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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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HAWAII STATE TEACHERS ASSOCIATION and UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO,
Plaintiffs-Appellants/Appellees/Cross-Appellants,

vs.

NEIL ABERCROMBIE[1], Governor, State of Hawaiʻi, BARBARA A. KRIEG[2], Interim Director, Department of Human Resources Development, State of Hawaiʻi; and KALBERT K. YOUNG, Director, Department of Budget and Finance, State of Hawaiʻi; Doe Defendants 1-10,
Defendants-Appellees/Appellants/Cross-Appellees.

NO. 30052

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 09-1-1372)

January 17, 2012

[1] During the pendency of this appeal, Neil Abercrombie, Governor of the State of Hawaiʻi, succeeded Linda Lingle. Thus, pursuant to Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 43(c), Abercrombie has been substituted automatically for Lingle in this case.

[2] Barbara A. Krieg, Interim Director of the Department of Human Resources Development, State of Hawaiʻi and Kalbert K. Young, Director, Department of Budget and Finance, State of Hawaiʻi have been substituted as parties to this appeal pursuant to HRAP 43(c).

DISSENTING OPINION BY ACOBA, J.

I would hold, as opposed to the majority, that (1) the constitutional question of whether the actions of then-Governor Linda Lingle (Governor Lingle)[3] in unilaterally imposing work-furloughs violated collective bargaining rights under article XIII, section 2 of the Hawaiʻi Constitution,[4] must be decided first by the circuit court of the first circuit (the court), and (2) the court, thus, properly exercised its jurisdiction in this case inasmuch as the complaint of Petitioners, on its face, raised only a violation of article XIII, section 2, and sought injunctive relief against the imposition of furloughs, matters over which the court had jurisdiction and the Hawaiʻi Labor Relations Board (HLRB) did not. In my view, then, the court was correct in exercising jurisdiction over the complaint rather than deferring to the HLRB.

I.

The foreseeable consequence of the majority's holding today is to require the parties[5] to engage in proceedings before

[3] Neil Abercrombie, Governor of the State of Hawaiʻi, succeeded Governor Linda Lingle. Although Governor Abercrombie has been substituted for Governor Lingle in this action, the opinion herein refers to Governor Lingle inasmuch as her actions are at issue.

[4] Article XIII, section 2 of the Hawaiʻi Constitution provides that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."

[5] Respondents include Neil Abercrombie, Governor, State of Hawaiʻi, Sunshine P.W. Topping, Director, Department of Human Resources Development, State of Hawaiʻi, and Kalbert K. Young, Director, Department of Budget and Finance, State of Hawaiʻi. Neil Abercrombie, Sunshine P.W. Topping and Kalbert K. Young were all substituted as parties to this action pursuant to Hawaiʻi Rules of Appellate Procedure Rule 43(c).

the HLRB that could be a nullity if Governor Lingle's actions were declared unconstitutional or could be unnecessary if her actions are declared constitutional. If the court determined that Governor Lingle's actions were unconstitutional, then the decision of the HLRB would have been inconsequential. For if Governor Lingle's actions "were unconstitutional, then all other issues, including any prohibited practice claims, are subsumed in that determination[.]" see Hawaiʻi Gov't Emp's Ass'n, AFSCME Local 152 v. Lingle (HEGA), 124 Hawaiʻi 197, 227, 239 P.3d 1, 31 (2010) (Acoba, J., dissenting). The HLRB's decision then would be reversed. The course chosen by the majority invites the possibility of unnecessary delay and a waste of judicial and party resources.

Such a possibility has been avoided in the past because this court wisely asserted jurisdiction over article XIII, section 2 claims without requiring the parties to first submit statutory claims to the HLRB. See Malahoff v. Saito, 111 Hawaiʻi 168, 181, 140 P.3d 401, 414 (2006) (considering whether the Governor's and Comptroller's plan to implement a payroll lag under HRS § 78-13[6] violated the constitutional right to organize for collective bargaining under article XIII, section 2 of the Hawaiʻi Constitution); United Pub. Workers, AFSCME, Local 646 v.

[6] HRS § 78-13 provides in pertinent part that "[u]nless otherwise provided by law, all officers and employees shall be paid at least semimonthly except that substitute teachers, part-time hourly rated teachers of adult and evening classes, and other part-time, intermittent, or casual employees may be paid once a month[.]"

Yogi, 101 Hawaiʻi 46, 47, 62 P.3d 189, 190 (2002) (deciding whether a statute that prohibited employees and unions from collectively bargaining over cost items for two years violated the employees' right to organize for the purpose of collective bargaining under article XIII, section 2 of the Hawaiʻi Constitution); see also HGEA, 124 Hawaiʻi at 218-21, 239 P.3d at 22-25 (Acoba, J., dissenting). Thus, a collateral consequence of the majority's decision is that it ignores the precedent of this court. Accordingly, I must respectfully disagree that the instant case must be presented first to the HLRB.

II.

The majority reaches its holding by recharacterizing Petitioners' complaint[7] as asserting claims under Chapter 89 of the HRS. However, no such claims were raised or referenced in their complaint. In their complaint, Petitioners alleged that Governor Lingle's actions violated article XIII, Section 2 of the Hawaiʻi Constitution, an issue over which the court had sole and exclusive jurisdiction.[8]

[7] HSTA filed an original complaint, listing itself as the sole plaintiff, on June 16, 2009. On June 18, 2009, HSTA filed a first amended complaint, listing itself and UPW as the plaintiffs. For purposes of this opinion, the first amended complaint is referred to as the complaint.

[8] In addition to claims arising article XIII, section 2 of the Hawaiʻi Constitution, Petitioners also alleged that (1) the reduction of accrued retirement benefits violated article XVI, section 2, which provides that "accrued [retirement] benefits shall not be diminished[,]" and (2) the actions of Respondents usurped the authority of the legislature in violation of Article III, section 1, which provides that "[t]he legislative power of the State shall be vested in a legislature." Inasmuch as the majority's disposition relies upon Petitioners' article XIII, section 2 claim, Petitioners' other constitutional claims are not discussed.

In Count I of their complaint, Petitioners allege a violation of article XIII, Section 2 of the Hawaiʻi Constitution. Petitioners allege the violation resulted in (1) "a unilateral reduction of wages and cost items . . . for all state employees[,]" (2) "a prohibition on negotiations regarding a three-day furlough for two years which affects their wages, hours, and other terms and conditions of employment which are core subjects of collective bargaining as determined in Yogi," and a "unilateral suspension for two years of the collective bargaining process as provided by law." (Emphases added.) To that end, Petitioners sought a "declaratory order and judgment" that the furlough "decision and actions by [Respondents] . . . constitutes a violation of . . . Article XIII, Section 2. . . of the Hawaiʻi State Constitution."

Article XIII, section 2 grants persons in public employment "the right to organize for the purpose of collective bargaining as provided by law." The phrase "collective bargaining as provided by law" has been construed by this court as "the ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment." Yogi, 101 Hawaiʻi at 53, 62 P.3d at 196; see also Malahoff, 111 Hawaiʻi at 188, 140 P.3d at 421 (recognizing that "implicit within article XIII, section 2 is the right to collectively bargain over wages, hours, and other terms and conditions of employment") (internal quotation marks and

citations omitted). It is clear that Petitioners alleged a violation of a constitutional "right to organize for the purpose of collective bargaining as provided by law[,]" as defined by Yogi and Malahoff. Thus, Petitioners properly pled a claim under article XIII, section 2 of the Hawaiʻi Constitution.

III.

The HLRB should not decide claims arising under Chapter 89 of the HRS before the court considers Petitioners' constitutional claim. The majority essentially holds that Petitioners were required to exhaust administrative remedies before the court could decide Petitioners' claims under article XIII, section 2 of the Hawaiʻi Constitution. But this court has said that "[t]he requirement that a party exhaust [its] administrative remedies 'comes into play where a claim is cognizable in the first instance by an administrative agency alone[.]'" Hawaii Insurers Council v. Lingle, 120 Hawaiʻi 51, 71-72, 201 P.3d 564, 584-85 (2008) (quoting Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawaiʻi 192, 202 n.18, 891 P.2d 279, 289 n.18 (1995) (quoting Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 168 (1987))) (emphasis added). Moreover, "'an aggrieved party need not exhaust administrative remedies where no effective remedies exist.'" Id. (quoting In re Doe Children, 105 Hawaiʻi 38, 59, 93 P.3d 1145, 1166 (2004)) (emphasis added). In the instant case, the constitutional claim is not cognizable by the HLRB and accordingly, "there were no

remedies for [Petitioners'] constitutional claim under [Chapter 89 of the HRS.]" Id. Therefore, even if Petitioners initially brought this case before the HLRB, the HLRB "would have been powerless to declare [Lingle's actions] . . . unconstitutional" and afford Petitioners relief. Id. Inasmuch as the HLRB could not provide a remedy with respect to Petitioners' claim under article XIII, section 2 of the Hawaiʻi Constitution, Petitioners could not have failed to exhaust administrative remedies.

Moreover, it is beyond dispute that only the courts have jurisdiction over the question presented in Petitioners' complaint -- whether Governor Lingle's acts violated article XIII, section 2 of the Hawaiʻi Constitution. See HOH Corp. v. Motor Vehicle Indus. Licensing Bd., 69 Haw. 135, 142, 736 P.2d 1271, 1275 (1987) ("The 'delicate and difficult office [of ascertaining] whether . . . legislation is in accordance with, or in contravention of, [constitutional] provisions' is confided to the courts (quoting United States v. Butler, 297 U.S. 1, 63 (1936)) (ellipsis and brackets in original). It is equally unquestioned that an administrative agency lacks the power to address the constitutional issue presented in this case. Id. ("Although an administrative agency may always determine questions about its own jurisdiction it generally lacks power to pass upon constitutionality of a statute.") (Internal quotation marks, brackets, and citation omitted.) Even the HLRB acknowledges this well-established doctrine. See In re UPW,

AFCSME, Local 646, and Lum, et al., Case No. CE-01-634 (Dec. No. 471) ("With regard to constitutionality, as an administrative agency the Board is without jurisdiction to address such questions."). This is because, "[a]n administrative agency can only wield powers expressly or implicitly granted to it by statute." Morgan v. Planning Dep't., County of Kauai, 104 Hawaiʻi 173, 184, 86 P.3d 982, 993 (2004) (internal quotation marks and citation omitted). In light of the foregoing, the court properly considered Petitioners' constitutional claim before any referral to the HLRB.

IV.

The majority unilaterally infers that because Petitioners allege in their complaint "that [Governor] Lingle violated Article XIII, Section 2 of the Hawaiʻi Constitution by imposing a unilateral reduction in wages, prohibiting negotiations regarding the furloughs, and by unilaterally suspending the 'collective bargaining process as provided by law[,]'" Petitioners' "complaint states claims relating to 'prohibited practices,'" over which the HLRB has exclusive original jurisdiction. Majority opinion at 9-10. A prohibited practice is defined, among other things, as:

> (5) Refus[ing] to bargain collectively in good faith with the exclusive representative as required in section 89-9;
> (6) Refus[ing] to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
> (7) Refus[ing] or fail[ing] to comply with any provision of [chapter 89 of the HRS];

> (8) Violat[ing] the terms of a collective bargaining agreement[.]

HRS § 89-13. But, as noted, Petitioners did not raise any statutory claims and the majority in fact acknowledges this. Majority opinion at 7 (stating that Petitioners "in the instant case did not raise statutory issues in their complaint"). The majority's approach is problematic for another reason.

Inasmuch as Petitioners did not raise any statutory claim under Chapter 89 of the HRS, it is unclear what the HLRB would decide with respect to "prohibited practices," on the referral proposed by the majority. The majority does not identify any factual allegations in Petitioners' complaint that "relat[e] to" "prohibited practices" that must first be decided by the HLRB. Majority opinion at 9. If it were to do so, the majority would be advancing arguments not made by Petitioners. While this court may "decide the legal limits within which the parties may act," the "choices they should make within those limits and what would be in their best interest to effectuate once the law is applied, is prudently and lawfully committed to them." County of Kauaʻi ex rel. Nakazawa v. Baptiste, 115 Hawaiʻi 15, 60, 165 P.3d 916, 927, 961 (2007) (Acoba, J., dissenting, joined by Duffy, J.). With all due respect, it is legally inconceivable that the majority could direct that Petitioners present claims before the HLRB not raised in their complaint.

V.

Finally, HGEA plainly does not support the majority's

conclusion that Petitioners' article XIII, Section 2 claim must be construed as a claim grounded in Chapter 89 of the HRS. In HGEA, the majority "read HGEA's . . . complaint as raising . . . two pertinent issues: (1) whether Governor Lingle's furlough plan constitutes "a mandatory subject of collective bargaining negotiation protected by article XIII, Section 2 of the Hawaii State Constitution[,]" and (2) whether the furlough constitutes "a mandatory subject of collective bargaining negotiation . . . as prescribed by HRS § 89-9(a)." HGEA, 124 Hawaiʻi at 207, 239 P.3d at 11 (emphasis in original). The HGEA majority went on to conclude that the HLRB "had 'exclusive original jurisdiction' over the statutory issues raised by HGEA, and that the circuit court should have deferred ruling on the constitutional issues until after the HLRB had the opportunity to resolve the statutory questions." Id. at 200, 239 P.3d at 4. In other words, HGEA holds that where a plaintiff does challenge an alleged practice as a violation of both Chapter 89 of the HRS and the constitution, the statutory claim must be addressed by the HLRB before the court can address the constitutional question.

In contrast, in this case, Petitioners raised only one of the "two" separate "issues" raised in HGEA -- the issue over which the court, not the HLRB, has jurisdiction. Id. at 207, 239 P.3d at 11. In light of HGEA's acknowledgment of claims grounded in Chapter 89 of the HRS and claims grounded in article XIII, section 2 of the Hawaiʻi Constitution as separate and distinct

from each other, the majority's reliance on that case is unwarranted.

VI.

For the reasons set forth herein, I respectfully dissent.

/s/ Simeon R. Acoba, Jr.

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