations, and unfairly magnifies the remedies sought under the Grievance such that if the UPW prevails it would be rewarded for lack of diligence; and that the County's action are based on its rights under HRS § 658A-6 and case law. The Answer requests that the Complaint be dismissed; that the County be awarded its reasonable attorneys' fees and costs incurred in defending against the claims and causes of actions; and that the County be granted such other and further relief as is just and equitable.

On August 22, 2016, Respondents filed Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion for Summary Judgment on Prohibited Practices Complaint, asserting, *inter alia*, that the County has a right to seek judicial relief and the Board does not have jurisdiction to divest a party of rights afforded them; that the UPW abandoned its Grievance for seven years, which the County believes invalidates the arbitration and the parties' original arbitration agreement; and that the County exercised its right under HRS sections 658A-5 and -6 to seek judicial determination that the arbitration agreement no longer existed, had been abandoned, or rendered void.

On August 23, 2016, Respondents filed County of Maui, Alan Arakawa, and Thomas Kolbe's Opposition to Complainant's Motion for Summary Judgment for failure to state a *bona fide* prohibited practice, asserting the UPW is attempting to target and sanction the County for seeking a judicial determination of its rights; that there is no prohibited practice or unfairness to any employee, there is simply a legal position and request for review by the Circuit Courts; that the Agreement is silent on the selection of a replacement arbitrator; that the matter before the Board will become moot upon the ruling of the Circuit County; and that Respondents' conduct was not egregious.

On August 23, 2016, the UPW filed Union's Memorandum in Opposition to Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion to Dismiss Deputy Corporation Counsel Thomas Kolbe from the Action, asserting that Respondents' motion does not show clear legal basis on which to dismiss Respondent Kolbe, and Respondents' motion raises facts outside the scope of the complaint that are material facts in dispute.

On August 29, 2016, the UPW filed UPW'S Memorandum in Opposition to Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion for Summary Judgment of Prohibited Practice Complaint, asserting the Second Circuit Court's order dismissing the County's complaint is law of the case that rejects Respondents' claim of a right to pursue judicial relief; the employer waived any right to judicial relief by entering into an agreement to arbitrate and any claim of delays does not raise an issue of whether an agreement to arbitrate exists but whether relief under that agreement is any longer available, which is to be decided by an arbitrator; that this case remains a live controversy to determine the unlawfulness of the Respondents' conduct and the appropriate remedy in fees and penalties; that the Complaint does not come within the scope of the doctrine of collateral attack; and that Respondents' excuse for not arbitrating does not morph the refusal into some other legal position.

On August 30, 2016, the UPW filed UPW's Reply in Support of Union's Motion for Summary Judgment, asserting that a claim to a right to judicial relief does not excuse Respondents' behavior in refusing to arbitrate, and that HRS § 377-9 provides for sanctions against Respondents for their repeated prohibited practices.

On August 30, 2016, Respondents filed Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Reply in Support of their Motion to Dismiss Deputy Corporation Counsel Thomas Kolbe from this Action, asserting Complainants cannot overcome the presumption that Mr. Kolbe was at all times acting as counsel within the scope of his authority; Mr. Kolbe's actions and advice are protected by the attorney-client relationship and the attorney-client privilege; that the UPW's litigation tactic will create a flood of additional, collateral complaints before the Board; that the UPW's attempt to recast its Complaint from being about the County's bringing a Circuit Court action to being about the County's refusal to arbitrate presents no basis to name Mr. Kolbe as a Respondent; and that the County is entitled to attorney's fees and costs for the UPW's willful and baseless naming of the County's lawyer as a Respondent.

On August 31, 2016, the Board commenced the hearing on the merits in this matter, and began by dealing with the pending motions. The Board granted the Respondent's motion to dismiss Mr. Kolbe from this action. The parties were then afforded opportunity to present oral arguments on the pending motions for summary judgment. Following oral arguments, the Board orally announced that it denies the UPW's motion for summary judgment filed on August 16, 2016, and grants Respondents' motion for summary judgment filed on August 22, 2016. The

Board took note that the parties have agreed to the proceed with the selection of the arbitrator and the continuance of the arbitration; and that since the grievance was subject to HRS chapter 658A, any further disputes concerning the replacement of the arbitrator in the Grievance will not fall under the jurisdiction of the Board.

II. DISCUSSION AND CONCLUSIONS OF LAW

A. Standards of Review

i. Motion to Dismiss

The Board adheres to the legal standard set forth by the Hawaii appellate courts for motions to dismiss under Rule 12 of the Hawaii Rules of Civil Procedure (HRCP).

A motion to dismiss is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. In considering a motion to dismiss for lack of subject matter jurisdiction, a court 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 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss for failure to state a claim, "[d]ismissal 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 Hawai'i 104, 108, 253 P.3d 665, 669 (App. 2011) *(citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [The court] must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawai'i at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawai'i 403, 412, 198 P.3d 666, 675 (2008).

ii. Motions for Summary Judgment

Under HRCP Rule 56(b), a party "may move with or without supporting affidavits for a summary judgment in the party's favor[.]" Ralston v. Yim, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013). "Summary judgment is appropriate if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, [the court] must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawai'i 125, 129, 267 P.3d 1230, 1234 (2011).

For cases in which the non-movant bears the burden of proof at trial, the Hawai'i Supreme Court has adopted a burden-shifting paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004). Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Hawai'i at 56-57, 292 P.3d at 1286-1287; French, 105 Hawai'i at 472, 99 P.3d at 1056.

Additionally, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawai'i 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawai'i 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006). Once a movant has met its burden, the opposing party has the burden of coming forward with specific facts evidencing a need for trial; an opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Kroll Associates v. City and County of Honolulu, 833 F. Supp. 802, 804 (D. Haw. 1993), citing Commodity Futures Trading Commission v. Savage, 611 F.2d 270, 282 (9th Cir. 1979).

B. Statutory Provisions

HRS § 89-2 governs "Definitions" and provides in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

HRS § 89-10(a) governs "Written agreements; enforceability; costs items" and provides in relevant part:

> Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

HRS § 89-10.8(a) governs "Resolution of disputes; grievances" and provides in relevant part:

> A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.

HRS § 89-13(a) governs provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

(7) Refuse or fail to comply with any provision of this chapter; [or]

(8) Violate the terms of a collective bargaining agreement[.]

HRS § 658A-5 governs "Application for judicial relief" and provides in relevant part:

(a) Except as otherwise provided in section 658A-28, 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.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this chapter shall be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion shall be given in the manner provided by law or rule of court for serving motions in pending cases.

HRS § 658A-6 governs "Validity of agreement to arbitrate" and provides in relevant part:

(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.

HRS § 658A-11 governs "Appointment of arbitrator; service as a neutral arbitrator" and provides in relevant part:

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

C. Motion to Dismiss Mr. Kolbe

The Board finds and concludes that Mr. Kolbe is not an "employer" or "public employer" under the plain and clear language of HRS § 89-2, which provides in relevant part that an "employer" or "public employer" is the mayor in the case of a county, and "any individual who represents one of these employers or acts in their interest in dealing with public employees." At all relevant times, Mr. Kolbe performed services as a County attorney in litigation, including a grievance, dealing primarily with opposing counsel and a retired arbitrator, and not "in dealing with public employees," and accordingly Mr. Kolbe is not a statutory "employer" for purposes of a prohibited practice complaint.

Although Mr. Kolbe is not an "employer" or "public employer," his actions *may* provide the basis for a prohibited practice complaint if he is the public employer's "designated representative" for a collective bargaining purpose, as HRS § 89-13(a) expressly refers to designated representatives. However, any designated representative of a public employer would necessarily be acting in an official capacity. Moreover, in this case, there is no evidence that Mr. Kolbe acted beyond his official capacity or beyond the authority granted by the County. Accordingly, the Board dismisses Mr. Kolbe as a respondent in this action because a claim against a person in their official capacity is a claim against the government itself. Kahoohanohano v. State, 114 Hawai'i 302, 337-38, 162 P.3d 696, 731-32 (2007). The true Respondents in this matter

are the Mayor in his official capacity and the County of Maui. It should also be noted that when the Hawaii Supreme Court reviews prohibited practice complaints on appeal, the Court automatically substitutes respondents pursuant to Rule 43 (c)(1) of the Hawaii Rules of Appellate Procedure. *See* UPW v. Abercrombie, 133 Hawaii 188 n.1, 325 P.3d 600 n.1 (2014); HGEA v. Casupang, 116 Hawaii 73, n.1, 170 P.3d 324 n.1 (2007). Similarly, the Board has previously granted dismissal of prohibited practice claims against individual employees of the UPW who acted in "official capacities" to the extent that a claim of breach of duty of fair representation may only lie against the UPW as an entity, and that liability, if any, rests solely with the UPW; to the extent individuals were personally named, they were named in their "official capacities" which is a suit against the UPW itself. *See* Taamu v. United Public Workers, AFSCME, Local 646, AFL-CIO, et al., Case No. CU-01-282, Order No. 2677; Mamuad v. Dayton Nakanelua, Case No. CU-10-331, Order No. 3070.

D. Cross-Motions for Summary Judgment

The Board grants the County's motion for summary judgment and denies the UPW's motion for summary judgment. The Complaint alleges prohibited practices under HRS § 89-13(a)(1), (5), (7), and (8), and violations of §§ 89-10(a) and 89-10.8. A prohibited practice requires a finding that a respondent acted "wilfully," which is a "conscious, knowing, and deliberate intent" to violate the provisions of chapter 89. Aio v. Hamada, 66 Haw. 401, 409-10, 664 P.2d 727, 733 (1983); In re Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007) ("in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89"). The Board finds that the County's actions in this instance were not sufficiently "wilfull" to sustain a prohibited practice complaint.

This matter presents a novel issue for the Board; namely, a circumstance where an arbitration proceeding was pending for such a long period of time that the Arbitrator retired during its pendency. The Unit 1 Agreement and chapter 89 are silent as to the actions the parties are to take should such an occurrence happen. Neither party argues that the grievance procedure contained in the Agreement is insufficient for purposes of § 89-10(a) or § 89-10.8. With respect to alleged violation of HRS § 89-10(a), the statute provides that all provisions in the agreement that are in conformance with chapter 89, including a grievance procedure, shall be valid and enforceable and shall be effective as specified in the agreement. The Board cannot find that the County violated this provision. The Unit 1 Agreement contained a grievance procedure that was utilized by the parties and resulted in the selection of Arbitrator Yamashita. There was no provision in the Agreement, however, expressly dealing with the actions a party must take when an arbitrator retires during the pendency of a grievance, nor does the Agreement waive common law claims of laches or abandonment with respect to arbitration proceedings. With respect to HRS

§ 89-10.8(a), the Board similarly cannot find a violation of that statute. The statute requires that a "public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning interpretation or application of a written agreement." Here, the Unit 1 Agreement did contain such a grievance procedure, satisfying the requirements of § 89-10.8(a). Again, the grievance procedure simply did not expressly provide a mechanism for replacing an arbitrator who retires during the pendency of a grievance, nor did it waive common law claims of laches or abandonment. The Board does not find that the lack of such provisions in the Agreement constitutes a wilfull violation of § 89-10.8(a).

The grievance procedure in the Agreement does not address the specific situation here, where the appointed arbitrator removes himself from the case and where the case has been dormant for seven years, and which led the arbitrator to believe the case was over with. Under these circumstances, the Board cannot find fault with the County's steps to determine whether the "controversy" was still subject to the prior agreement to arbitrate – i.e., whether under the doctrines of laches or abandonment the "controversy" was no longer subject to an arbitration agreement. Although the circuit court ultimately held that those legal issues were for the arbitrator to decide, the Board does not find a prohibited practice in the County's efforts to have the circuit court first rule on these questions pursuant to HRS § 658A-6(b), where the statutory language provides that "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."

The Board's holding in Hawaii Government Employees Association and David Ige, Board Case No. CE-06-859, Order No. 483, is distinguishable. Order No. 483 involved a situation where the respondent unilaterally terminated the grievance process and returned the grievance to the union. By contrast, here the County proceeded with the grievance by seeking a ruling from the circuit court under chapter 658A. There was no attempt by the County to unilaterally terminate the case, and the action taken by the County to seek a determination from the circuit court was not so "out of bounds" that it constitutes a prohibited practice.

With respect to HRS § 89-13(a)(1), (5), (7), and (8) regarding interference, restraint, or coercion; refusal to bargain collectively in good faith; refusal or failure to comply with any provision of chapter 89; and violation of the terms of the Agreement, the Board finds that the County disputed the arbitrability of the grievance based upon the doctrines of laches and abandonment. The County did, however, seek a forum in which to litigate these issues, which was the circuit court. HRS § 658A-6 governs "Validity of agreement to arbitrate" and provides in relevant part (emphases added):

> (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.

Although there is a distinction between subsections (b) and (c) in the statute with respect to the court's or arbitrator's jurisdiction, under the facts of this case the Board does not find that the County's actions pursuant to HRS § 658A-6(b) was "wilfull" so as to constitute a prohibited practice.

Similarly, with respect to the selection of a replacement arbitrator, the Agreement is silent on the actions the parties are to take when a previously-selected arbitrator retires during the pendency of an arbitration proceeding. Although the UPW obtained a list of names from the Board, the UPW also wrote to the County, "[w]e also believe the union can file a motion to compel arbitration and have a court order the selection of the arbitrator under HRS Chapter 658A." In turn, HRS § 658A-11 governs "Appointment of arbitrator; service as a neutral arbitrator" and provides in relevant part (emphasis added):

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. **If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.** An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

Here, the Agreement is silent on the selection of a successor arbitrator. The UPW references Board Order No. 2499 in Case No. CE-01-655, wherein the Board found the County of Maui committed a prohibited practice in wilfully refusing to follow the "striking" provisions in the CBA regarding selection of the arbitrator. However, that case involved the initial selection of

an arbitrator, and the refusal to proceed with the CBA's provisions for selection of an arbitrator affected the UPW's ability to obtain relief from an arbitrator regarding its discovery issues. By contrast, in the present case, the County and UPW had selected an arbitrator pursuant to the terms of the Agreement, and that arbitrator had issued rulings on a discovery dispute; the issue was selection of a successor arbitrator due to retirement, which is a novel issue before the Board. In Order No. 2499, the Board acknowledged that HRS § 658A-11 provides a mechanism for selection of an arbitration where the agreed upon method fails. Given the novelty of the specific circumstances of this case, the Board finds and concludes that the County did not commit a prohibited practice.

III. ORDER

For the reasons discussed above, the Board hereby grants Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion to Dismiss Deputy Corporation Counsel Thomas Kolbe from this Action; denies Union's Motion for Summary Judgment; and grants Respondents County of Maui, Alan Arakawa, and Thomas Kolbe's Motion for Summary Judgment on the Prohibited Practice Complaint. No further relief is granted to any party, and any further requests for relief are deemed denied.

This case is now deemed to be closed.

DATED: Honolulu, Hawaii, September 22, 2016.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

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