IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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NO. 30116
In the Matter of the Arbitration Between
UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO,
Union-Appellee,
v.
COUNTY OF HAWAIʻI - HOLIDAY PAY (2003-022B),
Employer-Appellant

AND

NO. 30421
In the Matter of the Arbitration Between
UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO,
Union-Appellant,
v.
COUNTY OF HAWAIʻI - HOLIDAY PAY (2003-022B),
Employer-Appellee

NOS. 30116 & 30421

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P. NO. 09-1-0237)

SEPTEMBER 29, 2011

FOLEY, PRESIDING J. AND LEONARD, J.;
GINOZA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY FOLEY, PRESIDING J.

This consolidated appeal arises out of an arbitration of an employer-employee labor dispute over holiday pay and benefits.

In appeal No. 30116, Employer County of Hawaii (County or Employer) appeals from the Judgment (Judgment) filed on September 16, 2009 in the Circuit Court of the First Circuit[1] (First Circuit Court). The First Circuit Court entered judgment in favor of Union United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Employee) and against County pursuant to the "Order Granting Union's Motion to Confirm Arbitration Award Dated July 9, 2009 as Modified on July 29, 2009," filed September 16, 2009.

On appeal, County contends the First Circuit Court erred when it

(1) found the First Circuit Court, rather than the Circuit Court of the Third Circuit (Third Circuit Court), to be the proper venue to hear UPW's July 17, 2009 "Motion to Confirm and to Modify and Correct Award by Arbitrator Michael Marr Dated July 9, 2009" (Motion to Confirm);

(2) confirmed the Final Arbitration Award (Arbitration Award) because the award violated public policy under Hawaii Revised Statutes (HRS) § 89-9(d)(7) (Supp. 2003); and

(3) confirmed the Arbitration Award because Arbitrator Michael Marr (the Arbitrator) exceeded his authority by ruling on the issue of collateral estoppel.

In appeal No. 30421, UPW appeals from the First Circuit Court's March 22, 2010 post-judgment "Order Granting Employer County of Hawaii's Motion to Stay Enforcement of Judgment Pending Appeal Filed on January 7, 2010" (Order Granting Motion to Stay).

UPW contends that

[1] The Honorable Sabrina S. McKenna presided.

(1) in a case involving or growing out of a labor dispute, a court lacks jurisdiction to stay enforcement of an arbitral award;

(2) under HRS § 380-4(3) (1993), a court lacks jurisdiction to withhold monetary payments to persons involved in a labor dispute;

(3) before a court has jurisdiction to issue an injunctive order under HRS Chapter 380, the court must meet certain procedural requirements; and

(4) judicial relief is unavailable under HRS § 380-8 (1993) to a party who seeks to undermine the arbitration process.

I.

A. ARBITRATION PROCEEDINGS

UPW is the collective bargaining representative for collective bargaining Unit 1 employees (Unit 1 employees). The July 1, 2003 Collective Bargaining Agreement (CBA) for Unit 1 employees requires the parties to resolve contract disputes via a grievance process culminating in arbitration of unresolved disputes. On August 22, 2003, UPW filed a class grievance on behalf of Unit 1 employees, alleging that County failed to pay holiday pay and benefits to employees who were on leaves of absence without pay. County denied the grievance, UPW submitted the case to arbitration, and the parties mutually selected the Arbitrator.

On March 24, 2008, UPW filed a Motion for Summary Disposition. The Arbitrator heard the motion on July 18, 2008 and on August 12, 2008 issued an "Order Granting in Part and Denying in Part [UPW's] Motion for Summary Disposition Filed on March 24, 2008," as corrected by order dated August 13, 2008. On January 30, 2009, the Arbitrator heard UPW's two motions: one for discovery sanctions, attorney's fees, and costs of discovery and one for a final arbitration award, back pay with interest, a cease and desist order, and attorney's fees. On June 1, 2009, the Arbitrator held a hearing on the parties' positions regarding

holiday pay for certain classes of employees. On July 9, 2009, the Arbitrator issued the Arbitration Award in favor of UPW and against County.

B. FIRST CIRCUIT COURT AND APPELLATE PROCEEDINGS

UPW filed the Motion to Confirm the Arbitration Award on July 17, 2009. On September 16, 2009, pursuant to the "Order Granting Union's Motion to Confirm Arbitration Award Dated July 9, 2009 as Modified on July 29, 2009," the First Circuit Court filed the Judgment, entering judgment in favor of UPW and against County. County filed a notice of appeal from the Judgment on October 12, 2009. County's appeal was docketed as No. 30116. On December 28, 2009, UPW filed a motion to dismiss the appeal for lack of appellate jurisdiction, which motion this court denied on March 15, 2010.

On January 7, 2010, County filed a post-judgment "Motion to Stay Enforcement of Judgment Pending Appeal" (Motion to Stay). On March 22, 2010, the First Circuit Court entered the Order Granting Motion to Stay. UPW filed a notice of appeal on April 5, 2010 from the Order Granting Motion to Stay. UPW's appeal was docketed as No. 30421.

This court filed an Order of Consolidation on December 23, 2010, consolidating appeal Nos. 30116 and 30421 under No. 30116 for disposition.

II.

A. ARBITRATION AWARD

The appellate court reviews "the circuit court's ruling on an arbitration award de novo" and is also "mindful that the circuit court's review of arbitral awards must be extremely narrow and exceedingly deferential." Tatibouet v. Ellsworth, 99 Hawaiʻi 226, 233, 54 P.3d 397, 404 (2002) (internal quotation marks, citation, and brackets omitted).

The appellate court's review of arbitration awards is guided by the following principles:

> It is well settled that because of the legislative policy to encourage arbitration and thereby discourage litigation, judicial review of an arbitration award is confined to the strictest possible limits. As such, a court has no business weighing the merits of the arbitration award. Indeed, the legislature has mandated that a court may vacate an arbitration award only on the four grounds specified in HRS § 658-9,[2] and may modify or correct an award only on the three grounds specified in HRS § 658-10. Therefore, HRS § 658-8 contemplates a judicial confirmation of the award issued by the arbitrator, unless the award is vacated, modified, or corrected in accord with HRS §§ 658-9 and 658-10.
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> Based upon the policy limiting judicial review of arbitration awards, [the Hawaiʻi Supreme Court] has held that parties who arbitrate a dispute assume 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. Where arbitration is made in good faith, parties are not permitted to prove that an arbitrator[] erred as to the law or the facts of the case.

Id. (internal quotation marks, citations, ellipses, and brackets in original omitted) (quoting Wayland Lum Constr., Inc. v. Kaneshige, 90 Hawaiʻi 417, 421, 978 P.2d 855, 859 (1999)).

B. SCOPE OF ARBITRATOR'S AUTHORITY

"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 and cannot exceed his power by deciding matters not submitted." Clawson v. Habilitat, Inc., 71 Haw. 76, 78, 783 P.2d 1230, 1231 (1989). "[W]here an arbitrator has exceeded his or her powers by deciding matters not submitted, [the Hawaiʻi Supreme Court] has held, pursuant to HRS § 658-9(4),[3] that the resulting arbitration award must be vacated." Tatibouet, 99 Hawaiʻi at 235, 54 P.3d at 406.

> When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved

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[2] HRS Chapter 658 was repealed in 2001 when the Hawaiʻi Legislature adopted Chapter 658A, based on the Uniform Arbitration Act. 2001 Haw. Sess. Laws Act 265, § 1 at 810 & § 5 at 820. The former § 658-9 (Vacating Award) is now § 658A-23, § 658-8 (Award and Confirming Award) was split into § 658A-19 and § 658A-22, and § 658-10 (Modifying or Correcting Award) is now § 658A-24.

[3] Now HRS § 658A-23(4). See supra note 2.

> by an arbitrator. Unless the arbitral decision does not draw its essence from the collective bargaining agreement, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 764, 103 S. Ct. 2177, 2182 (1983) (internal quotation marks, citations, and brackets omitted).

> Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator. [The second Arbitrator's] conclusions that [the first Arbitrator] acted outside his jurisdiction and that this deprived [the first Arbitrator's] award of precedential force under the contract draw their "essence" from the provisions of the collective bargaining agreement. Regardless of what our view might be of the correctness of [the second Arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it.

Id. at 765, 103 S. Ct. at 2183.

C. PUBLIC POLICY

A court may not enforce any contract "that is contrary to public policy." Id. at 766, 103 S. Ct. at 2183. It follows 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 United States Supreme Court has recognized a public policy exception to the general deference given arbitration awards. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42-43, 108 S. Ct. 364, 373-74 (1987) (to refuse to enforce an arbitration award, the alleged violation of public policy must be clearly shown).

> [T]he public policy exception requires a court to determine that (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. Hence, a refusal to enforce an arbitration award must rest on more than speculation or assumption.

Inlandboatmen's Union of the Pac., Hawaiʻi Region, Marine Div. of Int'l Longshoremen's & Warehousemen's Union v. Sause Bros., Inc., 77 Hawaiʻi 187, 193-94, 881 P.2d 1255, 1261-62 (App. 1994) (internal quotation marks, citations, ellipsis, and brackets in original omitted).

D. SUBJECT MATTER JURISDICTION

"Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo." Hawaiʻi Mgmt. Alliance Ass'n v. Ins. Comm'r, 106 Hawaiʻi 21, 26, 100 P.3d 952, 957 (2004) (internal quotation marks and citation omitted). "If a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid, therefore, such a question is valid at any stage of the case." Int'l Bhd. of Painters & Allied Trades, Drywall Tapers, Finishers & Allied Workers Local Union 1944, AFL-CIO v. Befitel, 104 Hawaiʻi 275, 281, 88 P.3d 647, 653 (2004) (internal quotation marks, citation, and brackets omitted).

E. STATUTORY INTERPRETATION

> "Questions of statutory interpretation are questions of law reviewable *de novo*." *Gump v. Wal-Mart Stores, Inc.*, 93 Hawaiʻi 417, 420, 5 P.3d 407, 410 (2000). In our review of questions of statutory interpretation, this court follows certain well-established principles, as follows:
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> > First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation 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. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
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> Awakuni v. Awana, 115 Hawaiʻi 126, 133, 165 P.3d 1027, 1034 (2007)[.]

Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawaiʻi 197, 201-02, 239 P.3d 1, 5-6 (2010).

III.

A. THE FIRST CIRCUIT COURT[4] DID NOT ERR WHEN IT FOUND THAT IT WAS THE PROPER VENUE FOR THE PROCEEDING TO CONFIRM THE ARBITRATION AWARD.

County contends that pursuant to HRS § 658A-27 (Supp. 2010),[5] the Third Circuit Court,[6] not the First Circuit Court, was the proper venue for the court proceeding to confirm the Arbitration Award. County argues that the CBA is silent on where an arbitration hearing should be held, County arbitration hearings on the merits are always held within the third judicial circuit, and County would never have consented to move an evidentiary hearing outside the third judicial circuit because most of the witnesses lived in that circuit.

County also contends that an arbitration hearing on the merits was never held and, therefore, under HRS § 658A-27, the proper venue was "any circuit in which an adverse party resides or has a place of business." County reasons that because it was the adverse party with its place of business in the third judicial circuit, the Third Circuit Court was the proper venue. Lastly, County claims the First Circuit Court had previously

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[4] This court takes judicial notice that the first judicial circuit is comprised of, inter alia, the island of Oahu. HRS § 603-1(1) (Supp. 2010).

[5] HRS § 658A-27 provides:

> **HRS §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.

[6] This court takes judicial notice that the third judicial circuit is comprised of the island of Hawaiʻi. HRS § 603-1(3) (Supp. 2010).

ruled that the Third Circuit Court was the proper venue to hear this case.

Section 15.18c of the CBA provides that "[t]he date, time and place of the hearing fixed by the Arbitrator shall be within twenty (20) calendar days from the selection of the Arbitrator." In its opening brief, County concedes that the Arbitrator has the authority to fix the date, time, and place of the hearing. Therefore, County's contention that the CBA was silent on where the arbitration hearing should be held is without merit.

County next argues that only pre-arbitration hearings were held, no arbitration hearing on the merits was conducted, and, thus, there was no arbitration.

Pursuant to HRS § 658A-27, when an arbitration hearing has been held, any application for judicial relief is made in the court where the arbitration hearing was held; "[o]therwise, the motion may be made in the court of any circuit in which an adverse party resides or has a place of business."

> Under well-established rules of statutory construction,
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> > where there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning.
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> Reefshare, Ltd. v. Nagata, 70 Haw. 93, 99, 762 P.2d 169, 173 (1988) (citation and quotation marks omitted).

United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Hanneman, 106 Hawaiʻi 359, 365, 105 P.3d 236, 242 (2005).

County reasons that because there was no evidentiary hearing on the merits, there was no arbitration. County cites to no authority for the proposition that an arbitration hearing only occurs when there is a hearing on the merits.

Arbitration is a method of dispute resolution entered into before a neutral third party agreed to by the disputing

parties and whose decision is binding. Black's Law Dictionary 119 (9th ed. 2009). The CBA provided that the arbitrator determines the issues to be resolved and conducts the hearing. CBA 15.18b & c. In the instant case, the parties mutually selected the Arbitrator. Following a telephone conference on November 26, 2007 with the parties, the Arbitrator faxed a letter to the parties identifying the agreements and stipulations made during the telephone conference. According to the letter, UPW agreed to file its motion for summary disposition on the finality of the 2003 Parnell[7] and 2007 Ikeda[8] awards on the issue of holiday pay by March 31, 200[8], and County agreed to file its memorandum in opposition to UPW's motion for summary disposition no later than April 30, 2008.

County was aware from the beginning of arbitration that the first, and perhaps only, issue to be arbitrated was whether County was estopped from arguing on the merits regarding holiday pay. County did not object on the basis of arbitrability or on any other basis, participated in two more telephone conferences, and submitted an opposition memorandum on the issue of collateral estoppel.

The Arbitrator set the hearing regarding UPW's motion for summary disposition for May 28, 2008 at the UPW Union Hall (UPW Hall) in Honolulu. On May 8, 2008, County asked for a continuance on the motion and, on May 30, 2008, confirmed a new date of July 18, 2008 for the hearing on UPW's motion.

The motion for summary disposition came on for hearing on July 18, 2008 at the UPW Hall with both parties and the Arbitrator present. On January 30, 2009, the Arbitrator

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[7] In re Arbitration Between State of Hawaii (State), University of Hawaii, Employer, and United Public Workers, AFSCME, Local 646, AFL-CIO, Union, Re: Class Grievance Involving DENIAL OF HOLIDAY PAY (Edward J. Parnell, Arbitrator, 2003) (referred to as 2003 Parnell).

[8] In re United Public Workers, AFSCME, Local 646, AFL-CIO, Union, and University of Hawaii, Employer, Grievance of Yong Mi Han (Walter Ikeda, Arbitrator, 2007) (referred to as 2007 Ikeda).

conducted a hearing via teleconference regarding a final arbitration award and motions for discovery sanctions. On June 1, 2009, the Arbitrator held a third hearing via telephone conference with UPW and County on holiday pay for certain classes of employees. Based on the hearings of January 30, 2009 and June 1, 2009, the Arbitrator issued the Arbitration Award on July 9, 2009.

UPW then filed the Motion to Confirm in the First Circuit Court. It was only at this point County contended, in its opposition memorandum to the motion, that because the merits had not been addressed, arbitration had not been held.

The facts indicate the Arbitrator fixed the place of the hearing, the arbitration was held in Honolulu over the course of three dates, County participated in person and by telephone, and, in the end, the Arbitration Award was issued based on the arbitration hearing.

County further argues that the First Circuit Court had previously ruled that the Third Circuit Court was the proper venue to hear this case. County misstates the First Circuit Court's ruling.

On December 22, 2008, the First Circuit Court (Judge McKenna presiding) heard a motion by UPW to consolidate another holiday pay arbitration case, Special Proceeding No. 08-1-0432 (SP No. 08-1-0432), with the instant case. The First Circuit Court determined that venue in the first circuit for the motion was improper because UPW was not the adverse party and ordered the case transferred to the Third Circuit Court. Notwithstanding that order, on January 13, 2009, in the First Circuit Court, the parties filed a stipulation to dismiss SP No. 08-1-0432 without prejudice.

On August 17, 2009, Judge McKenna heard UPW's Motion to Confirm. Judge McKenna stated that if SP No. 08-1-0432 were

still pending in the Third Circuit Court, then the Motion to Confirm would have been properly heard in the Third Circuit Court. However, since SP No. 08-1-0432 had been dismissed, the Motion to Confirm had been filed in a new and separate action. The judge determined that the instant arbitration was properly held in Honolulu, where the Arbitrator was located. Judge McKenna likened arbitration hearings to court proceedings, where the location of the proceeding is considered to be wherever the fact finder is, even if witnesses or parties participate via telephone or video conference from another location.

We conclude the First Circuit Court did not err in finding that the it was the proper venue to hear the Motion to Confirm.

B. THE FIRST CIRCUIT COURT DID NOT ERR IN CONFIRMING THE ARBITRATION AWARD WHEN IT FOUND THE AWARD DID NOT VIOLATE PUBLIC POLICY AND THE ARBITRATOR DID NOT EXCEED HIS SCOPE OF AUTHORITY.

Whether the First Circuit Court erred in confirming the Arbitration Award is a question of law reviewable de novo. Tatibouet, 99 Hawaiʻi at 233, 54 P.3d at 404. In this court's review of the First Circuit Court's ruling, we are cognizant of the extreme deference the First Circuit Court must give to its review of the arbitration award. Id.

County contends the Arbitration Award violated public policy by denying County's fundamental constitutional right to due process, improperly applying collateral estoppel to the 2003 Parnell Award in contravention of the CBA grievance process as outlined in CBA Section 15, and materially altering the CBA in disregard of employees' rights under HRS Chapter 89.

Under the fifth amendment of the United States Constitution and article 1, section 5 of the Hawaiʻi Constitution, a person shall not be deprived of life, liberty, or property without due process of law. Procedural due process requires a party be given notice and an opportunity to be heard.

Sandy Beach Defense Fund v. City Council of City & County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). County argues that because it was not a party to the 2003 Parnell Award, the application of collateral estoppel denied County its right to procedural due process.

Collateral estoppel prevents the relitigation of a fact or issue that was determined in a prior case between the same parties or their privies on a different cause of action. Bremer v. Weeks, 104 Hawaiʻi 43, 54, 85 P.3d 150, 161 (2004). Historically, collateral estoppel required mutuality and privity between the parties. Bernhard v. Bank of Am. Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942). Hawaiʻi courts have moved away from this traditional requirement to a modern doctrine that recognizes nonmutual defensive and offensive collateral estoppel. See Ellis v. Crockett, 51 Haw. 45, 54-57, 451 P.2d 814, 821-23 (1969); Morneau v. Stark Enters., Ltd., 56 Haw. 420, 423-24, 539 P.2d 472, 475 (1975); In re Herbert M. Dowsett Trust, 7 Haw. App. 640, 644-48, 791 P.2d 398, 401-04 (1990); Bush v. Watson, 81 Hawaiʻi 474, 479-81, 918 P.2d 1130, 1135-37 (1996).

In Dorrance v. Lee, 90 Hawaiʻi 143, 976 P.2d 904 (1999), the Hawaiʻi Supreme Court set forth a four-factor "collateral estoppel test" to determine whether or not collateral estoppel applies.

> We therefore hold that the doctrine of collateral estoppel bars relitigation of an issue 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 [hereinafter, the collateral estoppel test].

Id. at 149, 976 P.2d at 910. The party asserting collateral estoppel carries the burden of establishing that the factors have been met. Lingle v. Hawaiʻi Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO, 107 Hawaiʻi 178, 186, 111 P.3d 587, 595 (2005).

In Tradewind Ins. Co. v. Stout, 85 Hawaiʻi 177, 938 P.2d 1196 (App. 1997), this court considered equitable factors to ensure that the due process rights of a non-party to the prior decision were not violated when collateral estoppel was applied.

> [D]ue process requires that the estopped party have an identity or community of interest with, and adequate representation by, the losing party in the first action and reasonably expects to be bound by the prior adjudication. [*Safeco Ins. Co. of Am. v. Yon*, 796 P.2d 1040, 1044 (Idaho Ct. App. 1990).] When applying this rule, . . . various equitable factors . . . must be considered:
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> > Whether it would be generally unfair in the second case to use the result of the first case, whether assertion of the plea of estoppel by a stranger to the judgment would create anomalous [results], whether the party adversely affected by the collateral estoppel offers a sound reason why he should not be bound by the judgment, and whether the first case was litigated strenuously or with vigor.
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> Id. at 1045[.]

85 Hawaiʻi at 187-88, 938 P.2d at 1206-07 (brackets in original omitted).

In 2004, the Hawaiʻi Supreme Court expanded the doctrine of collateral estoppel when it issued its landmark decision in Exotics Hawaiʻi-Kona, Inc. v. E.I. Dupont De Nemours & Co., 104 Hawaiʻi 358, 90 P.3d 250 (2004), affirmatively recognizing the doctrine of nonmutual offensive issue preclusion.[9] The court held:

> In sum, inasmuch as (1) we have acknowledged that "it is not necessary that the party asserting issue preclusion in the second suit was a party in the first suit," *Bremer*, 104 Hawaiʻi at 54, 85 P.3d at 161, (2) we find [*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979),] and *Tradewind* to be persuasive, and (3) we believe that the use of nonmutual offensive issue preclusion will assist our courts in preventing unnecessary relitigation of issues and will promote consistency of judgments and judicial economy, we now explicitly adopt and recognize the doctrine of nonmutual offensive issue preclusion.

[9] In Exotics Hawaiʻi-Kona, the Hawaiʻi Supreme Court used the term "issue preclusion" instead of "collateral estoppel." 104 Hawaiʻi at 365 n.14, 90 P.3d at 257 n.14. For purposes of this opinion, the terms are used interchangeably.

Id. at 371, 90 P.3d at 263 (brackets in original omitted). In addition to reiterating the four-factor Dorrance test, the Exotics Hawaiʻi-Kona court held that nonmutual offensive "issue preclusion should be qualified or rejected when its application would contravene an overriding public policy or result in manifest injustice." 104 Hawaiʻi at 372, 90 P.3d at 264 (internal quotation marks and citation omitted).

In the "Order Granting in Part and Denying in Part [UPW's] Motion for Summary Disposition Filed on March 24, 2008," as corrected, the Arbitrator applied the Dorrance collateral estoppel test and determined the four-factor test was met. Specifically, the Arbitrator determined that (1) the issues decided in the 2003 Parnell Award were identical to the ones presented in the instant case, (2) the 2003 Parnell Award was a final judgment on the merits, (3) the issues decided were essential to the 2003 Parnell final judgment, and (4) the party against whom collateral estoppel was asserted (County) was a party or in privity with a party in the 2003 Parnell Award (the State of Hawaiʻi, University of Hawaiʻi).

The Arbitrator provided an extensive analysis of the fourth factor, privity, and based his finding of privity between County and the State of Hawaiʻi, University of Hawaiʻi on two principles. The first principle was the contractual relationship among the employer group members,[10] as well as with UPW, mandated by HRS Chapter 89 and established by the CBA. The Arbitrator noted that all the employer members and UPW were signatories to the CBA. Privity traditionally exists among parties to a contract. Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005).

[10] The members of the employer group included: The State of Hawaiʻi, the Judiciary, the City and County of Honolulu, County of Maui, County of Hawaii, County of Kauai, and Hawaii Health Systems Corporation.

The second principle the Arbitrator applied was the public policy exception of a pre-existing substantive legal relationship. This exception was recognized in a 2008 United States Supreme Court case addressing the split among the circuit courts regarding privity and the application of collateral estoppel. In Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161 (2008), the Supreme Court listed six categories of recognized public policy exceptions to nonmutual issue preclusion, including the consideration of a pre-existing legal relationship. Id. at 893-95, 128 S. Ct. at 2172-73.

The Arbitrator found that a pre-existing substantive legal relationship had existed since 1971 among the employer group members, as evidenced by the statutory mandate under Chapter 89 and the fifteen successive CBAs.

The Arbitrator was satisfied that the Dorrance factors had been met, state and federal case law supported the application of nonmutual offensive issue preclusion, and it was not against public policy to apply collateral estoppel -- in particular, nonmutual offensive issue preclusion.

We note that in a recent federal arbitration case, the United States Court of Appeals for the Ninth Circuit held that

> (1) arbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel, (2) arbitrators are entitled to determine in the first instance whether the prerequisites for collateral estoppel are satisfied, and (3) arbitrators possess broad discretion to determine when they should apply offensive non-mutual collateral estoppel.

Collins v. D.R. Horton, Inc., 505 F.3d 874, 882 (9th Cir. 2007) (internal quotation marks, citations, and brackets omitted).

Even if the Arbitrator applied the law incorrectly, when parties agree to arbitrate, they "assume 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." Tatibouet, 99 Hawaiʻi at 233, 54 P.3d at 404 (internal quotation marks and citation omitted). Where the arbitration

award was made in good faith, County is not "permitted to prove that the arbitrator[] decided wrong either as to the law or the facts of the case." Id. at 236, 54 P.3d at 407.

County argues that the Arbitrator exceeded his scope of authority when he decided the issue of collateral estoppel because that issue had not been submitted to him as required under Section 15.20b.4 of the CBA.

The CBA defines the scope of an arbitrator's authority in rendering his decision and award:

> 15.20 AWARD.
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> 15.20a. The Arbitrator shall render the award in writing no later than thirty (30) calendar days after the conclusion of the hearing(s) and submission of briefs provided, however, the submission of briefs may be waived by mutual agreement between the Union and the Employer.
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> 15.20b. The award of the Arbitrator shall be final and binding provided, the award is within the scope of the Arbitrator's authority as described as follows:
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> 15.20b.1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the sections of this Agreement.
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> 15.20b.2. The Arbitrator shall be limited to deciding whether the Employer has violated, misinterpreted, or misapplied any of the sections of this Agreement.
>
> 15.20b.3. A matter that is not specifically set forth in this Agreement shall not be subject to arbitration.
>
> 15.20b.4. The Arbitrator shall not consider allegations which have not been alleged in Steps 1 and 2.

(Emphasis added.)

Under Section 15.20b.4., the arbitrator may not consider allegations that were not alleged at Step 1 or Step 2 of the grievance process. However, the arbitrator may consider a request for summary disposition under HRS § 658A-15(b)(2) (Supp. 2010), which provides that, with notification to the other parties, a party may ask an arbitrator to "decide a request for summary disposition of a claim or particular issue."

Here, UPW filed a motion for summary disposition to estop County from re-litigating the issue of holiday pay. It was

within the Arbitrator's authority to consider the issue of collateral estoppel when addressing UPW's request for summary disposition, in keeping with the goal of promoting judicial economy, avoiding inconsistent results, and providing an efficient and less costly procedure. Exotics Hawaiʻi-Kona, 104 Hawaiʻi at 365, 90 P.3d at 257; Uniform Arbitration Act, § 15 cmt. 2 (2000).

County contends the Arbitrator exceeded his scope of authority in violation of public policy. County argues that the Arbitrator materially altered the CBA by making an award in one grievance final and binding on parties in another grievance. County asserts that this alleged material alteration of the CBA violated public policy by denying the employees their right to participate in the collective bargaining process.

County acknowledges that HRS Chapter 89 requires multi-party negotiations of the CBA, but contends the application of collateral estoppel will force the public employers to collectively administer the CBA, which materially alters the CBA. County suggests that the public employers will each need to monitor grievances filed against any of the other employers in the employer group to protect their own interests. County argues that this alleged joint administration violates the intent of Chapter 89 to "promote efficient and orderly government operations" and represents a material change in the CBA. County also argues that applying collateral estoppel impacts each employer's right to "[d]etermine methods, means, and personnel by which the employer's operations are to be conducted," as provided under HRS § 89-9(d)(7).

Because County and UPW agreed under the CBA to have an arbitrator rather than a judge resolve disputes, "it is the arbitrator's view of the facts and of the meaning of the contract that [County and UPW] have agreed to accept." United Paperworkers Int'l Union, 484 U.S. at 37-38, 108 S. Ct. at 370. In spite of County's public policy claim that the Arbitrator's

interpretation of the CBA represented a material alteration of the CBA, the essence of the argument is that the Arbitrator misinterpreted the CBA and the statute.

Insofar as County attempts to raise a public policy question, a court may not enforce a contract "that is contrary to public policy." W.R. Grace & Co., 461 U.S. at 766, 103 S. Ct. at 2183. It follows 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. To apply an exception to the deference generally given arbitration awards,

> the public policy exception requires a court to determine that (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. Hence, a refusal to enforce an arbitration award must rest on more than speculation or assumption.

Inlandboatmen's Union, 77 Hawaiʻi at 193-94, 881 P.2d at 1261-62 (internal quotation marks, citations, brackets, and ellipsis omitted).

County fails to clearly show a violation of an explicit, well-defined, and dominant public policy, which is necessary for a court to recognize the limited public policy exception to the general deference given to arbitration awards. "[C]ourts have no business overruling [the arbitrator] because their interpretation of the contract is different from [the arbitrator's]." United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," a court may not overturn his decision. United Paperworkers Int'l Union, 484 U.S. at 38, 108 S. Ct. at 371. The First Circuit Court did not err in confirming the Arbitration Award.

Because we affirm the Judgment of the First Circuit Court, thereby concluding this appeal, we consider UPW's

contention that the First Circuit Court erred in staying the enforcement of its Judgment pending appeal to be moot.

IV.

The Judgment filed on September 16, 2009 in the Circuit Court of the First Circuit is affirmed.

On the briefs:

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