IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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HAWAII STATE TEACHERS ASSOCIATION,
Petitioner/Union-Appellant,

vs.

UNIVERSITY LABORATORY SCHOOL;
EDUCATION LABORATORY PUBLIC CHARTER SCHOOL LOCAL SCHOOL BOARD,
Respondent/Employer-Appellee.

SCWC-12-0000295

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000295; S.P. NO. 11-1-0411)

FEBRUARY 27, 2014

CONCURRING OPINION BY RECKTENWALD, C.J.

I write separately to address the application of HRS § 89-10.8(a) to the circumstances of this case. As both Univ. of Hawaii Prof'l Assembly v. Univ. of Hawaii (hereinafter, UHPA) and Bronster v. United Pub. Workers, AFSCME, Local 646, AFL-CIO acknowledge, arbitral jurisdiction can be overridden by a

preclusive statute. UHPA, 66 Haw. 207, 212, 659 P.2d 717, 720 (1983) (concluding that § 89-9(d)(7) did not preclude arbitration "because we would require more direct language in a statute to allow it to take away the bargained-for remedy of arbitration") (emphasis added); Bronster, 90 Hawaiʻi 9, 14, 975 P.2d 766, 771 (1999) (discussing UHPA). Although HRS § 89-10.8(a)(1) could preclude arbitral jurisdiction in certain situations, it is inapplicable here because the instant case does not involve the type of dispute that the provision was intended to exclude from "grievance" arbitration.

HRS § 89-10.8 addresses the "resolution of disputes" involving "grievances," and must be read in conjunction with HRS § 89-11, which addresses the "resolution of disputes" involving "impasses" in negotiations, i.e., when parties reach a point in the course of negotiations where they cannot agree on terms and become deadlocked. See HRS § 89-2 (defining "impasse" as the "failure of a public employer and an exclusive representative to achieve agreement in the course of collective bargaining") (emphasis added). Prior to 2000, the procedures for dealing with grievances and impasses were contained in the same provision, HRS § 89-11. See HRS § 89-11 (Supp. 1999). However, in 2000, the legislature revised chapter 89. Although HRS § 89-11 continued to govern the resolution of impasses, a new section was added, HRS § 89-10.8, that governed disputes involving grievances. In

order to ensure that the processes set forth in the two provisions did not conflict, the legislature provided in HRS § 89-10.8(a)(1) that "[a] dispute over the terms of an initial or renewed agreement shall not constitute a grievance." See 2000 Haw. Sess. Laws Act 253, § 91 at 886. Consistent with that approach, HRS § 89-11 contains several references to impasses over "the terms of an initial or renewed agreement." Thus, when HRS § 89-10.8(a)(1) is read in light of HRS § 89-11, it becomes apparent that HRS § 89-10.8(a)(1) excludes such impasses from being a grievance in order to preclude deadlocked parties from circumventing the impasse procedures by characterizing their dispute as a grievance.

HRS § 89-10.8(a) does not preclude the filing of a grievance where parties, like those here, have negotiated and agreed to the Supplemental Agreement, but disagree about the interpretation or implementation of its terms. The fact that one of the parties suggests that a term of the Supplemental Agreement, specifically Exhibit 1, was not agreed upon is not a sufficient grounds to remove this dispute from the grievance resolution procedures established by the parties pursuant to HRS § 89-10.8. Arbitrators commonly address issues of mutual and unilateral mistake involving otherwise complete collective bargaining agreements, see Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 18-40 to 43 (Kenneth May ed., 7th ed.

2012), and there is nothing in HRS § 89-10.8(a)(1) that suggests the legislature intended that a dispute of this kind would not be "grist in the mills of the arbitrators." See United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960).

Accordingly, the dispute here was not the type of impasse that HRS § 89-10.8(a)(1) was intended to preclude from being characterized as a grievance. The statutory provisions therefore do not preclude arbitration in the instant case.

/s/ Mark E. Recktenwald