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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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HAWAI'I STATE TEACHERS ASSOCIATION,
Union-Appellant,
v.
UNIVERSITY LABORATORY SCHOOL,
EDUCATION LABORATORY PUBLIC CHARTER SCHOOL LOCAL
SCHOOL BOARD, (GRIEVANCE OC-11-24) (2011-013),
Employer-Appellee

NO. CAAP-12-0000295

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPECIAL PROCEEDING NO. 11-1-0411)

APRIL 15, 2013

FOLEY, PRESIDING J., FUJISE AND REIFURTH, JJ.

OPINION OF THE COURT BY FOLEY, J.

Union-Appellant Hawai'i State Teachers Association (HSTA) appeals from the March 2, 2012 "Order Denying HSTA's Motion to Compel Arbitration Filed August 3, 2011" and the March 28, 2012 "Final Judgment" entered in the Circuit Court of the

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First Circuit¹ (circuit court) in favor of Employer-Appellee University Laboratory School, Education Laboratory Public Charter School Local School Board (collectively, ULS).

I. BACKGROUND

HSTA is the bargaining representative of teachers and other personnel of the State of Hawai'i Department of Education in bargaining unit 5. Pursuant to a June 30, 2009 Memorandum of Agreement (MOA), ULS became the employer of several bargaining unit 5 employees. The MOA provided that the conditions of employment would be defined according to the collective bargaining agreement between the HSTA and the State of Hawai'i Board of Education in effect at the time (Master Agreement). The MOA also required ULS and HSTA to negotiate a supplemental agreement and stated that the bargaining unit 5 employees' salaries would be subject to future supplemental agreements with ULS.

After executing the 2009 MOA, ULS and HSTA engaged in bargaining, and the parties signed a supplemental agreement executed on June 21, 2010 (Supplemental Agreement). Appendix XIV of the Supplemental Agreement states:

2. Designation on Salary Schedule

- Designation: an employee's appropriate salary placement designation (class and step) is made onto the unit 5 master agreement salary schedule. For step placement, parties shall use the attached chart (Exhibit 1) indicating negotiated step increments for unit 5 members.

The Master Agreement salary schedule referenced above identified the different salary amounts for each step but did not provide any information about the teachers' step placement. Exhibit 1, which purportedly contained information about the teachers' step placement, was not attached to the Supplemental Agreement when the parties executed the agreement.

¹ The Honorable Patrick W. Border presided.

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On October 29, 2010, HSTA emailed the ULS principal stating it had "inadvertently omitted 'Exhibit 1' for Appendix XIV. . . . This should be included as part of the [Supplemental Agreement]." ULS's principal responded that the Exhibit 1 attached to HSTA's email had not been formally presented to ULS's bargaining team during negotiations over the Supplemental Agreement's terms. He stated he had assumed that Appendix XIV's reference to Exhibit 1 referred to a salary table used by one of HSTA's negotiation team members during negotiations. During the parties discussions over the next several months, ULS maintained the parties did not reach an agreement as to the contents of Exhibit 1 of Appendix XIV, and ULS demanded further negotiation.

The record indicates the parties did not engage in further bargaining. On April 13, 2011, HSTA filed a grievance asserting that Exhibit 1 and Appendix XIV had been bargained in good faith and that ULS violated the Supplemental Agreement by repudiating Exhibit 1. On May 31, 2011, HSTA informed ULS that the HSTA Board of Directors had approved its grievance for arbitration.

On April 28, 2011, ULS filed a prohibited practice complaint with the Hawai'i Labor Relations Board (HLRB), alleging HSTA had engaged in prohibited practices by attempting to unilaterally insert unbargained-for contract terms, in violation of Hawaii Revised Statutes (HRS) §§ 89-13(b)(1), (2), (4), and (5) (2012 Repl.), and by filing an illegal grievance disputing the terms of an initial agreement, in violation of HRS § 89-10.8(a)(1) (2012 Repl.). HSTA filed a motion to dismiss the complaint, which the HLRB denied. The HLRB's adjudication of the prohibited practice complaint was pending at the time of the circuit court proceedings on appeal.

On August 3, 2011, HSTA filed as a special proceeding a motion to compel arbitration of its grievance in the circuit court. On March 2, 2012, the circuit court entered its "Order

Denying HSTA's Motion to Compel Arbitration Filed August 3, 2011." On March 28, 2012, the circuit court entered its "Final Judgment" in ULS's favor.

HSTA filed a timely notice of appeal on March 29, 2012. On appeal, HSTA contends the circuit court erred in denying its motion to compel arbitration.

II. STANDARD OF REVIEW

A petition to compel arbitration is reviewed *de novo*. The standard is the same as that which would be applicable to a motion for summary judgment, and the trial court's decision is reviewed using the same standard employed by the trial court and based upon the same evidentiary materials as were before it in determination of the motion.

Sher v. Cella, 114 Hawai'i 263, 266, 160 P.3d 1250, 1253 (App. 2007) (quoting Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 524-25, 135 P.3d 129, 133-34 (2006)).

III. DISCUSSION

Both the Master Agreement and the Supplemental Agreement include provisions for filing and processing grievances through binding arbitration. The two agreements state, in pertinent part:

ARTICLE V - GRIEVANCE PROCEDURE

A. **DEFINITION.** Any claim by [HSTA] or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

. . . .

H. **ARBITRATION.** If a claim made by [HSTA] or teacher has not been satisfactorily resolved, [HSTA] may present a request for arbitration of the grievance[.]

. . . .

e) If the Employer disputes the arbitrability of any grievance submitted to arbitration, the arbitrator shall first determine the question of arbitrability. If the arbitrator finds that it is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

Because the existence of an agreement to arbitrate is not in dispute, and because the agreements state that disputes over the arbitrability of grievances must be submitted to arbitration, HSTA contends HRS Chapter 658A, the Uniform Arbitration Act (Supp. 2012), mandates that the circuit court compel arbitration. See In re United Pub. Workers, AFSCME, Local 646, AFL-CIO, 124 Hawai'i 372, 378, 244 P.3d 609, 615 (App. 2010) ("When agreements reserve questions of arbitrability for the arbitrator, . . . the court may only consider [whether there is a valid agreement to arbitrate].").

The circuit court's order does not specify its grounds for denying HSTA's motion to compel arbitration. However, the hearing transcript indicates the court determined the motion was premature. The court concluded it would be more temperate to wait until the HLRB issued a ruling on ULS's prohibited practice complaint, noting the possibility of overlap and conflicts between an arbitration and the ongoing HLRB proceedings. The circuit court did not, however, make a ruling on its jurisdiction to compel arbitration or on the arbitrability of the dispute. We conclude the circuit court neither exceeded its proper role nor erred in concluding that arbitration was premature until the HLRB ruled on ULS's complaint.

Although public policy favors arbitration, arbitration is ultimately a matter of contract, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Sher, 114 Hawai'i at 267, 160 P.3d at 1254. Here, the agreements calls for arbitration of union grievances only, not other controversies, and grants to the arbitrator jurisdiction to determine the arbitrability of grievances only. The agreements' arbitration provisions comply with HRS § 89-10.8(a), which states: "A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and

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binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement."

The existence of a grievance, however, is conditioned on a finding that the parties negotiated the terms of the initial Supplemental Agreement in good faith. HRS § 89-10.8(a)(1) ("A dispute over the terms of an initial or renewed agreement shall not constitute a grievance[.]"). Thus, an arbitrator cannot determine whether there has been a violation of the Supplemental Agreement without first considering whether the initial terms, specifically the contents of Exhibit 1, had ever been properly negotiated in the first place.

Consequently, the issue which HSTA wishes to compel to arbitration is closely related to the issues raised in ULS's prohibited practice complaint. ULS's prohibited practice complaint alleges HSTA failed to bargain in good faith and requests an order declaring that Exhibit 1 was never properly negotiated. The complaint also challenges the validity of HSTA's grievance, alleging the grievance violates HRS § 89-10.8(a)(1) by improperly attempting to give an arbitrator subject matter jurisdiction to adjudicate a bargaining dispute over terms that have not yet been negotiated into the initial Supplemental Agreement.

Pursuant to HRS § 89-14 (2012 Repl.), the HLRB has exclusive original jurisdiction over the issues raised in ULS's complaint. See also Hawai'i Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 204, 239 P.3d 1, 8 (2010) ("[T]he legislature clearly intended for the HLRB to have exclusive original jurisdiction over prohibited practice complaints[.]"). In this case, the HLRB has already chosen to exercise its exclusive jurisdiction over ULS's complaint, as indicated by its denial of HSTA's motion to dismiss the complaint.

We conclude HSTA's motion to compel arbitration implicates technical and policy issues within the jurisdiction of an administrative agency with statutory and comprehensive regulatory authority, and in such cases, a court may apply the primary jurisdiction doctrine and defer to the agency before proceeding. Fratinaro v. Employees' Ret. Sys. of State of Hawai'i, 121 Hawai'i 462, 468, 220 P.3d 1043, 1049 (2009). A court's application of the primary jurisdiction doctrine does not indicate that it lacks jurisdiction. Id. Contrary to HSTA's assertions, therefore, the circuit court did not ignore Hawai'i's policy favoring arbitration, nor did it improperly decide the underlying issue of arbitrability when it denied HSTA's motion to compel arbitration.

Although HSTA correctly asserts that parallel proceedings may be pursued, under these circumstances, compelling arbitration likely would have produced conflicting or redundant judgments and wasted effort and expense. On the other hand, the HLRB's resolution of ULS's statutory claims will not require the HLRB to adjudicate the interpretation or application of the terms. Furthermore, ULS does not dispute that if the HLRB decides that HSTA did not violate its statutory duties under HRS Chapter 89 and that the grievance is valid, any remaining issues would be subject to arbitration. Therefore, we agree with the circuit court's assessment that HSTA's motion to compel arbitration was premature.

However, we conclude the circuit court exceeded its authority when it dismissed the action. "Where the doctrine of primary jurisdiction applies, the court has the discretion either to retain jurisdiction and stay the proceedings or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Pavsek v. Sandvold, 127 Hawai'i 390, 402, 279 P.3d 55, 67 (App. 2012) (emphasis added; internal quotation marks and brackets omitted). Based on the record we cannot

determine whether the circuit court considered whether "unfair disadvantage" would result from its dismissal. Accordingly, we remand for determination of whether a stay or dismissal without prejudice is appropriate.

IV. CONCLUSION

For the foregoing reasons, we vacate the March 28, 2012 "Final Judgment" entered in the Circuit Court of the First Circuit and remand this case with instructions to consider whether a stay or dismissal without prejudice would be the appropriate remedy under the primary jurisdiction doctrine.

On the briefs:

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