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NO. CAAP-22-0000545
(Consolidated with No. CAAP-22-0000534)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LINDA S. MARTELL, Plaintiff-Appellant-Appellee, v.
EMPLOYEES' RETIREMENT SYSTEM, STATE OF HAWAIʻI and
BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM,
STATE OF HAWAIʻI, Defendants-Appellees-Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 1CCV-21-0001449)

SECOND AMENDED ORDER GRANTING STAY PENDING APPEAL
(By: Leonard, Presiding Judge, McCullen and Chan, JJ.)

This Second Amended Order Granting Stay Pending Appeal amends the Order filed herein on December 15, 2022, in conjunction with our granting of Plaintiff-Appellant-Appellee Linda S. Martell's (**Martell's**) motion to publish the December 15, 2022 Order.

On October 31, 2022, Defendants-Appellees-Appellants the Employees' Retirement System, State of Hawaiʻi, and the Board of Trustees of the Employees' Retirement System, State of Hawaiʻi (**Board**) (collectively, **ERS**), filed a Motion for Stay Pending Appeal (**Motion for Stay**). On November 6, 2022, Martell filed a Memorandum in Opposition to [the Motion for Stay]. ERS requests

a stay pending appeal of the Circuit Court of the First Circuit's (**Circuit Court**) September 9, 2022 Amended Final Judgment (**Amended Judgment**), which reversed the Board's November 17, 2021 Final Decision. The Circuit Court ordered that: (1) the case be remanded to the Board; (2) that Martell should be credited for certain additional service as a per diem judge; and (3) the Board was required to adjust Martell's pension accordingly.

To be clear, this is not a decision on the merits of the appeal from the Amended Judgment. The issue before this court is whether ERS should be granted a stay pending review by a merits panel and a decision on the merits. This issue is governed by the Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 8, which provides in relevant part:

> **Rule 8. STAYS, SUPERSEDEAS BONDS, OR INJUNCTIONS PENDING APPEAL.**
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> **(a) Motions for stay, supersedeas bond or injunction in the appellate courts.** A motion for stay of the judgment or order in a civil appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal shall ordinarily be made in the first instance to the court or agency appealed from.
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> A motion for such relief on an appeal may be made to the appellate court before which the appeal is pending or to a judge thereof, but, if the appeal is from a court, the motion shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the relief the applicant requested, with the reasons given by the court appealed from for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits, declarations, or other sworn statements or copies thereof. With the motion shall be filed such copies of parts of the record as are relevant. Notice of the motion shall be given to all parties. The motion shall be filed with the appellate clerk and should ordinarily be considered by the appellate court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge or justice of the court. If the motion for such relief is from an agency, the motion shall comply with statutory requirements, if any.

> **(b) Stay may be conditioned upon giving of bond; proceedings against sureties.** Relief available in the appellate courts under this rule may be conditioned upon the filing of a bond or other appropriate security in the court or agency appealed from. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, the bond, stipulation, or undertaking shall comply with applicable statutes, and each surety submits to the jurisdiction of the court or agency appealed from and irrevocably appoints the clerk of the court as the surety's agent upon whom any documents affecting liability on the bond or undertaking may be served. Liability may be enforced on motion in the court or agency appealed from without the necessity of an independent action. The motion and such notice of the motion as the court or agency prescribes may be served on the clerk of the court appealed from, who shall forthwith mail copies to the sureties if their addresses are known.

Here, ERS satisfied the ordinarily-required procedures stated in HRAP Rule 8(a). ERS first filed a motion for stay in the Circuit Court. The Circuit Court denied that motion. The Motion for Stay filed in this appellate court states the reasons for the relief requested and the facts relied upon, and is supported by a sworn declaration and exhibits attached thereto.

ERS argues, in the first instance, that it is entitled to a stay as a matter of right because it is a government agency, based on Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 62(e), which states:

> (e) **Stay in favor of the state, etc.** When an appeal is taken by or at the direction of the State or a county, or by an officer or agency of the State or a county, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

We recognize that ERS is a State agency. See Hawaii Revised Statutes (**HRS**) § 26-8 (Supp. 2021). However, we decline to adopt ERS's interpretation of HRCP Rule 62(e). Rule 62(e) provides that <u>when</u> a State agency appeals, **<u>and</u>** the judgment is stayed, *then* no bond or other security is required. The rule

does not mandate that every judgment is automatically required to be stayed when a State agency appeals.[1]

Moreover, HRCP Rule 62 is applicable to requests for stay filed in the circuit courts, whereas HRAP Rule 8 governs requests made to this court." See Kelepolo v. Fernandez, 148 Hawaiʻi 182, 188, 468 P.3d 196, 202 (2020) ("In our circuit courts, a stay of proceedings to enforce a judgment is governed by HRCP Rule 62"); id. at 189, 468 P.3d at 203 ("In the Hawaiʻi appellate courts, a motion for stay of judgment is governed by HRAP Rule 8."). HRAP Rule 8 does not contain language similar to the language set forth in HRCP Rule 62(e). While we are guided by the considerations applicable in stay motions before the circuit court, we exercise our discretion to grant a stay under HRAP Rule 8. Kelepolo, 148 Hawaiʻi at 190, 468 P.3d at 204.

Accordingly, we reject ERS's argument that it is entitled to a stay as a matter of right, without a bond.

ERS further argues, in the alternative, that HRCP Rule 62(c) is similar to Rule 62(c) of the Federal Rules of Civil Procedure, and that pursuant to the balancing test applied in the federal courts, a stay should be granted without bond. It is unnecessary for this court to look to extra-jurisdictional case law interpreting a rule that is similar to the rule applicable in

[1] ERS points to a footnote in Kelepolo v. Fernandez, 148 Hawaiʻi 182, 189 n.9, 468 P.3d 196, 203 n.9 (2020), in which the Hawaiʻi Supreme Court "noted that the circuit court is required to grant a stay without bond when the State or county is the appellant requesting a stay of enforcement of the judgment. HRCP Rule 62(e)." In context, it is clear that this dictum (Kelepolo did not involve an appeal by the State) was intended to comment on a request for stay before the circuit court, and more importantly, to address whether or not a bond could or should be required by a circuit court, as opposed to whether the stay itself is mandatory. Later footnotes in Kelepolo cite, *inter alia*, HRCP Rule 62(g) and note that the circuit court rules do not restrict an appellate court's discretion in granting a stay. 148 Hawaiʻi at 190 n.13 & n.14, 468 P.3d at 204 n.13 & n.14.

our circuit courts, as we have previously established a balancing test in the context of an injunction or stay pending appeal pursuant to HRAP Rule 8.

In Stop Rail Now v. DeCosta, 120 Hawaiʻi 238, 243, 203 P.3d 658, 663 (App. 2008) (citation omitted), we held that the appropriate balancing test is: "(1) whether the moving party has shown that it is likely to succeed on the merits; (2) whether the balance of irreparable harms favors the issuance of an injunction; and (3) whether the public interest supports granting such an injunction." We noted that the weight to be attached to the various elements of this test may vary, and that a strong showing on the merits of a case may reduce the showing necessary on the other elements, whereas a strong showing of irreparable harm may reduce the weight given to preliminary assessment of the merits. Id. at 244, 203 P.3d at 664. Similarly, a strong public interest in maintaining the status quo pending appeal may carry greater weight in some circumstances. Cf. Kelepolo, 148 Hawaiʻi at 193, 468 P.3d at 207.

Here, ERS argues that it has a strong likelihood of prevailing on the merits for various reasons. First, citing two supreme court cases and the internal management exception in HRS § 91-1 (Supp. 2021), ERS argues that the Circuit Court erred in determining that certain memoranda dated March 6, 1990, and October 20, 2017, constituted improper rulemaking. It is unclear to this motions panel whether ERS will prevail on this complex and weighty issue after all arguments and authorities are fully considered by the merits panel; we decline to grant or deny

relief based on our preliminary assessment of the merits of the parties' abbreviated arguments presented on this issue.

ERS further argues that, even if both the March 6, 1990 and October 20, 2017 memoranda are rules, the relief awarded by the Circuit Court was improper. The Circuit Court's rationale in ordering service credit to Martell from October 1, 2017, to December 31, 2021, is unclear. The Circuit Court found that the March 6, 1990 memorandum was improper rulemaking. However, it appears from the Order Resolving Appeal that the Circuit Court relied at least in part upon the March 6, 1990 memorandum as the basis for providing Martell with additional service credit.[2] The Circuit Court's Order Resolving Appeal did not explain this inconsistency. While our assessment is not intended to restrict the merits panel's full and independent review of this issue, and the related issues as to proper calculation of Martell's pension based on certain service from November 16, 2017, to December 31, 2021, it preliminarily appears that ERS may prevail on the argument that the Circuit Court's Order Resolving Appeal should be vacated, at least in part. However, we decline to grant or deny relief solely based on our preliminary assessment of the merits of the parties' abbreviated arguments presented on this issue.

We next consider whether the balance of irreparable harms favors the issuance of a stay pending appeal. ERS contends that irreparable harm may result absent a stay pending appeal

[2] The Circuit Court ruled, *inter alia*, "that Martell should be credited for service from October 1, 2017 to December 31, 2021, for months meeting the requirements of the March 6, 1990 Memorandum, as previously interpreted, and to adjust Martell's pension accordingly."

because if the ERS plan is administered in a manner inconsistent with HRS chapter 88, as well as the Internal Revenue Code, the ERS plan's status as a qualified government plan could be at risk. ERS submits that if it pays additional benefits to Martell, inconsistent with her eligibility to those benefits, ERS's tax qualified status could be jeopardized, which could result in additional costs and penalties not only to the plan, but also its participants, including non-party ERS members and beneficiaries. ERS's contention is supported by, *inter alia*, declarations and a 1959 Internal Revenue Code determination that the ERS plan meets the requirements of the Internal Revenue Code, but inviting the ERS's attention to the fact that the law concerns not only the form of the plan, but also its effect in operation. While this letter determination is arguably thin gruel in isolation, ERS further points to Internal Revenue Service decisions disqualifying plans for failure to follow eligibility criteria.

Martell argues that the balance of harms favors her because she is retired and reliant on her retirement benefits, and that if a stay is granted, she will have to live her post-retirement years without the additional benefits. She suggests that her interests will not be adequately protected because the ERS will not be required to post a bond. Martell provides no declaration or other evidence supporting her assertion of reliance on the benefits or supporting her assertions concerning the impact of not receiving the additional benefits pending resolution of this appeal. There is no evidence or information concerning the amount of the disputed benefits.

ERS submits that Martell is retired as of December 31, 2021, and that she will continue to receive the undisputed amount of her retirement benefits during the appeal.

On balance, we conclude that the weight of potential harms favors the ERS. While there is no certainty that the ERS plan or non-party plan participants will be harmed by adverse tax consequences or unnecessary costs to the plan if disputed benefits were paid to Martell, Internal Revenue Service action against the plan could cause serious and potentially irreparable harm to many current and retired public workers in Hawaiʻi. On the other hand, there is nothing in the record concerning whether and the extent to which Martell might be harmed by the delay in receiving unquantified, adjusted benefit amounts. We can presume that receiving additional moneys during the pendency of the appeal would be better for Martell than not receiving additional moneys, but there is no basis for determining harm will arise from that difference with any reasonable certainty. Finally, we reject Martell's suggestion that her ultimate ability to receive the additional benefits is in jeopardy because ERS will not be required to post a bond. There is not a scintilla of evidence to suggest that the ERS will not be willing and able to pay Martell additional benefits due, if she prevails on appeal.

Finally, the public interest weighs heavily in favor of a stay. There is substantial public interest in having the ERS operate in accordance with HRS chapter 88 and the Internal Revenue Code. Public policy also favors protecting pension plan assets.

It appears to this court that the ERS has the present financial ability to facilely respond to the payment directives in the Amended Judgment. Shanghai Inv. Co. Inc. v. Alteka Co. Ltd., 92 Hawaiʻi 482, 486, 503-04, 993 P.2d 516, 520, 537-38 (2000), overruled on other grounds by Blair v. Ing, 96 Hawaiʻi 327, 331 n.6, 31 P.3d 184, 188 n.6 (2001). Therefore, and in light of the policy considerations inherently underlying HRCP Rule 62(e), the ERS will not be required to post a supersedeas bond to stay the Amended Judgment.

For these reasons, the Circuit Court's September 9, 2022 Amended Judgment is stayed pending the final disposition of this appeal.

DATED: Honolulu, Hawaiʻi, April 5, 2023.

/s/ Katherine G. Leonard
Presiding Judge

/s/ Sonja M.P. McCullen
Associate Judge

/s/ Derrick H.M. Chan
Associate Judge