CONCURRING OPINION BY GINOZA, J.

I respectfully concur in the result. In this appeal, Appellant County of Hawaiʻi (County) contends that the Circuit Court of the First Circuit (Circuit Court) erred in confirming the arbitration award issued by Michael Marr (Arbitrator) in favor of Appellee United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The County asserts that the Circuit Court erred by: (1) determining that venue was proper in the First Circuit; (2) ruling that the arbitration award did not violate public policy and was thus enforceable; and (3) ruling that the Arbitrator did not exceed his authority by rendering an award based on collateral estoppel/issue preclusion.[1] UPW contests the County's points of error and also claims that the County waived any right to judicial review of the arbitration award by its failure to file a motion to vacate the award.

As set forth below, I would conclude as follows:

(1) Analyzing the venue issue under Hawaii Revised Statutes (HRS) § 658A-27 (Supp. 2010) *in pari materia* with relevant provisions in HRS § 658A-15 (Supp. 2010), venue was proper in the First Circuit.

(2) The County has not waived its right to challenge the arbitration award on public policy grounds, even though it did not file a motion to vacate the award, because the public policy exception is a judicially recognized exception not enumerated under HRS § 658A-23 (Supp. 2010) (Vacating award). The Arbitrator was legally incorrect in deciding that issue preclusion applied to the County in this case. However, the Arbitrator's error in applying the law does not rise to the level of invoking the public policy exception recognized in Inlandboatmen's Union of the Pac., Haw. Region v. Sause Bros., Inc., 77 Hawaiʻi 187, 881 P.2d 1255 (App. 1994).

(3) The County has waived its claim that the Arbitrator exceeded his powers because such a claim is covered by HRS

[1] As noted by the majority, the terms "collateral estoppel" and "issue preclusion" have often been used interchangeably.

§ 658A-23 and the County failed to file a motion to vacate the award preserving this argument.

I. Venue

The proper venue for UPW's motion to confirm the arbitration award is determined by the interpretation and construction of HRS § 658A-27. Statutory construction is a question of law reviewed on appeal *de novo*. Ueoka v. Szymanski, 107 Hawaiʻi 386, 392, 114 P.3d 892, 898 (2005). Moreover,

> Our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Id., at 392-93, 114 P.3d at 898-99 (brackets omitted); See also HRS § 1-16 (2009 Repl.) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.").

HRS § 658A-27 provides:

> **[§658A-27] Venue.** A motion pursuant to section 658A-5 shall be made in the court of the circuit in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the circuit in which it was held. Otherwise, the motion may be made in the court of any circuit in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any circuit in this State. All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs.

(Emphasis added).[2]

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[2] The parties do not dispute that UPW's motion to confirm the arbitration award was a motion pursuant to HRS § 658A-5. HRS § 658A-5 (Supp. 2010) states:

> **[§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.
>
> (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

(continued...)

The County argues that the collective bargaining agreement (CBA) is silent as to where an arbitration hearing is to be held, that no arbitration hearing was in fact held in this matter, and therefore the proper venue was in the Third Circuit, where the County resides or has a place of business.

UPW, in turn, argues that venue was proper in the First Circuit because the arbitration agreement states the place of hearing is to be "fixed by the arbitrator," the Arbitrator set the place to hear UPW's "motion for summary disposition" in Honolulu, and subsequent motions were heard via telephone conferences in which the Arbitrator and UPW's counsel were located in Honolulu while the County's counsel was located in the County of Hawaiʻi. UPW further argues that no evidentiary hearing was held in the County of Hawaiʻi, and the final arbitration award and all prior orders were rendered from Honolulu where the Arbitrator was located.

The key question is what constitutes an "arbitration hearing" under HRS § 658A-27. In construing this statute, it is helpful to consider other HRS Chapter 658A provisions *in pari materia* which may shed light on this issue. Reading the plain language of HRS § 658A-27 in context with other relevant provisions in HRS Chapter 658A, particularly HRS § 658A-15 (Arbitration Process), I believe an "arbitration hearing" was held in this matter when the Arbitrator decided to hold a hearing on UPW's "motion for summary disposition" and the parties were allowed to be heard on the matter and to submit evidence by way of declarations and numerous exhibits.

Under HRS § 658A-15, different parts of the arbitration process are established, including an arbitrator's authority to (a) "hold conferences with the parties" that are held "before the

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[2](...continued)
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.

hearing" and (b) "decide a request for summary disposition." In turn, an arbitrator may order a "hearing" as set forth in HRS § 658A-15(c) and (d). HRS § 658A-15 establishes the different aspects of the "arbitration process" as follows:

> **[§658A-15] Arbitration process.** (a) An Arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold **conferences** with the parties to the arbitration proceeding **before the hearing** and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.
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> (b) An arbitrator may decide a **request for summary disposition** of a claim or particular issue:
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> (1) If all interested parties agree; or
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> (2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.
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> (c) If an arbitrator orders a **hearing**, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but shall not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.
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> (d) At a **hearing** under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.
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> (e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with section 658A-11 to continue the proceeding and to resolve the controversy.

(Emphasis added).

In this case, the record reflects that the Arbitrator allowed UPW to file a "motion for summary disposition," pursuant to HRS § 658A-15(b). In addition to briefing the motion, and

consistent with HRS § 658A-15(c) and (d), the Arbitrator decided to hold a hearing and the parties were allowed to submit evidence via declarations and exhibits. As specified by HRS § 658A-15(d), the parties were allowed "to be heard" and "to present evidence material to the controversy." There is nothing in the record to suggest that either party sought to present witnesses at this hearing, but HRS § 658A-15 does not contemplate that an arbitration hearing is held only when witnesses appear. Rather, the statute establishes the right at a hearing to be heard, to present evidence, and to cross-examine witnesses that do appear at the hearing.

In this case, the Arbitrator set an arbitration hearing as contemplated by HRS § 658A-15 to be held in Honolulu, the hearing was in fact held in Honolulu, and the parties were allowed to be heard and to present evidence. Because an arbitration hearing was held in Honolulu, venue was proper in the First Circuit under the terms of HRS § 658A-27.

II. Public Policy Exception

A. The County has not waived its challenge based on the public policy exception

The County argues that the arbitration award should not have been confirmed because it is contrary to public policy. This court has recognized "a limited public policy exception to the general deference given arbitration awards" which is to be applied under the guidelines of United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) "and as such guidelines may be refined in future cases." Inlandboatmen's Union, 77 Hawaiʻi at 194, 881 P.2d at 1262.

UPW responds, *inter alia*, that the County waived its right to judicial review because it did not file a motion to vacate the arbitration award. When challenging an arbitration award on one of the grounds set forth in HRS § 658A-23 (Supp. 2010) (Vacating award), a party must indeed file a timely motion to vacate under that statute. Otherwise, the right to appeal a

confirmation order and challenge it on any of the grounds under HRS § 658A-23 is waived. Cf., Excelsior Lodge No. One v. Eyecor, Ltd., 74 Haw. 210, 223-28, 847 P.2d 652, 658-60 (1992) (considering statutes in predecessor HRS Chapter 658, a party that failed to challenge an arbitration award in conformance with statutes allowing for vacating, modifying or correcting an award would be foreclosed from subsequently appealing a confirmation order); Schmidt v. Pac. Benefit Servs., Inc., 113 Hawaiʻi 161, 168, 150 P.3d 810, 817 (2006); Mathewson v. Aloha Airlines, Inc., 82 Hawaiʻi 57, 82, 919 P.2d 969, 994 (1996) (construing predecessor HRS Chapter 658, "a party seeking to *change* the substance or amount of an arbitration award must timely move *either* to vacate the award under HRS § 658-9 *or* to modify or correct it under HRS § 658-10.")

However, the County may still challenge the arbitration award on public policy grounds even though it did not file a motion to vacate the award and instead only opposed UPW's motion for confirmation in the Circuit Court. As recognized in Inlandboatmen's Union:

> [a] party's claim that an arbitrator's award under a contract would compel it to violate a statute necessarily invokes consideration of a public policy exception to the general deference given arbitration awards which does not fit within the literal definition of vacating, modifying or correcting an award under the express provisions of HRS chapter 658.

77 Hawaiʻi at 193, 881 P.2d at 1261 (emphasis added).[3] In Inlandboatmen's Union, this court considered whether the public policy exception applied even though the party challenging the

[3] Inlandboatmen's Union considered statutes under HRS Chapter 658. In the 2001 Legislature, HRS Chapter 658 was repealed and replaced by HRS Chapter 658A, effective as of July 1, 2002. See 2001 Haw. Sess. Laws Act 265. Similar to HRS Chapter 658, however, the current provisions in HRS Chapter 658A allow a party to an arbitration award to file a motion to vacate, modify or correct an arbitration award for specified reasons. See HRS §§ 658A-23 and 658A-24 (Supp. 2010). Therefore, the recognition in Inlandboatmen's Union, that the public policy exception does not fit within the statutory provisions for vacating, modifying or correcting an award, continues to apply under HRS Chapter 658A. The public policy exception is a judicially recognized exception.

arbitration award had not filed a motion to vacate, modify, or correct the award as was then allowed under HRS Chapter 658. See also Gepaya v. State Farm Mut. Auto. Ins. Co., 94 Hawaiʻi 362, 365, 14 P.3d 1043, 1046 (2000) (citing Inlandboatmen's Union and acknowledging there is a "judicially recognized" exception to confirming an arbitration award when the award clearly violates public policy).

The basis for the public policy exception was explained as follows:

> A court will not enforce "any contract ... that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298, 307 (1983). It follows then that "[i]f the contract as interpreted [by an arbitrator] violates some explicit public policy, [the courts] are obliged to refrain from enforcing it." *Id.* Thus, the U.S. Supreme Court has recognized a "public policy" exception to the general deference given arbitration awards. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).
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> > A court's refusal to enforce an arbitrator's award ... because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. [The "public policy" exception] derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.
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> *Id.* at 42, 108 S.Ct. at 373, 98 L.Ed.2d at 301-02 (citations omitted).

Inlandboatmen's Union, 77 Hawaiʻi at 193, 881 P.2d at 1261 (emphasis added).

Here, the County did not file a motion to vacate, modify or correct the arbitration award. Nonetheless, because the public policy exception is not based on any of the reasons provided under HRS § 658A-23 or § 658A-24 for vacating, modifying, or correcting an award, and instead is based on the concept that a court should not lend its aid to an illegal act, I believe the County has not waived its right to contest the

Circuit Court's confirmation order on appeal based on public policy grounds. The County raised the public policy exception in the Circuit Court in opposing UPW's motion to confirm the arbitration award.

B. The Arbitrator was incorrect on the law in concluding that issue preclusion applied to the County

The County argues that the arbitration award violates public policy because the Arbitrator improperly determined, under principles of issue preclusion, that the County was bound by the arbitration decision in State of Hawaiʻi, University of Hawaiʻi v. United Public Workers, AFSCME, Local 646, AFL-CIO (Re: Class Grievance Involving Denial Of Holiday Pay) (2003) (Parnell, Arb.) (Parnell arbitration). In the "Order Granting in Part and Denying in Part [UPW's] Motion for Summary Disposition Filed on March 24, 2008," the Arbitrator stated that he was applying a combination of state law and principles set forth in Taylor v. Sturgell, 553 U.S. 880 (2008) concerning issue preclusion. In my view, Hawaiʻi case law does not support application of issue preclusion in this case, and the Arbitrator misread and misapplied Taylor.

1. Hawaiʻi Law

The Parnell arbitration was litigated between UPW and the State of Hawaiʻi, University of Hawaiʻi (University) and that decision was later reduced to judgment. The County was never a party to that litigation.

As noted by the majority, the starting point for analyzing issue preclusion under Hawaiʻi law is the four-part test established in Dorrance v. Lee, 90 Hawaiʻi 143, 149, 976 P.2d 904, 910 (1999). Re-litigation of an issue is barred where:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication[.]

Because the County was not a party to the Parnell arbitration and is the party against whom collateral estoppel is asserted, the key question is whether the County was "in privity" with the University. As explained below, in cases similar to this, the concept of privity under Hawaiʻi law has been directly tied to *whether the party to be bound was adequately represented in the prior litigation*.

In Lingle v. Hawaiʻi Gov't. Emps. Ass'n., AFSCME, Local 152, 107 Hawaiʻi 178, 111 P.3d 587 (2005), the Hawaiʻi Supreme Court analyzed the four-part Dorrance test, and particularly the question of privity, in a case involving collective bargaining agreements and management rights under HRS Chapter 89. In that case, UPW and the State Department of Transportation (DOT) arbitrated a dispute as to whether DOT was required to temporarily assign a Bargaining Unit 1 (BU-1) employee to a vacant Bargaining Unit 2 (BU-2) position. UPW represents BU-1 employees and Hawaiʻi Government Employees Association (HGEA) represents BU-2 employees. HGEA was not party to the arbitration between UPW and DOT, which was ultimately decided in favor of UPW and confirmed in the circuit court.

In a separate proceeding, DOT had petitioned the Hawaiʻi Labor Relations Board (HLRB) for a declaratory ruling of its management rights under HRS § 89-9(d), claiming that the arbitrator could not require it to assign a BU-1 employee to the BU-2 position because that would violate a collective bargaining agreement with HGEA. HGEA intervened in the HLRB proceeding.

When the HLRB denied DOT's petition on mootness grounds, an appeal was taken to the circuit court and then ultimately to the Hawaiʻi Supreme Court. One of the issues addressed on appeal was UPW's claim that HGEA was collaterally estopped from seeking declaratory relief in the HLRB proceeding because HGEA was in privity with DOT in the arbitration proceeding. Considering the Dorrance four-part test, the court concluded that privity was lacking, explaining:

> In addressing privity, this court has previously stated that "[p]reclusion is fair in circumstances where the nonparty and party had the same practical opportunity to control the course of the proceedings." *Bush v. Watson*, 81 Hawaiʻi 474, 480, 918 P.2d 1130, 1136 (1996) (citation omitted). "Preclusion may also be appropriate where the party in the previous action was acting in a representative capacity for the current party. However, several important rules limit the extent of preclusion by representation. The most obvious rule is that the representative must have been appointed by a valid procedure." *Id.* at 481, 918 P.2d at 1137 (citation, brackets and quotation marks omitted).
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> In the instant case, HGEA's participation in the arbitration proceedings was limited to the testimony of HGEA representatives who were called to testify by UPW. HGEA was not a party in the arbitration and, thus, was not allowed to call its own witnesses or cross-examine witnesses for UPW. As such, it cannot be said that HGEA had the same opportunity as the DOT to control the arbitration proceedings. In addition, although UPW argues that the DOT served as a representative of HGEA, there is no evidence in the record that HGEA appointed the DOT to represent its interests by any valid procedure. Accordingly, because HGEA was not in privity with the DOT, we hold that HGEA was not collaterally estopped from seeking a declaratory ruling from the HLRB.

107 Hawaiʻi at 186-87, 111 P.3d at 595-96 (emphasis added).

In Lingle, the court relied on its previous decision in Bush v. Watson, 81 Hawaiʻi 474, 918 P.2d 1130 (1996), where defendants in a state court action had asserted the plaintiffs' claims were precluded by litigation in a federal court action. In Bush, the Hawaiʻi Supreme Court held that there was no privity between plaintiffs in that state action and the plaintiffs in the federal action. Even though two plaintiffs in the state action had participated as amici in the appeal in the federal action, there was no showing: that they controlled the federal litigation; or that any plaintiff in the federal action was acting as a representative for the state action plaintiffs, "much less was appointed as a representative by a valid procedure." Id. at 479-81, 918 P.2d at 1135-37.

In another case addressing privity and applying Bush, the Hawaiʻi Supreme Court expressly noted that it had rejected the theory of "virtual representation" stating:

> We declined . . . in Bush, to preclude a non-party to the prior litigation based on, essentially, "virtual

> representation," and we decline to do so now. We adhere to our ruling in Bush that for a party to the prior litigation to have been representing a nonparty, "the representative must have been appointed by a valid procedure."

SHOPO v. Soc'y of Prof'l Journalists-Univ. of Hawaiʻi Chapter, 83 Hawaiʻi 378, 401, 927 P.2d 386, 409 (1996). In SHOPO, the court thus held that collateral estoppel did not apply to preclude parties in that case from re-litigating the constitutionality of a statute when they were not parties to a prior suit addressing the same issue.

Given the principles underlying privity as established by these cases, which focus on the adequacy of representation in the prior litigation, there was no privity between the County and the University. The party asserting preclusion has the burden of establishing the Dorrance elements. See Lingle, 107 Hawaiʻi at 186, 111 P.3d at 595. In this case, UPW made no showing that the County and the University had the same practical opportunity to control the course of the proceedings in the Parnell arbitration. There also is no showing that the University was acting in a representative capacity for the County in the Parnell arbitration or that the University was appointed to represent the County by way of a valid procedure.

Under Hawaiʻi case law, therefore, the requirements for issue preclusion against the County were not met.

2. Taylor v. Sturgell

The Arbitrator's reliance on Taylor in deciding the question of issue preclusion was also incorrect. Rather than supporting application of issue preclusion to the County in this case, I believe Taylor supports the opposite. Similar to the Hawaiʻi Supreme Court, the United States Supreme Court in Taylor rejected the "virtual representation" exception to the general rule against nonparty issue preclusion. By finding privity between the County and the University based on their contractual relationship via the CBA, and by applying preclusion without procedural protections to ensure adequate representation of the

County during the Parnell arbitration, the Arbitrator applied a version of "virtual representation" that was rejected in Taylor.

The Taylor court explained that different federal courts of appeals had adopted varying tests under the theory of "virtual representation", requiring *inter alia*: "identity of interests" between the party to be bound and the party subject to the prior judgment; and "adequate representation" defined in a variety of ways. The court rejected the theory of "virtual representation" on three grounds.

First, the court stated that "our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." 553 U.S. at 898. Second, and particularly important in this case, the court explained the requirements needed to establish adequate representation. In this regard, the court stated:

> A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented. In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

553 U.S. at 900-01 (citations omitted) (emphasis added). The court further explained its distaste for the broad concept of "virtual representation" because it would "authorize preclusion based on identity of interest and some kind of relationship between the parties and nonparties," but without adequate procedural protections. Id. at 901. Third, the Taylor court rejected the "virtual representation" exception because it would "likely create more headaches than it relieves" and noting that "[p]reclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties." Id.

In the instant case, the requirements for adequate representation as described in Taylor were not met. Even if it were assumed that the interests of the County and the University

were "aligned," there is nothing in the record to suggest that the University understood during the Parnell arbitration that it was acting in a representative capacity for the County and nothing in the record to suggest that the arbitrator in that case "took care to protect the interests" of the County. Further, there is no showing that the County had notice of the Parnell arbitration when it was being litigated. Thus, a version of the "virtual representation" exception that was rejected in Taylor was applied by the Arbitrator in this case.

In rendering his decision on issue preclusion, the Arbitrator specifically relied on two of six exceptions recognized in Taylor as allowing nonparty issue preclusion. The Arbitrator concluded that, since the 1970's, there has been a "pre-existing substantive legal relationship" between the County and the University because of the statutory scheme adopted in Hawaiʻi regarding collective bargaining and the development of that statutory scheme over time. However, the exception recognized in Taylor based on a pre-existing "substantive legal relationship" does not encompass collective bargaining agreements. Rather, although not necessarily exhaustive, the Taylor court described the types of "qualifying relationships" under this exception as including "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." Id. at 894. "These exceptions originated 'as much from the needs of property law as from the values of preclusion by judgment.'" Id. (quoting 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4448, p.329 (2d ed. 2002)); see also 2 Restatement (Second) of Judgments §§ 43-44, 52, 55 (1982). The pre-existing substantive legal relationship exception recognized in Taylor does not, in my view, apply to this case.

The other exception discussed in Taylor and relied upon by the Arbitrator provides that, "in certain limited circumstances, a nonparty may be bound by a judgment because she

was adequately represented by someone with the same interests who was a party to the suit." Id. at 894 (quotation marks and brackets omitted). However, as explained in Taylor, "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries." Id. (citations omitted). Again, this exception does not, in my view, apply to this case.

In sum, therefore, I believe the Arbitrator incorrectly analyzed and applied the principles set out in Taylor.

C. The Arbitrator's error on the law does not invoke the public policy exception

Because in my view the Arbitrator misconstrued the law in ruling that the County was bound by the Parnell arbitration decision, the question ultimately is whether the Arbitrator's erroneous application of the law regarding issue preclusion rises to the level of invoking the public policy exception recognized in Inlandboatmen's Union.

It has long been recognized in Hawaiʻi that where parties have agreed to arbitration, "they thereby assumed all the hazards of the arbitration process, including the risk that the arbitrators may make mistakes in the application of law and in their findings of fact." Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Haw. 332, 336, 460 P.2d 317, 319 (1969). See also Daiichi Hawaiʻi Real Estate Corp. v. Lichter, 103 Hawaiʻi 325, 336, 82 P.3d 411, 422 (2003); Tatibouet v. Ellsworth, 99 Hawaiʻi 226, 236, 54 P.3d 397, 407 (2002). Given these precepts, the limitations on judicial review in these circumstances, and, consistent with that, the high bar set for applying the public policy exception in cases decided to date, I conclude that the requirements for invoking the public policy exception have not been met.

The public policy exception recognized in Inlandboatmen's Union is a limited exception and only applies

when "(1) the award would violate some explicit public policy that is well defined and dominant, and that is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests, and (2) the violation of the public policy is clearly shown." 77 Hawaiʻi at 193-94, 881 P.2d at 1261-62 (citations, internal quotation marks, brackets and ellipses omitted).

Further, the public policy exception is to be applied under the guidelines of Misco and as those guidelines are refined in other cases. Inlandboatmen's Union, 77 Hawaiʻi at 194, 881 P.2d at 1262. Therefore, it is significant to note that -- up to this juncture in time -- this court, the Hawaiʻi Supreme Court, and the United States Supreme Court have primarily considered the public policy exception in regard to whether *implementation* of an arbitration award or *the remedy* provided under an award would violate public policy, and not whether an arbitrator misconstrued the law in reaching his or her decision. See Inlandboatmen's Union; Mathewson; Misco;[4] Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000).

In Inlandboatmen's Union, grievances under a collective bargaining agreement were arbitrated and the arbitration award provided, *inter alia*, that affected employees had the right "to complete their scheduled watches" and to be assigned work under certain circumstances, and that the employer could not terminate a scheduled watch to avoid paying overtime. The employer, Sause Bros., Inc. (Sause), challenged this aspect of the award claiming that *implementation* of the award could cause Sause to violate federal law regarding manning vessels. Although the public

[4] In Misco, the United States Supreme Court expressly noted that "[w]e need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12; see also id. at 46 (Blackmun, J. and Brennan, J., concurring) ("[T]he Court does not reach the issue upon which certiorari was granted: whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer.").

policy exception was recognized, this court ultimately concluded that its requirements were not met. That is, although Sause pointed to a specific federal statute, it had not clearly shown that the statute would be violated. This court noted:

> We are mindful that the public policy exception "does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy[,]" *Id.* and that we "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."

77 Hawaiʻi at 196, 881 P.2d at 1264.

In Mathewson, the Hawaiʻi Supreme Court considered application of the public policy exception and noted Inlandboatmen's Union as "recognizing [the] test established in [Misco], for application of [the] public policy exception to *enforcement of arbitration awards.*" 82 Hawaiʻi at 78 n.18, 919 P.2d at 990 n.18 (emphasis added). The court considered and rejected an employer's argument that an arbitration award reinstating a terminated airline pilot had violated public policy.

In Misco, an arbitration award reinstated an employee who had been terminated for allegedly possessing marijuana in the parking lot of a paper converting plant. The employee operated a machine that used sharp blades to cut rolling coils of paper. The employer challenged the arbitration award, arguing that reinstating the employee (*i.e.*, implementing the award) was contrary to public policy. The United States Supreme Court recognized the public policy exception, but reversed the court of appeals, which had vacated the award, because: the lower court "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs[,]" 484 U.S. at 44; even if such public policy existed, a violation was not clearly shown because finding marijuana in the employee's car was insufficient to establish actual use of drugs in the workplace; and under the award, the employee could be reinstated in an "equivalent" job

and the record did not establish he would pose a serious threat in every such job for which he qualified.

Finally, in Eastern Associated Coal Corp., the United States Supreme Court considered, and rejected, an employer's argument that an arbitration award violated public policy by reinstating an employee who had twice tested positive for marijuana. The employee's duties included driving heavy vehicles on public highways and under federal regulations he was subject to random drug testing. The court noted that the award did not violate any specific provision of law or regulation. Further, the court explained certain underlying principles, including that the parties had "bargained for the arbitrator's construction of their agreement" and that "courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances." 531 U.S. at 62 (internal quotation marks omitted). Moreover, the court stated, "as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." Id. (internal brackets and quotation marks omitted).

In the instant case, the implementation of the arbitration award requires the County to, *inter alia*, provide holiday pay entitlements to employees who were on leaves of absences without pay before, during, or after the holiday observance. The County does not argue that implementing this award violates any specific law or regulation. The County's closest argument in this regard is that the award violates public policies regarding collective bargaining as embodied in and underlying HRS Chapter 89. However, this argument does not establish that providing the holiday pay entitlements required by the award violates "explicit" public policy that is "well defined and dominant." The County points to no provision in HRS Chapter 89 that would be violated by implementing the award.

For these reasons, I conclude that the public policy exception does not preclude enforcement of the arbitration award.

III. The County Has Waived Its Claim That The Arbitrator Exceeded His Authority

Under HRS § 658A-23, one of the bases for vacating an arbitration award is when an arbitrator has exceeded his authority or power. HRS § 658A-23(a)(4). Because the provisions in HRS Chapter 658A specifically address this basis for challenging an arbitration award, the County has waived this argument by failing to file a motion to vacate pursuant to HRS § 658A-23(a)(4). Excelsior Lodge No. One, 74 Haw. at 223-28, 847 P.2d at 658-60; Schmidt, 113 Hawaiʻi at 168, 150 P.3d at 817; Mathewson, 82 Hawaiʻi at 82, 919 P.2d at 994.

IV. Conclusion

Based on the foregoing, I concur in the result which affirms the Circuit Court's judgment.