IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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DISTRICT COUNCIL 50, OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES and ALOHA GLASS SALES & SERVICE, INC., Petitioners/Plaintiffs-Appellants,

vs.

KEALIʻI S. LOPEZ, in her capacity as Director, Department of Commerce and Consumer Affairs, Respondent/Defendant-Appellee.

SCWC-28762

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28762; CIV. NO. 07-1-0310)

APRIL 17, 2013

CONCURRING AND DISSENTING OPINION BY CIRCUIT JUDGE KIM, WITH WHOM CIRCUIT JUDGE TOʻOTOʻO, JOINS

I concur with the majority's analysis in Section III. A. of its opinion and with its conclusion that Okada Trucking is clearly distinguishable from the instant case. However, I respectfully dissent from the remainder of Section III. and from the holding as the majority sets it forth.

In its decision affirming the circuit court's ruling in this matter, the Intermediate Court of Appeals (ICA) stated as follows:

> When interpreting the meaning of an administrative rule, "courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." International Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) (citations omitted). "Moreover, an administrative agency's interpretation of its own rules is entitled to 'deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.'" Lee v. Elbaum, 77 Hawai'i 446, 457, 887 P.2d 656, 667 (App.1993). Okada Trucking Co., Ltd. v. Bd. of Water Supply, stands for the proposition that deference should be given to administrative hearings officers. 97 Hawai'i 450 at 458, 40 P.3d 73 at 81 (2002). "[I]nsofar as an administrative hearings officer possesses expertise and experience in his or her particular field, the appellate court 'should not substitute its own judgment for that of the agency' either with respect to questions of fact or mixed questions of fact and law." Id. (quoting Southern Foods Grp., L.P. v. State, Dept. of Educ., 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999)).

District Council 50 v. Lopez, No. 28762, 2012 WL 3044105, at *4 (App. July 26, 2012) (mem. op.).

The ICA then concluded:

> The Appellants fail to demonstrate how the Hearing Officer's application of the "incidental and supplemental" provision to the jalousie window work is clearly erroneous or inconsistent with the underlying legislative purpose. Given the standard of review and the deference afforded to administrative decisions of this nature, we conclude the circuit court did not err in affirming the Board's Final Order.

Id. at 5.

I think the ICA got it right, and nothing in the majority opinion persuades me that the ICA committed error here,

much less the requisite grave error. I disagree with the majority's analysis in Section III.B. of its opinion and with the conclusions and holding based on that analysis, and I consequently respectfully dissent. In my view, it is in fact this Court which is committing grave error by arrogating to itself the power to essentially direct the making of what are heavily fact-dependent decisions in an area best and properly left to the discretion and hard-won expertise of the responsible agency. It is an error that I fear in times to come the citizens of this community will find ample reason to rue.

/s/ Glenn J. Kim

/s/ Fa‘auuga To‘oto‘o