CONCURRING AND DISSENTING OPINION BY GINOZA, J.

In this appeal, we consider whether the Circuit Court of the Fifth Circuit (circuit court) was correct in vacating the remedy portion of the Arbitration Decision and Award (Arbitration Decision), in which Employers-Appellees County of Kauaʻi and the Kauaʻi Police Department (collectively the County) were ordered to promote three non-selected candidates (the Grievants) to the position of Sergeant in the Kauaʻi Police Department and which awarded attendant back pay and benefits.

I concur with the majority that the County was not estopped from asserting that the Arbitrator exceeded his authority. I respectfully dissent, however, from the remainder of the majority opinion because unlike the majority, I conclude that the Arbitrator exceeded his powers under the applicable collective bargaining agreement (CBA) by ordering that the Grievants be promoted to the position of Sergeant and awarding the attendant back pay and benefits. In my view, pursuant to Hawaii Revised Statutes (HRS) § 658A-23(a)(4) (Supp. 2013),[1] the circuit court correctly vacated that part of the Arbitration Decision. Additionally, because I would decide this case on the statutory grounds set forth in HRS § 658A-23(a)(4), I would not reach the question of whether the Arbitration Decision violates public policy, which the majority opinion addresses at length.

I. Brief Background

In 2007, the Kauaʻi Police Department engaged in a process to fill vacancies and to promote officers from an existing list of eligible candidates. Oral interviews were conducted in August 2007 and subsequently, on September 23, 2007, five officers were selected to be promoted to the position of

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[1] HRS § 658A-23(a)(4) provides:

> **[§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:
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> . . . .
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> (4) An arbitrator exceeded the arbitrator's powers[.]

Sergeant. These five officers were selected from a pool of nine candidates.[2] Grievants, three of the officers not selected for promotion, thereafter filed grievances that came before the Arbitrator.

In the Arbitration Decision, the Arbitrator noted that "[t]he focus of this grievance is that the oral exam was flawed, was not objective, was not based on merit principles and was unfair, unjust and improper for the selection of Police Sergeants[,]" and that Article 47 of the CBA was "at the center of this arbitration."[3] In resolving the grievances, the Arbitration Decision not only concluded that the oral interview process was subjective, arbitrary and capricious, but then also ordered the County to promote the three Grievants to the position of Sergeant. The Arbitrator thus made the ultimate decision to promote Grievants, and appears to have done so based on unclear and unilaterally decided criteria. Moreover, the effect of the Arbitrator's ruling to promote the Grievants was that there were eight individuals promoted for the five vacant positions.

II. Discussion

A. Applicable Standards Regarding An Arbitrator's Powers

In determining whether an arbitrator has exceeded his powers for purposes of HRS § 658A-23(a)(4), we must look to the provisions of the arbitration agreement. "The scope of an arbitrator's authority is determined by the relevant agreement. Accordingly, what issues, if any, are beyond the scope of a contractual agreement to arbitrate depends on the wording of the contractual agreement to arbitrate." *Hamada v. Westcott*, 102

[2] Initially, there was a pool of ten candidates, but one candidate withdrew from consideration before the oral interviews were conducted.

[3] Article 47, entitled "Promotions," provides in relevant part that "[p]romotions shall be based upon fair standards of merit and ability, consistent with applicable civil service statutes, rules and regulations and procedures."

Hawaiʻi 210, 214, 74 P.3d 33, 37 (2003) (citations, internal quotation marks and brackets omitted).[4]

> The mere submission of an issue to an arbitrator does not *ipso facto* grant the arbitrator authority over such a claim. Although public policy underlying Hawaiʻi law strongly favors arbitration over litigation, the mere existence of an arbitration agreement does not mean that the parties must submit to an arbitrator disputes which are outside the scope of the arbitration agreement. The scope of an arbitrator's authority must arise from the controlling contract. As a general rule, the construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court. Accordingly, Appellees' presentation of its claim to the arbitrator is not material to the question of what was within the arbitrator's scope of authority.

Id. at 217, 74 P.3d at 40 (internal citations and quotation marks omitted).

In *Tatibouet v. Ellsworth*, 99 Hawaiʻi 226, 54 P.3d 397 (2002) the Hawaiʻi Supreme Court further elaborated on the standards for determining when an arbitrator exceeds his or her authority.

> Precisely because "the scope of an arbitrator's authority is determined by agreement of the parties," it follows that "an arbitrator must act within the scope of the authority conferred upon him by the parties and cannot exceed his power by deciding matters not submitted." *Clawson v. Habilitat, Inc.*, 71 Haw. 76, 78, 783 P.2d 1230, 1231 (1989) (citations omitted). Accordingly, ... where an arbitrator has exceeded his or her powers by deciding matters not submitted, this court has held, pursuant to HRS § 658-9(4), that the resulting arbitration award must be vacated. *Brennan v. Stewarts' Pharmacies, Ltd.*, 59 Haw. 207, 223, 579 P.2d 673, 681-82 (1978).
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> *Mathewson [v. Aloha Airlines, Inc.*], 82 Hawaiʻi at 75, 919 P.2d at 987 (some alterations in original and bracket omitted). Thus, an arbitrator's award is valid when it "draws its essence" from the arbitration agreement. *[University of Hawaiʻi Prof'l Assembly on Behalf of Daeufer v. University of Hawaii]*, 66 Haw. at 233 659 P.2d at 727 (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). The Court in *Enterprise Wheel & Car Corp.*, noted

[4] Hamada, like other cases cited herein, considered whether an arbitrator exceeded his powers under HRS § 658-9(4) (1993), the predecessor statute to HRS § 658A-23(a)(4). HRS Chapter 658 was repealed and replaced by HRS Chapter 658A effective on July 1, 2002. See 2001 Haw. Sess. Laws Act 265, §§ 1, 5 and 8 at 810-20. Similar to the current statute, one of the grounds for vacating an arbitration award under HRS § 658-9(4) was "[w]here the arbitrators exceeded their powers[.]"

> that a presumption of validity exists for an arbitration award when the arbitrators do not evidence a betrayal of the agreement between the contracting parties: "An award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. 1358.
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> This court has vacated cases where arbitrators have decided issues beyond those submitted by the parties. *University of Hawaiʻi v. University of Hawaiʻi Prof'l Assembly ex rel. Watanabe*, 66 Haw. 232, 659 P.2d 732 (1983) (vacating the arbitration award because the arbitrator "should only have considered the limited question of whether UH had applied its qualifications in an arbitrary and capricious way"); *Brennan*, 59 Haw. at 222-23, 579 P.2d at 681-82 (holding that arbitrators exceeded their powers when they decided issues not presented for resolution). This court has also vacated arbitration awards pursuant to HRS § 658-9(4) in cases where the arbitrators acted without the authority bestowed upon them by the parties' agreement. *University of Hawaiʻi v. University of Hawaiʻi Prof'l Assembly ex rel. Wiederholt*, 66 Haw. 228, 659 P.2d 729 (1983) (vacating award because the collective bargaining agreement did not allow the arbitrator to appoint an *ad hoc* panel); *[AOAO of Tropicana Manor v. Jeffers]*, 73 Haw. 201, 830 P.2d 503 (vacating award because arbitrator reopened hearings and modified award after final disposition).

99 Hawaiʻi at 235-36, 54 P.3d at 406-07 (footnotes and original brackets omitted).

B. Relevant Provisions of the CBA[5]

Appellant State of Hawaii Organization of Police Officers (SHOPO), on behalf of Grievants, contends that under Article 32 in the CBA, the Arbitrator was empowered to order the promotion of the Grievants because he had the authority to "otherwise change" employer actions found to be unfair, unjust or improper. SHOPO also asserts what appears to be a threshold argument, that the circuit court erred "when it substituted its interpretation of the meaning of the CBA for that of the

[5] As noted by the majority, there appears to be some question as to which version of the CBA applies in this case, one that was in effect from July 1, 2003 to June 30, 2007, or one that was in effect from July 1, 2007 to June 30, 2009. The Arbitration Decision references both versions and the record contains portions of both. The parties do not dispute the relevant language to be considered (regardless of which version applies), although the numbering of at least one applicable section is different. For sake of consistency with the majority opinion, I refer herein to the latter version of the CBA.

Arbitrator when the CBA called for the Arbitrator's decision to be 'final and binding.'" SHOPO apparently contends by this argument that even as to the issue of determining whether the Arbitrator exceeded his authority, the Arbitrator's interpretation of the CBA was final and binding. For the reasons discussed below, I cannot agree with these contentions.

SHOPO's arguments rest on Article 32 of the CBA and the relevant portion is set forth at Article 32(L)(9)(b), which states:

> **ARTICLE 32. GRIEVANCE PROCEDURE**
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> . . . .
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> **L. Step IV (Arbitration)**
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> . . . .
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> **9. Arbitration Award**
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> . . . .
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> **b. Final and Binding** - The award of the Arbitrator shall be accepted as final and binding. There shall be no appeal from the Arbitrator's decision by either party, *if such decision is within the scope of the Arbitrator's authority as described below*:
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> **(1) Limitations on Arbitrator's Powers** - The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
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> **(2) Arbitrator's Authority** - The Arbitrator's authority shall be to decide whether the Employer has violated, misinterpreted or misapplied any of the terms of this Agreement and in the case of any action which the Arbitrator finds unfair, unjust, improper or excessive on the part of the Employer, such action may be set aside, reduced or *otherwise changed* by the Arbitrator. The Arbitrator may, in the Arbitrator's discretion, award back pay to recompense in whole or in part, the employee for any salary or financial benefits lost, and return to the employee such other rights, benefits, and privileges or portions thereof as may have been lost or suffered.

(Underline and italics emphasis added.)

As to SHOPO's argument that the circuit court erred by substituting its interpretation of the CBA for that of the Arbitrator in determining whether he exceeded his authority, HRS § 658A-23(a)(4) expressly authorizes a court to vacate an arbitration award if "[a]n arbitrator exceeded the arbitrator's

powers[.]" Additionally, in this case, the CBA itself at Article 32(L)(9)(b) provides that there shall be no appeal from the Arbitration Decision "*if* such decision is within the scope of the Arbitrator's authority as described below[.]" (Emphasis added.) This language thus expressly references an appeal on the question of whether the Arbitrator exceeded his authority. See *Tatibouet*, 99 Hawaiʻi at 240, 54 P.3d at 411. Hence, even beyond the authority provided by HRS § 658A-23(a)(4), the CBA applicable in this case expressly contemplates that a party may seek judicial review when there is a question whether the Arbitrator exceeded his authority.

The ultimate question is thus whether the Arbitrator acted within his scope of authority or exceeded it under the agreement of the parties. As to the Arbitrator's scope of authority, Article 32(L)(9)(b)(1) states that "[t]he Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement." In this regard, the County points to Article 11 of the CBA, which reserves the County's management rights under HRS § 89-9(d)(1)-(8) (2012). Article 11 of the CBA states:

> **ARTICLE 11. RIGHTS OF THE EMPLOYER**
> **A. Management Rights** - The Employer reserves and retains, solely and exclusively, all management rights and authority, including the rights set forth in Section 89-9(d)(1)-(8), Hawaii Revised Statutes, except as specifically abridged or modified by this Agreement.

(Emphasis added.) The County asserts that, by summarily promoting Grievants, the Arbitrator infringed on the County's authority under HRS Chapter 76 to promote employees based on the merit principle. Even more specifically, the County points to HRS § 89-9(d)(2) and (3), which provide:

> The employer and the exclusive representative shall not agree to any proposal . . . [that] would interfere with the rights and obligations of a public employer to: . . . (2) [d]etermine qualifications, standards for work, and the nature and contents of examinations; (3) [h]ire, promote, transfer, assign, and retain employees in positions; . . . .

(Block format altered.) These provisions thus recognize the employer rights to, among other things, "determine qualifications

. . . and the nature and contents of examinations" and to "promote." HRS § 89-9(d). In *United Public Workers, AFSCME, Local 646, AFL-CIO v. Hanneman*, 106 Hawaiʻi 359, 105 P.2d 236 (2005), the Hawaiʻi Supreme Court construed HRS § 89-9(d)(3) with regard to an employer's right to transfer employees -- this same provision includes the employer's right to promote -- and deemed the provision to be clear and unambiguous in upholding the right of the City and County of Honolulu to transfer refuse collection workers to a different baseyard. 106 Hawaiʻi at 365, 105 P.3d at 242.

As noted by the majority, HRS § 89-9(d) was amended effective as of July 1, 2007.[6] However, the amendments did not change the language of HRS § 89-9(d)(2) or (3), but addressed the permissive subjects for collective bargaining. Although the 2007 amendments may be germane to whether the Arbitration Decision *violates public policy*, *i.e.* whether promoting the Grievants violated an explicit law regardless of the terms of the CBA, the amendments do not affect the interpretation of terms actually contained in the CBA to determine if the Arbitrator exceeded his

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[6] In 2007, the legislature made the following amendments to HRS § 89-9(d):

> [~~The employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit; the suspension, demotion, discharge, or other disciplinary actions taken against employees within the bargaining unit; and the layoff of employees within the bargaining unit. Violations of the procedures so negotiated may be subject to the grievance procedure in the collective bargaining agreement.~~] This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.
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> Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

2007 Haw. Sess. Laws Act 58, § 1 at 101.

authority under HRS § 658A-23(a)(4). In short, the analysis as to scope of the Arbitrator's authority rests on interpreting the provisions that are contained in the CBA, not whether any of the CBA provisions should be invalidated. *See Tatibouet*, 99 Hawaiʻi at 235, 54 P.3d at 406; *Clawson v. Habilitat, Inc.*, 71 Haw. 76, 78, 783 P.2d 1230, 1231 (1989) ("The scope of an arbitrator's authority is determined by agreement of the parties. An arbitrator must act within the scope of the authority conferred upon him by the parties . . . .").

Hence, under the language of the CBA, whether the Arbitrator exceeded his authority in this case comes down to whether the County's right to promote, expressly reserved by Article 11, has been "*specifically* abridged or modified by this Agreement." (Emphasis added.) SHOPO points to Article 32(L)(9)(b)(2) and the language therein that "in the case of any action which the Arbitrator finds unfair, unjust, improper or excessive on the part of the Employer, such action may be set aside, reduced or *otherwise changed* by the Arbitrator." (Emphasis added.) In determining whether an arbitrator exceeds his powers under a collective bargaining agreement, the Hawaiʻi Supreme Court has expressed the general principle that "[i]n construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen." *University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii*, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983) (hereafter *UHPA*) (internal citations and quotation marks omitted). Here, in my view, the "otherwise changed" language is not a specific abridgement or modification of the County's right to promote reserved by Article 11.

First, the types of issues subject to grievance and arbitration under the CBA are wide-ranging and go far beyond just

promotions. Therefore, it cannot be said that the "otherwise changed" language is meant to "specifically" modify or abridge the County's promotion rights reserved by Article 11. Second, the issue of promotions is specifically addressed in Article 47 of the CBA and there is nothing therein to suggest that a grievance allows an arbitrator to promote an employee who was not selected for promotion. To the contrary, Article 47, Section C entitled "Non-Selection" provides only that:

> **c. Non-Selection** - An employee who is certified from an eligible list for promotion but not selected shall upon written request submitted within 20 calendar days of non-selection, be entitled to an individual conference with the appointing authority or designated representative to discuss the reasons for the employee's non-selection and the employee's promotion potential.

The agreement of the parties thus reserves to the County the right to promote pursuant to Article 11 and those rights are not specifically abridged or modified.

It is worth noting the distinction between this case and *UHPA*. In *UHPA*, an employee of the University of Hawaiʻi (UH) was denied tenure and filed a grievance under a collective bargaining agreement. 66 Haw. at 216, 659 P.2d at 723. One of the key questions addressed by the Hawaiʻi Supreme Court was "whether the arbitrator had the power to actually grant tenure or promotion to the grievant." *Id.* at 218, 659 P.2d at 724. The Hawaiʻi Supreme Court answered this question affirmatively in *UHPA*, but did so on the basis of the particular language in the collective bargaining agreement being construed in that case. There, the applicable agreement stated that:

> In any grievance involving the employment status of a Faculty Member, the Arbitrator shall not substitute his judgment for that of the official making such judgment unless he determines that the decision of the official is arbitrary or capricious.

Id. Given this language, the court held that the agreement "expressly gave the arbitrator the right and power to '*substitute his judgment for that of the official*' upon his finding that official's decision to be 'arbitrary or capricious.'" *Id.* at 218-19, 659 P.2d at 724 (emphasis added). In contrast to *UHPA*, the

CBA in this case reserved the County's right to promote in Article 11, unless that right was specifically abridged or modified by the agreement, which it was not.

In sum, I would hold that the Arbitrator's remedy of promoting the Grievants and awarding back pay and benefits exceeded his authority under the CBA. I would not reach the issue of whether the Arbitration Decision violated public policy.

III. Conclusion

For the foregoing reasons, I would affirm the circuit court's order vacating the remedy portion of the Arbitration Decision.