

DAVID Y. IGE
GOVERNOR



JAMES K. NISHIMOTO
DIRECTOR

CINDY S. INOUE
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

February 12, 2016

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
For Hearing on Tuesday, February 16, 2016
10:00 a.m., Conference Room 309
By

JAMES K. NISHIMOTO
DIRECTOR
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT

House Bill No. 2351
Relating to Services Performed by Civil Service Employees

CHAIRPERSON NAKASHIMA, VICE CHAIR KEOHOKALOLE AND MEMBERS OF
THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT:

The Department of Human Resources Development (DHRD) **supports** H.B. No. 2351.

H.B. No. 2351 is submitted for the purpose of complying with: (1) the Hawaii Supreme Court's Konno decision regarding privatization, and (2) an agreement entered into with the United Public Workers (UPW) in connection with various litigation arising out of the Konno decision.

In 1997, the Hawaii Supreme Court ruled in the case Konno v. Hawaii County that the county violated civil service laws and merit principles when it hired private contractors to perform landfill operations work. The Court held that civil service laws required that only civil service employees perform work historically and customarily performed by civil service employees.

Subsequent to the Konno case, the Legislature enacted Act 90 (SLH 2001). Act 90, part II, allowed the State to contract for services historically and customarily performed by civil service employees if equivalent or better services could be provided at lower cost. Act 90, part II, however, was repealed on June 30, 2007.

Shortly after Act 90, part II, was repealed, the UPW sought to have the State and all other jurisdictions terminate all of their contracts. The UPW later filed class grievances in 2007 and prohibited practice complaints in 2009 against the State and

other jurisdictions, thereby initiating years of litigation.

In June 2015, the State Executive Branch and the UPW entered into a letter of understanding through court-ordered mediation which placed a moratorium on all pending litigation. In compliance with the letter of understanding, DHRD has implemented a process of reviewing departmental contracts for work historically and customarily performed by UPW-type employees to confirm that there is a valid basis for exemption from civil service. The letter of understanding also contemplates that departments will identify positions and/or other resources needed in order to enable contracted work to be done by civil service employees, and to seek such positions and/or other resources from the legislature. This bill is an effort to comply with this requirement.

H.B. No. 2351 seeks authorization and funding for civil service positions and equipment needed by the Executive Branch departments to provide UPW-type services to the public through civil service employees rather than through contractors. Specifically, the bill seeks authorization and funding for 30 positions and associated equipment for the Department of Public Safety, Department of Land and Natural Resources, Department of Defense, and Department of Accounting and General Services. Should these positions be authorized and funded, it is anticipated that funds currently being used to contract for the relevant services will be diminished. We note, however, that a transition period will be required to allow these departments to establish, recruit for, and fill the positions, as well as to purchase any needed equipment. During this transition period, contract funds will still be required in order for the departments to continue to provide needed services to the public without interruption.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR OF
HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
LABOR & PUBLIC EMPLOYMENT**

**Tuesday, February 16, 2016
10:00 AM
State Capitol, Conference Room 309**

**In consideration of
HOUSE BILL 2351
RELATING TO SERVICES PERFORMED BY CIVIL SERVICE EMPLOYEES**

House Bill 2351 proposes to authorize the establishment of civil service positions and appropriates associated general and non-general funds to enable the Executive Branch departments to provide services to the public with civil service employees rather than through contracting the private sector. **The Department of Land and Natural Resources (Department) strongly supports this Administration measure.**

The Department supports this pilot project and believes that it will assist in providing facilities maintenance support for our Division of Boating and Ocean Recreation on Oahu and Division of State Parks on Kauai. However, given the wide geographic range and varying needs at state parks, forests and small boat harbors across the state, the Department believes that multiple roving teams will need to be established on each island to effectively cover the services currently performed by contract with the private sector. Such specialized services include tree trimming, plumbing, electrical and vehicle maintenance that are not needed on a full-time basis and which are more cost-effective when performed by contract with the private sector.

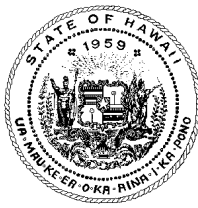
Thank you for your consideration of this testimony.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

NOLAN P. ESPINDA
DIRECTOR

Cathy Ross
Deputy Director
Administration

Jodie F. Maesaka-Hirata
Deputy Director
Corrections

Shawn H. Tsuha
Deputy Director
Law Enforcement

No. _____

TESTIMONY ON HOUSE BILL 2351
RELATING TO SERVICES PERFORMED
BY CIVIL SERVICE EMPLOYEES

By
Nolan P. Espinda, Director

House Committee on Labor & Public Employment
Representative Mark M. Nakashima, Chair
Representative Jarrett Keohokalole, Vice Chair

Tuesday, February 16, 2016; 10:00 a.m.
State Capitol, Room 309

Chair Nakashima, Vice Chair Keohokalole, and Members of the Committee:

The Department of Public Safety (PSD) **supports** House Bill (HB) 2351, which seeks to authorize permanent civil service position counts and associated funds out of the general and non-general funds of the State of Hawaii for these positions.

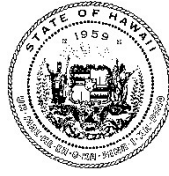
HB 2351 would provide PSD the following four (4) positions:

- One (1) Plumber II position to provide services for Oahu correctional facilities
- One (1) Electrician II position to provide services for Oahu correctional facilities
- One (1) Plumber II position to provide services for Hawaii Island correctional facilities
- One (1) Electrician II position to provide services for Hawaii Island correctional facilities

Due to limited staff to perform plumbing and electrical work, PSD has been contracting with private entities for these services. The four (4) additional positions and funding will improve the Department's ability to maintain safe and secure facilities.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR



DOUGLAS MURDOCK
Comptroller

AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY
OF
DOUGLAS MURDOCK, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT
ON
FEBRUARY 16, 2016

H.B. 2351

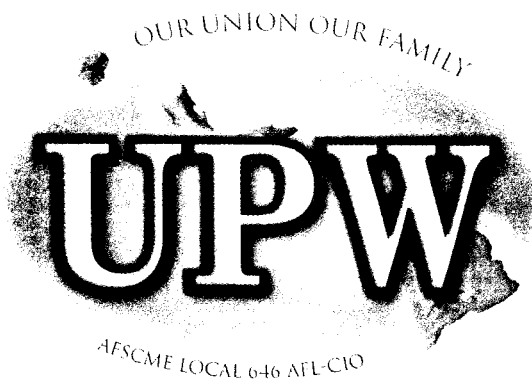
RELATING TO SERVICES PERFORMED BY CIVIL SERVICE EMPLOYEES

Chair Nakashima and members of the Committee, thank you for the opportunity to submit written testimony on H.B. 2351. The Department of Accounting and General Services supports H.B. 2351 (the measure).

We support this measure as it reflects the State's commitment to comply with the Hawaii Supreme Court's ruling in the Konno versus Hawaii case while concurrently recognizing the State's duty to provide essential services to the public and State employees.

Specifically for the Department of Accounting and General Services, the bill requests one (1) position on Maui, four (4) positions on Oahu, vehicles, supplies, and equipment required by these employees to carry out their responsibilities to eliminate contracts for these services. The responsibilities of these positions and equipment include the removal and disposal of trash (from our buildings), cleaning and resupply of restrooms, and the overall upkeep of our facilities and grounds. These are essential functions to meet minimum health requirements that make our buildings safe for the public and our employees.

Thank you for the opportunity to submit written testimony on this measure.



The House of Representatives
The Twenty-Eighth Legislature
Regular Session of 2016

COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

Representative Mark M. Nakashima, Chair
Representative Jarrett Keohokalole, Vice-Chair

DATE OF HEARING: February 16, 2016

TIME OF HEARING: 10:00 a.m.

PLACE OF HEARING: Conference Room 309, State Capitol

**TESTIMONY ON H.B. 2351 RELATING TO
SERVICES PERFORMED BY CIVIL SERVICE EMPLOYEES**

By Dayton M. Nakanelua,
State Director of the United Public Workers,
AFSCME, Local 646, AFL-CIO

My name is Dayton M. Nakanelua, and I am the state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW is the exclusive representative for approximately 11,000 public employees, which include blue collar, non-supervisory employees in Bargaining Unit 01 and institutional, health and correctional employees in Bargaining Unit 10, in the State of Hawaii and various counties. We appreciate the opportunity to provide written testimony in support of H.B. 2351 in light of (1) the rights of public employees under the merit principle established by Article XVI, Section 1 of the State Constitution, (2) the controversy with the Lingle administration over privatization and layoffs, (3) the letter of understanding with the Ige Administration to bring state agencies and departments (other than UH and DOE) into compliance with civil service laws in connection with unlawful privatization of governmental services which have historically and customarily been provided by civil servants,

and (4) the scope of services which need to be converted from private to public services.

I.

The Merit Principle

The civil service system has been referred to as “the one great political invention of nineteenth century democracy.” United Public Workers of America v. Mitchell, 330 U.S. 75, 121 (1947), cited in Konno v. County of Hawaii, 85 Hawai‘i 61, 69, 937 P.2d 397, 405 (1997). The framers of our constitution adopted Article XVI, Section 1 in 1950 which states: “The employment of persons in the state civil service, as defined by law, shall be governed by the merit principle.”

As recognized by our Supreme Court in Hawaii Government Employee’s Association v. County of Maui, 59 Haw. 65, 87, 576 P.2d 1029, 1042 (1978):

The merit system has become an established policy of government. This has been a policy of state-wide application. Uniformity in the administration of the law is essential to its success. (Emphasis added).

In Konno, the Court determined that the policy behind privatization of government services is in conflict with the purpose and policies underlying the merit system:

In contrast to privatization, the purpose of the civil service is not just to foster efficiency but to implement other policies as well. Craig Becker, With Whose Hands: Privatization, Public Employment, and Democracy, 6 Yale L. & Pol’y Rev. 88, 94–99 (1988). One obvious policy is the elimination of the “spoils system,” which awarded jobs based on political loyalty. Id. at 95. The civil service also embodies positive principles of public administration such as openness, merit, and independence. Id. at 95-96. Openness is served through public announcement of job vacancies, clear articulation of qualifications, open application to all persons, and selection according to objective criteria. Id. at 96. Merit is served through a system of competitive examinations and qualification standards aimed at identifying competent candidates. Id. Independence is served through the job security provided by civil service laws; because civil servants can be terminated only for just cause, they are more likely to speak out against unlawful activities occurring in their agencies.

85 Hawai'i at 68-69, 937 P.2d at 404-05.

After the 1997 ruling in Konno, the Legislature extensively studied privatization and the civil service laws (see, Mark J. Rosen, Privatization in Hawaii, Legislative Referenced Bureau (December 1997); Legislative Auditor, Review of Privatization Contracts for Certain State and County Agencies (Rpt. No. 02-21, December 2002)), and decided to afford relief from Konno for a period of approximately ten years until June 30, 2007. See 1998 Haw. Sess. L. Act 230 §§ 14 & 17 at 789-800; 2001 Haw. Second Sess. L. Act 90 at § § 2 and 14 at 158-59 & 168.

II.

The Controversy with the Lingle Administration

Commencing on and after July 1, 2007 the UPW began informal meetings with representatives of the Lingle administration to obtain compliance with the merit principle and to significantly curtail privatization by state agencies. We began review of more than 700 private contracts for services customarily performed by civil servants in bargaining units 1 and 10. With the recession of 2009 we urged the Governor not to layoff civil servants without first substantially cutting back on privatization since the State is required to pay private employees (under those private contracts) wages and benefits not less than what is paid to civil servants under Section 103-55, Hawaii Revised Statutes (HRS).¹ Governor Lingle disregarded our request and laid off approximately 1,100 state workers in 2009 instead. See Attachment 1.

On September 16, 2009 the UPW filed suit contesting the layoffs and Lingle's refusal to terminate privatization. See Attachment 2. The complaint alleged in counts 3 and 4 that the Lingle administration violated the constitutional merit principle and civil service laws. See Attachment 2 at pages 19 to 22. The circuit court dismissed the action on grounds that the action should have first been filed with the merit appeals board and the Hawaii Labor Relations Board. On February 28, 2014 the Supreme Court reversed the circuit court in United Public Workers, AFSCME, Local 646, AFL-CIO v. Abercrombie, 133 Hawai'i 188, 325 P.2d 600 (2014). See Attachment 3. Upon remand of the case to the circuit court the UPW and the State entered a stipulation and order for mediation before Arbitrator Walter Ikeda on November 13, 2014. See Attachment 4.

¹ In light of Section 103-55, HRS, there are no labor cost savings by contracting out (or privatization) of unit 1 and 10 services.

III.

The Understanding with the Ige Administration & Related Developments

The mediation process began in January 2015 based on a review of all current private contracts for services rendered by civil servants affecting bargaining unit 1 and 10 employees. On June 29, 2015 the UPW entered an agreement with the Ige administration which (1) placed a moratorium on proceedings before the Hawaii Labor Relations Board and before arbitrators on privatization disputes with the State of Hawaii, (2) put an end to automatic renewals of affected private contracts, (3) developed a procedure to ensure that contracts entered by the executive departments will correctly apply the statutory exemptions under Sections 76-16 (b) (2) and (b) (15), HRS, and (4) submit legislation and budget requests to fund additional bargaining unit 1 and 10 positions needed to continue essential public services without privatization. See Attachment 5. Numerous contracts are being reviewed by the Department of Human Resources Development in accordance with the June 29, 2015 letter of understanding. Attachment 6.

IV.

The Scope of Affected Services

The UPW respectfully submits that consideration should be given to the restoration of essential civil service positions which were previously eliminated following the 2009 layoffs. We believe the relevant service areas affected by unlawful privatization include:

1. Janitorial, custodial, and related cleaning and disposal services;
2. Grounds keeping, ground maintenance, landscaping, tree trimming, and related services;
3. Building equipment and office repair and maintenance services;
4. Refuse collection, disposal, and recycling services; and
5. Paramedical assistant (PMA) positions in the State Hospital and elsewhere;

H.B. 2351 is an important first step to the process of full compliance with the requirements of Article XVI, Section 1 of our State Constitution. The measure does not increase the cost of obtaining essential services. Our review of private contracts indicate that the cost of "privatization" is higher than providing the service in question under the merit system. Thank you.

The Honolulu Advertiser

JULY 21, 2009 ► CALL 538-NEWS TO SUBSCRIBE HAWAII'S COMPLETE SOURCE 75¢ OAHU, \$1 NEIGHBOR ISLANDS ► HOME FINAL ★

Layoff list includes 1,100 state workers

BY DERRICK DePLEDGE
Advertiser Government Writer

The Lingle administration yesterday provided public-sector labor unions with a list of 1,100 state workers who face potential layoffs because of the state's budget deficit, but Gov. Linda Lingle did not estimate how much money the state would save by layoffs and repeated her preference for furloughs to reduce labor costs.



Lingle

Lingle and union leaders are scheduled to meet at noon today in the governor's office, where the state is expected to present a counterproposal to the unions' offer last week of a 5 percent pay cut to help with the deficit.

Lingle said a 5 percent pay cut would save \$203 million over two years, far short of the \$688 million the governor wants to save in labor costs to reduce a \$786 million deficit through June 2011. The governor said adjustments to worker health care costs, which are still being negotiated, could also limit savings from the unions' proposal.

The timing of the administration's layoff plans has raised suspicion among union leaders and leading Democrats that the Republican governor is using the layoff threat to pressure unions into accepting fur-

SEE LAYOFFS, A2

A2 | Tuesday, July 21, 2009

The Honolulu Advertiser

Layoffs

CONTINUED FROM A1

loughs.

U.S. Sen. Daniel K. Inouye, D-Hawaii, questioned the need for layoffs. "Why should there be layoffs? The program proposed by labor unions saves money and assures that state services continue. Workers are usually laid off if they are no longer necessary. In a period of economic crisis of this nature, you need government employees to assist others," the senator said in a statement.

"There are moments in our lives when political consequences could be considered. But this is a crisis that affects the lives and properties of our people. We should not make decisions to politically punish or politically enhance a group. This is a time when all of us should put our minds together, set aside differences and work out a solution."

Lingle called Inouye's comments inappropriate.

"By attempting to insert himself into the labor negotiation process, Sen. Inouye is unnecessarily creating a distraction from the fact that without the implementation of labor savings, the state's fiscal crisis will continue to deepen," she said in a statement. "This is not a political issue, as the senator hopes to lead the public to believe, but rather a fiscal reality that we must address."

Although the budget deficit is projected over two years, theoretically giving the administration and state Legislature time to close the gap, Lingle has argued that the state needs to act immediately to reduce labor costs or the cuts will only become deeper and more painful.

BUMPING A POSSIBILITY

The Lingle administration described the layoff list to the Hawaii Government Employees Association and the United Public Workers as the first step in the reduction-in-force process. The administration and the unions are expected to consult over the names before layoff notices are sent to workers.

Civil-service protections give senior workers the right to bump more junior

colleagues and in some cases retain their higher salaries while working at lower positions. The administration said the bumping process could take months, so it could not immediately estimate how much money layoffs would save. The administration also said another round of layoffs could be possible later.

Lingle said department directors who helped draft the layoff list tried to maintain core functions at their departments. The governor said workers in the state departments of Accounting and General Services; Agriculture; Business, Economic Development and Tourism; Health; and Human Services would be hardest hit.

Lingle, however, said she would prefer furloughs to layoffs.

"I want the people of Hawaii to know that I continue to believe that the furlough plan is the right way to address this fiscal crisis," the governor said after a news conference at Stevenson Middle School about disaster preparedness. "It allows us to keep our employees. It allows us to maximize public services that we can continue to deliver, and yet meet the fiscal crisis that we face."

"It's a real crisis. It's getting worse with each passing week that we're not able to get things resolved."

HGEA and UPW leaders chose not to immediately respond to the layoff list. Union officials said the governor neglected to include important information with the list, including worker retention points, which document seniority and determine bumping rights. The unions also want information on the status of vacant state positions and temporary workers who do not have civil-service protection.

The HGEA had sought to reschedule today's contract talks because top UPW leaders are on the Mainland. But, in a sign of how both sides are trying to manage public perceptions, the HGEA relented late yesterday after the governor said she would be at the meeting regardless and hoped union leaders would show up.

Reach Derrick DePledge at ddepledge@honoluluadvertiser.com or 525-8070.

ATTACHMENT

1-1

STATE DELIVERS LAYOFF NOTICES TO UNION EMPLOYEES

Governor orders three-day furlough per month for approximately 900 non-union employees

For Immediate Release: August 4, 2009

HONOLULU – Governor Linda Lingle announced that the State today will begin delivering written layoff notices to the approximately 1,100 State employees who were previously notified their positions could be eliminated. The notices state the positions of the affected employees will be eliminated as of November 13, 2009. Some of the employees may have the ability to "bump" persons with less seniority, and so it is unknown at this time which of the 1,100 notified individuals will actually lose their jobs. Because of these "bumping rights" it is also unknown at this time how much money the State will actually save from the elimination of these positions.

Governor Lingle also announced that she has instructed her Cabinet today to begin the process of identifying other State employees who may be subject to a second round of layoffs that might be needed in order to realize additional savings in the cost of running State government. It is not known at this time how many employees might be in this second wave of layoffs or Reduction in Force (RIF). FAQs on the RIF policy will be available on the Department of Human Resources Development's (www.hawaii.gov/hrd) and the Governor's (www.hawaii.gov/gov) websites by the end of the day.

"It is unfortunate we must take these difficult steps today," said Governor Lingle. "Furloughs have always been my first choice to achieve significant labor cost reductions needed to address the unprecedented budget shortfall the State is facing."

"Since the summer of 2008, my Administration has reduced State spending by approximately \$2 billion, without significantly reducing labor costs, except through attrition. But the simple facts are that our actual tax revenues for the past fiscal year, combined with the Council on Revenues' projections for the current fiscal year means the State is still facing a budget shortfall of \$786 million through June 30, 2011. Our current expenses continue to exceed our projected revenues and our labor costs equal approximately 70 percent of our general fund expenses. Therefore, in order to balance the budget, as the State Constitution requires, we must significantly reduce our labor expenses. I empathize with our employees and realize these layoffs will have a significant impact on the affected employees and their families. I sincerely wish this situation could have been avoided."

Governor Lingle also announced that she will furlough approximately 900 state employees for three days per month effective September 1, 2009. These "exempt excluded" employees are all non-union employees, who are not covered by Judge Karl Sakamoto's order barring the Governor from unilaterally implementing furloughs for union employees. It is expected that these furloughs will save the State approximately \$7 million to \$10 million for each twelve-month period the furloughs are in effect. Governor Lingle will also explore whether there are other employees, not covered by Judge Sakamoto's order that she can also furlough.

These actions by Governor Lingle are based on the State's current financial projections. The State Council on Revenues will meet on August 27 and again in January. If those projections show lower revenues for the State, further cost cutting will be necessary.

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For more information, contact:
Lenny Klompus
Senior Advisor – Communications
Phone: (808) 586-7708

Russell Pang
Chief of Media Relations
Phone: (808) 586-0043

LINDA LINGLE
GOVERNOR OF HAWAII



MARIE C. LADERTA
DIRECTOR

CINDY S. INOUE
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

July 20, 2009

HAND DELIVERED

Mr. Dayton M. Nakanelua
State Director
United Public Workers
1426 North School Street
Honolulu, Hawaii 96817

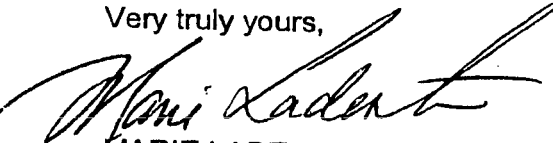
Dear Mr. Nakanelua:

RE: UPW Bargaining Unit 01 and 10 Impending Layoff

We are writing to inform you of an impending layoff. Attached is a list of permanent civil service positions in BUs 01 and 10 in the State Executive Branch that are part of the proposed impending layoff.

Please contact Allison Murakawa at 587-0932 if you would like to meet regarding this matter.

Very truly yours,


MARIE LADERTA
Director

Attachments

Of Counsel:
TAKAHASHI VASCONCELLOS & COVERT
Attorneys at Law

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Attorneys for Plaintiff

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2009 SEP 16 PM 1:20

E. ALAGAO
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

United Public Workers,
AFSCME, Local 646, AFL-CIO,

Plaintiff,

vs.

Linda Lingle, Governor, State
of Hawaii; Linda Smith, Chief
Policy Adviser to Linda
Lingle, State of Hawaii;
Georgina Kawamura, Director,
Department of Budget and
Finance, State of Hawaii;
Marie Laderta, Director,
Department of Human Resources
Development, State of Hawaii;
Clayton Frank, Director,
Department of Public Safety,
State of Hawaii; State of
Hawaii; and Doe Defendants 1-
10,

Defendants.

Civil No. 09-1-2145-09 D H M C
(Other Civil Action)

COMPLAINT; DEMAND FOR JURY
TRIAL; SUMMONS

(269:735)

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.

[Signature]
Clerk, Circuit Court, First Circuit

ATTACHMENT

2

2-1

COMPLAINT

COMES NOW the United Public Workers, AFSCME, Local 646, AFL-CIO, hereafter "UPW," and respectfully states as follows:

I.

JURISDICTION & VENUE

1. This is a civil action challenging the Defendants' retaliatory threats, layoffs, reductions in force, displacements, discharges, and other discriminatory actions regarding terms and conditions of employment on and after June 16, 2009 in violation of the statutory and constitutional rights of employees represented by the UPW.

2. Jurisdiction is conferred on this Court by Hawaii Revised Statutes (HRS) Sections 378-63, 603-21.5 (3), 603-21.9 (6), 632-1, 661-1, and other relevant statutory provisions.

3. Claims for relief alleged herein arose on the island of Oahu within the first judicial circuit and venue for this action is proper under Section 603-36 (5), HRS, and Section 378-63(b), HRS.

II.

PARTIES

4. Plaintiff UPW is an unincorporated association formed in 1944 to represent employees in collective bargaining and through Hawaii's merit system. UPW is an employee organization within the meaning of Section 89-2, HRS, is a "person" within the meaning of Section 378-61, HRS, and brings this civil action on its own behalf and on behalf of "employees" of the State of Hawaii within the meaning of Section 378-61, HRS, in bargaining units 1 and 10 under chapter 89, HRS.

5. Defendant Linda Lingle, hereafter Lingle, is Governor of the State of Hawaii and is an "employer" within the meaning of the Section 378-61, HRS, and is a "person" as defined

in Section 378-61, HRS, and as referred to in Section 378-65, HRS.

6. Defendant Linda Smith, hereafter Smith, is the chief policy advisor to Lingle, and as an agent of the State of Hawaii is an "employer" within the meaning of Section 378-61, HRS, and is a "person" as defined in Section 378-61, HRS, and as referred to in Section 378-65, HRS.

7. Defendant Georgina Kawamura, hereafter Kawamura, is the director of the department of budget and finance, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and 26-8, HRS, and as an agent of the State of Hawaii is an "employer" within the meaning of Section 378-61, HRS, and is a "person" as defined in Section 378-61, HRS, and referred to in Section 378-65, HRS.

8. Defendant Marie Laderta, hereafter "Laderta," is the director of the Department of Human Resources Development, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and Section 26-5, HRS, is an "employer" within the meaning of Section 378-61, HRS, and is a "person" as defined in Section 378-61, HRS, and as referred to in Section 378-65, HRS.

9. Defendant Clayton A. Frank, hereafter "Frank," is the director of the Department of Public Safety, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and Section 26-8, HRS, is an "employer" within the meaning of Section 378-61, HRS, and is a "person" as defined in Section 378-61, HRS, and as referred to in Section 378-65, HRS.

10. The State of Hawaii employs more than one "employee" as defined in Section 378-61, HRS, in bargaining units 1 and 10 who are represented by the UPW under chapter 89, and is an "employer" within the meaning of Section 378-61, HRS.

11. Defendants DOES 1 through 10 are persons, agents, entities, governmental bodies or other legal entities within the meaning of Section 378-61, HRS, sued herein under fictitious names for the reasons that their true names and identities, despite due diligence, are presently unknown to plaintiff or their attorneys and may be in some manner liable or necessary parties herein.

12. Defendants Lingle, Smith, Kawamura, Laderta, Frank, and Doe Defendants 1 through 10 are sued in their official capacities as agents of the State of Hawaii, in their individual capacities, and as "persons" within the meaning of Section 378-61, HRS, and Section 378-65, HRS.

III.

FACTUAL ALLEGATIONS

13. The right to organize for the purpose of collective bargaining of private and public employees was established by the framers of Hawaii's constitution in 1950 in Article XII.

14. In 1968 the framers amended Article XII, Section 2 to extend to "public employees" similar rights to collective bargaining previously adopted "for persons in private employment."

15. By 1968 when the proposed amendment to Article XII, Section 2 was placed on the general election ballot of November 5, 1968 for ratification by the voters of Hawaii, the term "collective bargaining" had a well recognized meaning and usage in both the private and public sectors, i.e., as the process by which wages, hours, and terms and conditions of employment are negotiated and agreed upon by a union on behalf of the employees collectively represented and the employer.

16. In 1970 the legislature adopted Hawaii's public sector collective bargaining statute as set forth in chapter 89, HRS.

17. In relevant portions, chapter 89, HRS (as adopted in 1970), set forth the public policies underlying collective bargaining in the public sector in Section 89-1, HRS, as follows:

The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a labor relations board to administer the provisions of chapters 89 and 377. (Emphasis added.)

18. Section 89-2, HRS (as adopted in 1970), defined the term "collective bargaining" as follows:

"Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession. (Emphasis added).

For nearly forty years under chapter 89, HRS, "collective bargaining" has been understood by the union and employer

representatives to mean a bilateral process of good faith negotiations over wages, hours, and other terms and conditions of employment and the reaching of an agreement thereby.

19. The "rights of employees" under chapter 89, HRS, are set forth in Section 89-3, HRS, as follows:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4. (Emphasis added).

20. Chapter 89 provides for a multi-employer and statewide bargaining process including the Governor, the mayors of the counties of Hawaii, Maui, the City and County of Honolulu, and Kauai, the chief justice, and the Hawaii Health Systems Corporation board for bargaining units 1 and the Governor, the mayor of the City and County of Honolulu, the chief justice, and the Hawaii Health Systems Corporation for bargaining unit 10 pursuant to Section 89-6, HRS.

21. Commencing in 1970 public employees in Hawaii organized for the purpose of collective bargaining under chapter 89.

22. On October 20, 1971 UPW was certified by the Hawaii Public Employment Relations Board as the exclusive bargaining representative of blue collar non-supervisory employees in bargaining unit 1, and on February 11, 1972 UPW was certified by the Hawaii Public Employment Relations Board as the

exclusive bargaining representative of institutional, health, and correctional workers in bargaining unit 10.

23. Over a period of nearly forty years, Plaintiff UPW has freely engaged in collective bargaining over wages, hours, and other terms and conditions of employment on behalf of bargaining unit employees in units 1 and 10.

24. On and after July 1, 1972 to the present UPW, the Governor, the Mayors and other public employers have negotiated more than fifteen (15) successive collective bargaining agreements setting forth uniform wages, hours, and terms and conditions of employment of bargaining unit 1 and 10 employees which have been jointly negotiated, ratified by a majority of employees, and approved by appropriate legislative bodies (as to cost items) in accordance with the procedures established in Sections 89-6 and 89-10, HRS.

25. In 1974, the Supreme Court held in Board of Education v. Haw. Pub. Emp. Rel. Bd., 56 Haw. 85, 87 (1974), that "good faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy 'to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.'"

26. In 2002, the Supreme Court held in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002), that denying public employees the right to negotiate over core subjects which include wages and cost items constitute a violation of Article XIII, Section 2 of the State Constitution.

27. The UPW, the Governor, the mayors of the various counties, the chief justice, and the Hawaii Health Systems Corporation board were parties to collective bargaining

agreements for unit 1 and unit 10 covering the period from July 1, 2007 to June 30, 2009.

28. On or about June 16, 2008 UPW notified the governor, the mayors, the chief justice, and the Hawaii Health Systems Corporation board of its desire to modify and amend certain provisions of the current unit 1 and 10 collective bargaining agreements, and soon thereafter bargaining commenced through the duly designated representatives of UPW and public employers.

29. At no time during the initial bargaining process did Defendants Lingle and Laderta indicate a desire to modify and amend any provision of the unit 1 and 10 agreements to provide for a three day furlough per month of bargaining unit employees for a period of two years from July 1, 2009 to June 30, 2011. No proposal for such furloughs was ever submitted by "the employer group" engaged in bargaining unit 1 and 10 negotiations with the UPW prior to July 7, 2009.

30. However, on or about April 13, 2009, April 15, 2009 and April 23, 2009, Defendants consulted and discussed (but declined to negotiate) with the UPW the concept of a furlough of sixteen days per year of public employees to address the effects of the economic recession on the State, while at the same time avoiding layoffs and increasing taxes.

31. On May 12, 2009, UPW, together with the Hawaii State Teachers Association (HSTA), Hawaii Government Employees Association (HGEA) and the University of Hawaii Professional Assembly (UHPA), submitted to Defendant Lingle a request to negotiate with public employers "a global settlement, seeking a universal solution to the financial issues resulting from the current economic recession."

32. On June 1, 2009 Defendant Lingle unilaterally announced a decision to implement "effective July 1st, and

continuing for the next two years . . . three furlough days per month for all state employees."

33. The June 1, 2009 decision and action by Defendant Lingle was intended to unilaterally reduce wages and salaries of state workers by an estimated fourteen (14) per cent from July 1, 2009 to June 30, 2011, to change and reduce the hours of work of employees, and to affect changes in other terms and conditions of employment of all state employees including but not limited to employees represented by UPW.

34. Defendant Lingle stated on June 4, 2009 that her furlough program "will likely allow us to avoid having to layoff employees."

35. On June 8, 2009, UPW requested Defendant Lingle and Defendant Laderta to negotiate over the June 1, 2009 decision and action by Lingle and to cease and desist from unilaterally implementing the statewide furlough of three days a month for all state employees for two years, and further to terminate all contracts for privatization which violate the merit principle.

36. On or about June 10, 2009, and thereafter Defendants refused to negotiate over the statewide furlough of three days a month for all state employees and declined to cease and desist from the unilateral course of conduct announced on June 1, 2009.

37. The June 1, 2009 decision by Defendant Lingle and the implementation of said decision by all Defendants was undertaken without compliance with the duty to bargain over core subjects of collective bargaining including wages, cost items, and hours of work, thereby intruding, abrogating, and abridging the rights of public employees to organize for the purpose of collective bargaining under Article XIII, Section 2 of the Hawaii State Constitution.

38. On June 16, 2009 UPW in Civil No. 09-1-1371-06 BIA and Hawaii State Teacher Association, hereafter "HSTA" in Civil No. 09-1-1372-06 KKS filed civil complaints in the circuit court of the first circuit, on their own behalf and on behalf of bargaining unit employees they represent, against defendants Lingle, Laderta, and Kawamura, thereby reporting to a "public body" in writing for violations of state law under Article XIII, Section 2, and other State Constitution provisions.

39. In its complaint filed in Civil No. 09-1-1371-06 BIA, UPW sought, inter alia, injunctive relief to enjoin defendants Lingle, Laderta, and Kawamura from implementing the furloughs of all state employees for three days a month for the next two years commencing on June 1, 2009.

40. Upon learning of the complaints filed by UPW and HSTA (as well as a complaint filed by HGEA in Civil No. 09-1-1375-06 SSM), Defendant Lingle made the following threats against the unions and state employees they represent:

"If the unions are successful at blocking the furloughs, we will have to go to some mass layoffs and some shutdown of programs."

41. The threats of mass layoffs and the shutdown of programs by Defendant Lingle on June 16, 2009 were in retaliation for the reported violation of state laws made by UPW to the circuit court in behalf of employees as defined in Section 378-61, HRS.

42. Defendant Lingle's threats of June 16, 2009 were widely reported by the broadcast and news media throughout the State of Hawaii on June 16, 2009 and June 17, 2009, were repeated thereafter in subsequent broadcasts and news media reports of Lingle's conduct (without any disclaimer or correction by Defendants) causing fear and other injuries to employees represented by UPW.

43. On June 18, 2009 the UPW filed a voluntary dismissal without prejudice in Civil No. 09-1-1371-06 BIA and the HSTA and UPW filed a first amended complaint in Civil No. 09-1-1372-06 KKS, restating their claims for violations of the state constitution.

44. On June 18, 2009 Defendants called a press conference attended by various department heads including Defendants Smith, Kawamura, Laderta and Frank, and Doe Defendants, and made the following threats of layoffs and shut down of programs and services against UPW and the employees UPW represented in the aforementioned court actions, and reported on the preparation of layoff plans by State departments as follows:

If the furloughs are not implemented, the State would have to lay off at least 2,500 Executive Branch employees to make up for the projected revenue shortfall. Such layoffs could also result in shut-down of entire programs and services. State executive departments are preparing layoff plans in the event that the public worker unions are successful in blocking the implementation of the furlough plan. (Emphasis added).

45. The threats by Defendants of 2,500 layoffs and the shut down of programs and services, and the announcement that Defendants Lingle, Smith, Kawamura, Laderta, Frank, and Doe Defendants were preparing to implement plans for layoffs on June 18, 2009 were undertaken in retaliation and reprisal for UPW's objection to Defendants' unconstitutional conduct and report to the circuit court of Defendants' violation of state laws.

46. The June 18, 2009 threats and actions by Defendants were widely reported by the broadcast and news media throughout the State of Hawaii on June 18, 2009 and June 19, 2009, were repeated thereafter in subsequent broadcasts and news media reports (without disclaimer or correction by Defendants),

thereby causing fear, terror, and injury to public employees represented by UPW.

47. On June 23, 2009 UPW (and HSTA) filed a motion for temporary restraining order and preliminary injunction in Civil No. 09-1-1372-06 KKS seeking, inter alia, to enjoin Defendants from implementing effective July 1, 2009 and continuing for the next two years furloughs of three days per month of all State employees as announced on June 1, 2009.

48. A hearing on the motion for temporary restraining order and preliminary injunction was held on July 2, 2009 before the Honorable Karl K. Sakamoto, and the Court determined that furloughs, which have a direct impact on wages (and the reduction of wages), constitute a core subject of collective bargaining under Article XIII, Section 2 of the State Constitution which must be negotiated, and granted the requested injunctive relief by UPW enjoining the unilateral statewide furloughs of three days per month for two years. The Court found that Defendants Lingle and Laderta had violated the State Constitution by attempting to impose the furloughs without collective bargaining.

49. Defendants represented to the circuit court during the July 2, 2009 hearing that "lack of work" was not a factor in their decisions or actions.

50. In the week following the July 2, 2009 ruling by the circuit court, Defendants met to finalize their plans to implement layoffs as threatened, and indicated that layoff notices would be sent out soon thereafter.

51. On July 8 and 9, 2009 Defendants Lingle and Smith announced that they had completed the review and discussion process with the heads of state agencies regarding layoffs and would be proceeding with their plans for mass layoffs and shut down of programs.

52. On and after July 9, 2009 Defendants Lingle and Laderta refused to authorize and approve bargaining unit 1 and 10 employees to attend educational and informational meetings requested and scheduled by the UPW, declined to comply with the terms and provisions of the unit 1 and 10 agreements regarding the processing of grievances, and unilaterally increased the amounts of employee contributions (and decreased the amount of employer contributions) for health benefits.

53. On July 17, 2009 Defendants notified various public employees that their names would be included on layoff lists, and on July 20, 2009 Defendant Laderta provided a list to UPW of approximately 123 bargaining unit 1 employees, and 93 bargaining unit 10 employees for impending layoffs.

54. On July 22, 2009 UPW requested that Defendant Laderta negotiate over the impending layoff criteria and procedure under Section 76-43, HRS, and Section 89-9(a), HRS, and to cease and desist from unilaterally implementing layoffs pending compliance with the duty to bargain over wages, hours, and other conditions of employment.

55. On July 23, 2009 Defendant Frank notified the UPW of an impending layoff due to the closure of the Kulani Correctional Facility on or about October 26, 2009. Although civil servants would be subject to layoff, no similar action would be taken with respect to employees performing the substantial amount of corrections work that has been privatized by the Department of Public Safety.

56. On July 29, 2009 the UPW requested that Defendant Frank negotiate over the decision to close the Kulani Correctional Facility, and requested Defendants to cease and desist from retaliating against employees represented by UPW for challenging Defendant Lingle's decision of June 1, 2009 to

furlough state employees for three days each month for the next two years.

57. On July 30, 2009 Defendant Laderta refused the July 22, 2009 request of UPW.

58. On August 3, 2009, Defendant Frank commenced the closure of Kulani Correctional Facility by informing inmates of their relocation by the end of September 2009.

59. On August 4, 2009, Defendant Lingle announced a decision to implement through written notices the layoff, reductions in force, and discharge of approximately 1,100 State employees (including unit 1 and unit 10 employees) on or about November 13, 2009, and threatened a second round of layoffs thereafter. Lingle indicated that the actions were necessitated by the challenge to furloughs.

60. On and after August 4, 2009, various state officials sent out written notices of layoffs to approximately 1,100 State employees, including notices to unit 1 and 10 employees, and Defendants withheld copies of the notices of layoffs sent to a significant number of bargaining unit 1 and 10 employees from UPW (until August 31, 2009).

61. On August 7, 2009 Defendants Laderta and Frank indicated to the UPW in response to a request for information that the layoff plans by defendants involved the abolishment of civil service positions for which funding was provided for by the legislature in the State budget enacted during the 2009 legislative session.

62. On August 28, 2009 Defendant Lingle again unlawfully threatened a second round of layoffs against public employees represented, inter alia, by UPW, and attributed said actions to the conduct of the union for opposing her furlough plans.

63. Defendants' decision to repeatedly threaten and to implement mass layoffs of bargaining unit 1 and 10 employees were made to retaliate against UPW and its members for exercising their right to report and challenge illegal government conduct by filing and pursuing a lawsuit in the circuit court against Defendants' unconstitutional furlough plan, and to engage in collective bargaining over furloughs.

64. Other public employers covered by the unit 1 and 10 agreements have not implemented layoffs, reductions in force, discharges, or engaged in such discriminatory and adverse actions which have been undertaken by Defendants.

65. Employees of the State of Hawaii who are excluded from collective bargaining have not been notified of mass layoffs in the same manner as implemented against employees represented by UPW (or other unions) who challenged Lingle's furlough plan.

66. Notwithstanding the economic recession, there is no economic necessity for immediate mass layoffs of UPW members. The Legislature included funding for all the positions in the State budget, and UPW has communicated to Defendants numerous times its willingness to negotiate through collective bargaining a solution to the issues raised by the economic recession.

67. At the same time that Defendants announced the layoff of public employees including the closure of Kulani Correctional Facility, the Department of Public Safety is subcontracting and privatizing responsibility for housing Hawaii inmates to private contractors. The Kulani Correctional Facility has capacity for approximately 160 inmates. The Department of Public Safety, State of Hawaii, is subcontracting with private contractors to house approximately 2,000 Hawaii inmates on the mainland at an annual cost of approximately \$55 million. Over the years the number of inmates being maintained at private

facilities has grown from approximately 300 to more than 2,000. Defendants have not announced any plan to reduce the reliance on contracting out and privatization in light of what Defendants consider to be excess capacity in facilities and personnel within the public correctional system.

68. All persons employed in unit 1 and 10 positions within the Department of Public Safety, State of Hawaii, have historically and customarily been recruited, hired, retained, assigned, and employed in accordance with the merit principles mandated by Article XVI, Section 1 of the Hawaii State Constitution and HRS Chapters 76 and 77.

69. Civil servants of the State of Hawaii in units 1 and 10 have also historically and customarily been responsible for corrections work for inmates incarcerated by the State of Hawaii. The contracting out and privatization of corrections work by Defendants cannot be justified when there are public employees available to perform such work who are being subject to layoffs, reductions in force, discrimination and other adverse actions.

70. Defendants' decision to lay-off public employees in the Department of Public Safety, State of Hawaii, while maintaining thousands of inmates in facilities on the mainland, staffed by private-sector workers, discriminates against civil servants and contravenes the merit principles mandated by Article XVI, Section 1 of the Hawaii State Constitution and HRS Chapters 76 and 77.

71. By reason of the foregoing premises UPW and the employees represented UPW have and will suffer damages in sums as of yet unascertained and Plaintiff asks leave of this Court to show the same at the time of trial hereof.

72. UPW and the employees it represents have no plain, adequate or complete legal remedies to redress the wrongs

alleged herein, and unless afforded injunctive relief will suffer irreparable harm and injury, contrary to public policy.

IV.

COUNT I - VIOLATIONS OF THE
HAWAII WHISTLEBLOWERS' PROTECTION ACT

73. The allegations of paragraphs 1 through 72 are restated, realleged, and fully incorporated herein.

74. The Hawai'i Whistleblowers' Protection Act states in relevant portions:

§ 378-62. Discharge of, threats to, or discrimination against employee for reporting violations of law.

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of:

(A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States[.]
(Emphasis added).

75. Defendants' conduct alleged herein constitutes acts of retaliation, reprisal, and intimidation in violation of Hawaii's Whistleblowers' Protection Act and was undertaken knowingly, intentionally, maliciously, wantonly and oppressively.

76. By the aforementioned conduct and other acts and deeds to be established during the proceedings herein Defendants have violated the rights of employees under Section 378-62, HRS, for retaliatory threats, reductions in force, discrimination, discharge, and other unlawful adverse actions.

77. As a result of Defendants' violations of law Plaintiff UPW and the employees UPW represents have suffered reputational injury, humiliation, mental anguish, emotional

distress, injuries to their person, lost wages and benefits, and incurred expenses including but not limited to attorney's fees and cost.

78. Plaintiff UPW and the employees UPW represents are entitled to injunctive relief and recovery of special damages, compensatory damages, punitive damages, make whole remedies including back pay with interest, reinstatement, reasonable attorney's fees and costs of litigation, penalties, and equitable relief under Sections 378-63, 378-64, 378-65, HRS.

79. Defendants Lingle, Smith, Kawamura, Laderta, Frank, and other Doe Defendants as "persons" within the meaning of Section 378-61, HRS, and as referred to in Section 378-65, HRS, are liable for civil fines and penalties of not less than \$500 nor more than \$5,000 for each and every violation of Section 378-62, HRS, committed against bargaining unit 1 and 10 employees on and after June 16, 2009.

V.

**COUNT II - VIOLATIONS OF ARTICLE I,
SECTION 4 OF THE HAWAII CONSTITUTION**

80. The allegations of paragraphs 1 through 79 are restated, realleged, and fully incorporated herein.

81. The Hawaii State Constitution, in Article I, Section 4, guarantees "the freedom of speech" and "the right of the people . . . to petition the government for a redress of grievances." Included within the rights protected by Article I, Section 4 are the rights to object to and challenge illegal government action in a court action.

82. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 by seeking relief in the circuit court against illegal government action that would unilaterally implement mandatory unpaid

furloughs of three days per month for all state employees for a two-year period.

83. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 in their capacity as citizens, rather than in the course of their official duties as public employees.

84. The issue raised by UPW's challenge to illegal government action is of broad public importance, affecting virtually the entire population of Hawaii that receives government services. The issue raised by UPW's challenge to illegal government action is also of broad public interest and received widespread coverage in the media both before and after Plaintiff filed its lawsuits.

85. As described above, Defendants retaliated against UPW and its members for challenging illegal government action in the courts by threatening layoffs of UPW members and taking action to implement such layoffs. The layoffs would cause severe economic injury to UPW members in the form of a loss of income and benefits as well as emotional distress.

86. By retaliating against UPW and its members for objecting to and reporting illegal government action, Defendants deprived UPW and its members of rights guaranteed by Article I, Section 4 of the Hawaii Constitution.

VI.

COUNT III- VIOLATIONS OF MERIT PRINCIPLES

87. The allegations in paragraphs 1 through 86 above are restated, realleged and fully incorporated herein.

88. Article XVI, Section 1 of the Hawaii State Constitution states:

Section 1. The employment of persons in civil service, as defined by law, of or under the State, shall be governed by the merit principle.

89. In Konno v. County of Hawaii, 85 Hawai'i 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil servants represented by UPW violates the merit principle.

90. On November 20, 2002 in the Matter of the Arbitration Between the United Public Workers, AFSCME, Local 646, AFL-CIO v. County of Hawaii, contracting out or privatization of bargaining unit work was found to violate, inter alia, the constitutional merit principle. Said award was confirmed by the circuit court in S.P. No. 02-1-0514 and constitutes a final judgment which is binding on all public employers who are parties to the unit 1 and 10 collective bargaining agreements.

91. The services performed by bargaining unit 1 and 10 employees in positions which are being abolished by the Defendants have historically and customarily been performed by civil servants under the merit system.

92. On June 8, 2009 Defendants Lingle and Laderta were requested by UPW to terminate all contracts for services which have historically and customarily been performed by civil servants in bargaining units 1 and 10 no later than June 30, 2009, and to cease and desist from undermining the job security of civil servants contrary to the merit principle.

93. On and after June 30, 2009 Defendants have refused to terminate contracts which are contrary to public policy in contravention of Article XVI, Section 1 of the Hawaii State Constitution.

94. Defendants, by the foregoing acts, and other acts to be established during the course of the proceeding herein

have violated the merit principle mandated by Article XVI, Section 1 of the Hawaii State Constitution.

VII.

COUNT IV -- VIOLATIONS OF
CIVIL SERVICE LAWS

95. The allegations in paragraphs 1 through 94 are restated, realleged and fully incorporated herein.

96. HRS Chapters 76 and 77 require that all blue collar, non-supervisory positions and institutional, health and correctional positions within the State of Hawaii, to be governed by the merit principles and that employees be hired and retained in accordance with the provisions thereof, unless specifically exempt under HRS § 76-16.

97. It is a fundamental requirement of the merit principle under Section 76-1, HRS, that civil servants be afforded reasonable job security.

98. HRS § 76-16 defines the merit system as follows:
§76-16 Civil service and exemptions.

...
(b) The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter established and embrace all personal services performed for the State, except the following:

...
(2) Positions filled by persons employed by contract where the director of human resources development has certified that the service is special or unique or is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform the service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year; . . .

99. At no time has Defendant Laderta certified pursuant to Section 76-16(b)(2), HRS, for exemption the services

performed by private contractors or otherwise authorized contracting out in units 1 and 10.

100. The contracting out and privatization of corrections work by Defendants is not justified under Section 76-16, HRS, when unit 1 and 10 employees are laid off, displaced, discharged, and subject to other adverse actions by Defendants.

101. Section 76-43, HRS, affords to employees with permanent appointments in civil service positions rights under the civil service laws as follows:

Whenever it is necessary to release employees due to lack of work, lack of funds, or other legitimate reasons, employees with permanent appointments in civil service positions shall have layoff rights. Layoffs shall be made in accordance with procedures negotiated under chapter 89 or established under chapter 89C, as applicable.

102. Defendants violated the rights of employees under Section 76-43, HRS, by refusing to negotiate the criteria, procedures, timing, and manner of handling mass layoffs for reasons other than "lack of work" or lack of "funds" with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees.

103. Defendants, by the foregoing acts, have abrogated the Civil Service Laws of the State of Hawaii.

VIII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff UPW prays that this Court grant the following relief:

1. An order temporarily enjoining Defendants from (a) proceeding with layoffs of employees in units 1 and 10; (b) making and implementing threats of layoffs and engaging in other retaliatory actions including discriminatory layoffs, reductions in force, discharges, and other adverse actions against

employees represented by UPW, and (c) restraining, interfering, and coercing employees for petitioning the government for redress of grievances and exercising their rights under Article I, Section 4 and Article XIII, Section 2 of the Hawaii State Constitution.

2. A preliminary injunction enjoining Defendants from (a) proceeding with layoffs of employees in units 1 and 10; (b) making and implementing threats of layoffs and engaging in other retaliatory actions including discriminatory layoffs, reductions in force, discharges, and other adverse actions against employees represented by UPW, and (c) restraining, interfering, and coercing employees for petitioning the government for redress of grievances and exercising their rights under Article I, Section 4 and Article XIII, Section 2 of the Hawaii State Constitution.

3. A declaratory order and judgment that the actions of Defendants as specified herein constitute violations of the Hawai'i Whistleblowers' Protection Act, Article IV, Section 1 of the Hawaii State Constitution, the merit principle protected by Article XVI, Section 1 of the Hawaii State Constitution, and the Civil Service Laws of the State of Hawaii.

4. A permanent injunction enjoining Defendants from (a) proceeding with layoffs of employees in units 1 and 10; (b) making and implementing threats of layoffs and engaging in other retaliatory actions including discriminatory layoffs, reductions in force, discharges, and other adverse actions against employees represented by UPW, and (c) restraining, interfering, and coercing employees for petitioning the government for redress of grievances and exercising their rights under Article I, Section 4 and Article XIII, Section 2 of the Hawaii State Constitution.

5. An award of special damages and compensatory damages to Plaintiff and the employees Plaintiff represents;

6. An award of punitive damages to Plaintiff and the employees Plaintiff represents;

7. Make whole relief for all adversely affected employees in amounts to be determined at the time of trial, including back pay with interest, and reinstatement;

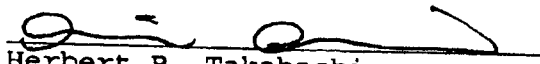
8. An award and order granting attorney's fees and costs to Plaintiff;

9. An order that fines and penalties be paid by Defendants Lingle, Smith, Kawamura, Laderta, Frank, and individual Doe Defendants of not less than \$500 nor more than \$5,000 for each violation of Section 378-62, HRS, pursuant to Section 378-65 (a), HRS, which shall be deposited in the general fund of the State of Hawaii pursuant to Section 378-65 (b), HRS,

10. An order prohibiting continuing violations of the merit principle by Defendants, and invalidating contracts contrary to public policy, and

11. Such other and further relief as the promotion of justice requires.

Dated: Honolulu, Hawaii, September 16, 2009.


Herbert R. Takahashi
Rebecca L. Covert
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

United Public Workers,
AFSCME, Local 646, AFL-CIO,

Plaintiff,

vs.

Linda Lingle, Governor, State
of Hawaii; Linda Smith, Chief
Policy Adviser to Linda
Lingle, State of Hawaii;
Georgina Kawamura, Director,
Department of Budget and
Finance, State of Hawaii;
Marie Laderta, Director,
Department of Human Resources
Development, State of Hawaii;
Clayton Frank, Director,
Department of Public Safety,
State of Hawaii; State of
Hawaii; and Doe Defendants 1-
10,

Defendants.

Civil No. _____
(Other Civil Action)

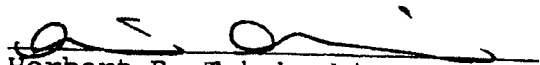
DEMAND FOR JURY TRIAL

(269:735)

DEMAND FOR JURY TRIAL

Trial by jury is hereby demanded.

Dated: Honolulu, Hawaii, September 16, 2009.


Herbert R. Takahashi
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

United Public Workers,) Civil No. _____
AFSCME, Local 646, AFL-CIO,) (Other Civil Action)

Plaintiff,)

vs.)

SUMMONS

Linda Lingle, Governor, State)
of Hawaii; Linda Smith, Chief)
Policy Adviser to Linda)
Lingle, State of Hawaii;)
Georgina Kawamura, Director,)
Department of Budget and)
Finance, State of Hawaii;)
Marie Laderta, Director,)
Department of Human Resources)
Development, State of Hawaii;)
Clayton Frank, Director,)
Department of Public Safety,)
State of Hawaii; State of)
Hawaii; and Doe Defendants 1-)
10,)
Defendants.)

(269:735)

SUMMONS

STATE OF HAWAII

To the above-named Defendant(s):

You are hereby summoned and required to serve upon
TAKAHASHI, MASUI, VASCONCELLOS & COVERT, Plaintiff's attorneys,
whose address is 345 Queen Street, Room 506, Honolulu, Hawaii
96813, an answer to the Complaint which is herewith served upon
you, within twenty (20) days after service of this summons upon
you, exclusive of the day of service. If you fail to do so,

judgment by default will be taken against you for the relief demanded in the Complaint.

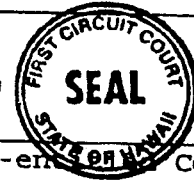
This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled Court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

SEP 16 2009

Dated: Honolulu, Hawaii, _____

E. ALAGAO



Clerk of the above-entitled Court

133 Hawai'i 188
Supreme Court of Hawai'i.

UNITED PUBLIC WORKERS, AFSCME, LOCAL
646, AFL-CIO, Petitioner/Plaintiff-Appellant,
v.

Neil ABERCROMBIE,¹ Governor, State of Hawai'i;
Kalbert K. Young, Director, Department of Budget
and Finance, State of Hawai'i; Barbara A. Krieg,
Director, Department of Human Resources
Development, State of Hawai'i; Ted Sakai,
Director, Department of Public Safety, State of
Hawai'i,² Respondents/Defendants-Appellees.

No. SCWC-12-0000505. | Feb. 28, 2014.

Synopsis

Background: Public-employee labor union filed action against state officials, alleging retaliation against union members for union's filing of lawsuit opposing a statewide furlough plan, and alleging unlawful privatization of civil service positions. The Circuit Court, First Circuit, Patrick W. Border, J., dismissed complaint for lack of jurisdiction. Union appealed. The Intermediate Court of Appeals (ICA), 129 Hawai'i 451, 2013 WL 3063803, vacated that judgment and remanded with instructions to stay the action so that parties could pursue appropriate administrative remedies. The Supreme Court granted certiorari review.

Holdings: The Supreme Court, McKenna, J., held that:

^[1] primary jurisdiction doctrine applied, so as to require Hawai'i Labor Relations Board (HLRB) to first address union's retaliation claims;

^[2] a stay, rather than a dismissal without prejudice, was appropriate for retaliation claims; and

^[3] primary jurisdiction doctrine did not apply to claims alleging unlawful privatization of civil service positions.

Judgment of ICA affirmed in part.

Acoba, J., filed an opinion concurring in part and dissenting in part in which Pollack, J., joined.

West Headnotes (10)

^[1] **Appeal and Error**
—Cases Triable in Appellate Court

The existence of jurisdiction is a question of law that the Supreme Court reviews de novo under the right/wrong standard.

1 Cases that cite this headnote

^[2] **Appeal and Error**
—Cases Triable in Appellate Court

A court's decision to invoke the primary jurisdiction doctrine is reviewed de novo.

1 Cases that cite this headnote

^[3] **Action**
—Actions and administrative proceedings
Administrative Law and Procedure
—Primary jurisdiction

If the court determines that the primary jurisdiction doctrine applies, the court, in its discretion, may determine whether to stay the litigation or dismiss without prejudice.

2 Cases that cite this headnote

^[4] **Labor and Employment**
—Jurisdiction and venue

Circuit court had original jurisdiction over claims filed by public-employee labor union under Hawai'i Whistleblowers' Protection Act (HWPA) and constitutional free-speech provision, asserting that state officials had retaliated against union members for union's

filing of a lawsuit opposing a statewide furlough plan. Const. Art. 1, § 4; HRS § 378–62.

prejudice.

Cases that cite this headnote

Cases that cite this headnote

¹⁵¹ **Labor and Employment**
—Practices of Employer

Primary jurisdiction doctrine applied, so as to require Hawai'i Labor Relations Board (HLRB) to first address claims filed by public-employee labor union in circuit court alleging that state officials had retaliated against union members, in violation of Hawai'i Whistleblowers' Protection Act (HWPB) and constitutional free-speech protections, for union's filing of lawsuit opposing a statewide furlough plan; action essentially presented a prohibited practice controversy involving an alleged violation of collective-bargaining right, and retaliation claim raised issues of public employment policy that ought to be considered by HLRB. Const. Art. 1, § 4, Art. 13, § 2; HRS §§ 89–1(b), 89–13(a), 89–14, 378–62.

Cases that cite this headnote

¹⁸¹ **Action**
—Actions and administrative proceedings
Labor and Employment
—Practices of Employer

A stay, rather than a dismissal without prejudice, was appropriate for retaliation claims filed against state officials by public-employee labor union in circuit court that, under primary jurisdiction doctrine, had to first be addressed by Hawai'i Labor Relations Board (HLRB) because they essentially presented a prohibited practice controversy involving an alleged violation of collective-bargaining right; statute of limitations could prevent union from refiling its claims at conclusion of HLRB's proceedings. Const. Art. 13, § 2; HRS §§ 89–13, 89–14.

Cases that cite this headnote

¹⁶¹ **Administrative Law and Procedure**
—Primary jurisdiction

Application of primary jurisdiction doctrine does not require that the agency and the court have concurrent jurisdiction over a claim.

2 Cases that cite this headnote

¹⁹¹ **Labor and Employment**
—Practices of Employer

Claims filed by public-employee labor union, asserting that state was unlawfully privatizing civil service positions, did not require resolution of collective-bargaining issues placed within special competence of Hawai'i Labor Relations Board (HLRB), and, therefore, primary jurisdiction doctrine did not apply so as to require that HLRB first pass on controversies related to privatization; rather, question of whether privatization violated civil service services and merit principles was a threshold question that had to be determined by circuit court before HLRB's specialized expertise in addressing prohibited practices was implicated. Const. Art. 16, § 1; HRS §§ 76–1, 89–5(a), 89–9(d).

Cases that cite this headnote

¹⁷¹ **Administrative Law and Procedure**
—Primary jurisdiction

Under the doctrine of primary jurisdiction, a court has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without

^[10] **Officers and Public Employees**
—Other matters

Claims filed by public-employee labor union, asserting that state was unlawfully privatizing civil service positions in violation of merit principle, did not fall within original jurisdiction of a merit appeals board (MAB), and, therefore, primary jurisdiction doctrine did not apply; privatization did not relate to recruitment and examination under provision authorizing “any person” to appeal such issues to an MAB, and union was not an “employee” under provisions relating to other claims appealable to an MAB. Const. Art. 16, § 1; HRS §§ 76–1, 76–11, 76–14, 76–16.

Cases that cite this headnote

Attorneys and Law Firms

****601** Rebecca Covert, Herbert R. Takahashi, Honolulu, and Davina W. Lam, for petitioner.

Richard H. Thomason, for respondent.

RECKTENWALD, C.J., NAKAYAMA, and McKENNA, JJ., with ACOBA, J., Concurring and Dissenting, with Whom POLLACK, J. Joins.

Opinion of the Court by McKENNA, J.

***189 I. Introduction**

This case concerns the application of the primary jurisdiction doctrine by the Intermediate Court of Appeals (“ICA”) to a lawsuit filed in circuit court by the United Public Workers, AFSCME, Local 646, AFL-CIO (“UPW”), on behalf of the employees (“Employees”) it represents. UPW presents the following question: “Whether the ICA erred by ordering the circuit court to stay this case under the doctrine of ‘primary jurisdiction’ even though the claims are within the original jurisdiction of the circuit courts and do not present issues committed

to the specialized administrative expertise of the Hawai‘i Labor Relations Board.”

****602 *190** UPW sought relief in the Circuit Court of the First Circuit (“circuit court”) alleging that then-Governor Lingle and members of her administration retaliated against UPW members for filing a lawsuit opposing her 2009 statewide furlough plan. In addition, UPW alleged that the State was unlawfully privatizing positions historically and customarily performed by civil servants under the merit system. UPW’s retaliation claims were brought under (1) the Hawai‘i Whistleblowers’ Protection Act (“HWPB”),³ and (2) article I, section 4 of the Hawai‘i Constitution (“Free Speech Clause” or “Free Speech retaliation claim”).⁴ UPW’s privatization claims were brought under (1) article XVI, section 1 of the Hawai‘i Constitution,⁵ and (2) Hawai‘i Revised Statutes (“HRS”) § 76–43 (Supp. 2010).⁶

We hold that UPW’s retaliation claims are originally cognizable in the circuit courts; however, the ICA correctly ruled that pursuant to the doctrine of primary jurisdiction, the enforcement of UPW’s retaliation claims requires the resolution of issues that have been placed within the special competence of the Hawai‘i Labor Relations Board (“HLRB”) under HRS Chapter 89. The ICA also correctly ruled that the circuit court should have stayed rather than dismissed the UPW’s retaliation claims pending the HLRB’s determination of issues within UPW’s claims that were within the HLRB’s special competence. We hold that pursuant to *Konno v. County of Hawai‘i*, 85 Hawai‘i 61, 937 P.2d 397 (1997), however, the primary jurisdiction doctrine does not apply to UPW’s privatization claims.

Accordingly, we affirm the ICA’s judgment on appeal vacating the circuit court’s “Order Granting Defendants’ Second Motion to Dismiss Plaintiff’s Complaint Filed September 16, 2009” and May 15, 2012 Final Judgment. We disagree, however, with the ICA’s remand instructions to the extent that it ordered the circuit court to stay UPW’s privatization claims. We agree that the circuit court must stay the retaliation claims pursuant to the primary jurisdiction doctrine, but the primary jurisdiction doctrine does not apply to UPW’s privatization claims; therefore, we instruct the circuit court to proceed consistent with this opinion.

II. Background

A. Factual Background⁷

1. Attempted Furlough and Injunction

On June 1, 2009, then-Governor Linda Lingle announced that state employees would be furloughed three days per month for two years to allow the state to avoid having to lay off employees. On June 16, 2009, UPW filed a complaint in the circuit court ("Furlough Lawsuit") "for violations of state law under Article XIII, Section 2,⁸ and other State Constitution provisions," and sought injunctive *191 **603 relief to enjoin the state from implementing the furloughs.⁹ On July 2, 2009, the circuit court¹⁰ concluded that the defendants had violated the State Constitution by attempting to impose the furloughs without collective bargaining, and granted UPW's injunction, enjoining the unilateral statewide furloughs.

2. Reduction in Force Announcement

Soon thereafter, on July 17, 2009, Marie Laderta (Defendant Laderta), Director of the Department of Human Resources Development, notified various public employees that their names would be included on layoff lists. Approximately 216 UPW employees were on the list. On July 23, 2009, Clayton Frank ("Defendant Frank"), Director of the Department of Public Safety, notified UPW of an impending layoff due to the closure of the Kulani Correctional Facility. On August 4, 2009, Defendant Lingle announced a decision to implement a reduction in force ("RIF") that would discharge approximately 1,100 State employees.

3. Privatization

UPW alleged that on June 8, 2009, UPW requested that Defendants Lingle and Laderta terminate all contracts for services that have historically and customarily been performed by civil servants in bargaining units 1 and 10. UPW alleged that the Defendants refused.¹¹

UPW also alleged that Defendants refused to negotiate over the (1) decision to close Kulani Correctional Facility, and (2) implementation of that decision. On August 3, 2009, Defendant Frank informed the inmates at Kulani of their relocation by the end of September 2009. UPW alleged that the Department of Public Safety then subcontracted with private contractors to house approximately 2,000 Hawai'i inmates on the mainland.

B. Procedural History

1. HLRB Prohibited Practice Complaint

On August 27, 2009, UPW filed an amended complaint with the HLRB ("HLRB Complaint") against Defendants Laderta, Lingle, and Frank ("Defendants").¹² The HLRB Complaint alleged a number of violations under HRS § 89-13(a) ("prohibited practice violations"). In relevant part, the HLRB Complaint alleged that the Defendants: (1) violated HRS § 89-13(a)(1) when Defendant Lingle interfered, restrained, and coerced employees in their exercise of statutory and constitutional rights by threatening mass layoffs and the shutdown of programs; (2) violated HRS § 89-13(a)(3) when Defendants discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of RIF, layoffs, and discharges; (3) violated HRS § 89-13(a)(5) by refusing to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for RIF displacements, and discharges of bargaining unit employees; (4) violated HRS § 89-13(a)(7) by refusing to comply with provisions of Chapter 89, including HRS §§ 89-3¹³ and 89-9(a)¹⁴, (c)¹⁵, and **604 *192 (d)¹⁶; and (5) violated HRS § 89-13(a)(8) by violating the terms of the unit 1 and 10 collective bargaining agreements.

The HLRB entered its Findings of Fact and Conclusions of Law on October 23, 2009. In relevant part, the HLRB found: (1) the record indicated that the State at all relevant times was facing a severe fiscal crisis that required it to balance its budget in the face of ever-increasing revenue shortfalls; (2) Defendant Lingle's consideration of layoffs of public employees as a means of addressing the predicted revenue shortfall preceded the filing of grievances or civil lawsuits by UPW; (3) the State had presented a legitimate, non-discriminatory, and nonretaliatory reason for its decision to lay off workers, and the Union had not presented evidence to rebut the State's assertions (the decline of revenues) or demonstrated that the stated reason was merely pretextual.

2. Circuit Court Complaint

Before the HLRB had issued its findings, UPW filed a complaint in the circuit court ("First Circuit Complaint") on September 16, 2009, alleging that Defendants' actions: (1) constituted acts of retaliation, reprisal, and intimidation in violation of the HWPAA; (2) violated Employees' rights guaranteed by the Free Speech Clause; (3) violated the merit principle¹⁷ mandated by *193 **605 article XVI, section 1 of the Hawai'i Constitution; and (4) violated Employees' rights under HRS § 76-43 by "refusing to negotiate the criteria, procedures, timing, and

manner of handling mass layoffs for reasons other than 'lack of work' or 'lack of funds' with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees."¹⁸

Defendants then filed a Motion to Dismiss the First Circuit Complaint on the grounds that: (1) UPW did not identify any "employees" protected by HWPB, and UPW is not an employee itself; (2) UPW's complaints did not include any facts that could "underlie a freestanding constitutional claim premised on access to the courts"; (3) this court in *Konno v. County of Hawai'i*, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997) had already held, "the Hawai'i Constitution does not establish an independently enforceable right to the protection of merit principles"; and (4) UPW's allegations under HRS § 76-43 are premised on the requirements of Chapter 89, Hawai'i's collecting bargaining law; therefore, the HLRB had exclusive original jurisdiction over such complaints. The circuit court¹⁹ denied Defendants' motion in its entirety.

Two years later, on September 14, 2011, Defendants filed a second Motion to Dismiss in the circuit court on the basis that this court had recently clarified that the HLRB had "exclusive original jurisdiction over the controversy" in *Hawai'i Government Employees Association v. Lingle* ("HGEA"), 124 Hawai'i 197, 239 P.3d 1 (2010).²⁰ On January *194 **606 17, 2012, this court published *Hawai'i State Teachers Association v. Abercrombie* ("HSTA"), 126 Hawai'i 318, 271 P.3d 613 (2012),²¹ which further clarified and affirmed our decision in *HGEA*.

On February 15, 2012, the circuit court²² granted Defendants' second Motion to Dismiss and dismissed all claims based on its conclusion that the circuit court lacked jurisdiction. The circuit court found that the underlying facts in UPW's First Circuit Complaint essentially mirrored those alleged by UPW in the "prohibited practice" claims before the HLRB. It concluded that HRS § 89-14 provided HLRB with exclusive original jurisdiction over controversies implicating prohibited practices, and therefore, "it would be wholly inconsistent with HLRB's exclusive, original jurisdiction for the First Circuit to hear the same underlying factual disputes and allegations and create the possibility of inconsistent judgments."

The circuit court also concluded that the statutory scheme required that HLRB be given the opportunity to address the allegations in UPW's prohibited practice complaint. The circuit court would then review HLRB's decision in its appellate capacity. The circuit court also concluded that the additional claims raised in the First Circuit

Complaint, not included in the HLRB complaint, were essentially prohibited practices, and stated that it lacked "primary subject matter jurisdiction" over those claims because exclusive, original jurisdiction rested with the HLRB.

Finally, to the extent that the First Circuit Complaint raised constitutional and statutory claims over which the HLRB lacked subject matter jurisdiction, the circuit court concluded that under *HGEA*, the HLRB had to be given the opportunity to resolve the claims within its jurisdiction before a court could consider the constitutional claims in its appellate capacity.²³ The circuit court further concluded that the claims could be rendered moot if HLRB ruled against UPW on the key factual and legal questions of whether the Governor's reason for instituting layoffs were: 1) premised upon a true fiscal exigency, and were within her unilateral management powers under HRS Chapter 89, or 2) premised upon an improper desire to retaliate against UPW members for engaging in conduct specifically protected by HRS Chapter 89.

As for the "statutory claims," the circuit court concluded that "allowing parallel litigation in the circuit court while the HLRB proceeding was ongoing would both undercut the HLRB's exclusive original jurisdiction and create a risk of inconsistent judgments." The circuit court then dismissed all of UPW's claims based on a lack of jurisdiction.

D. ICA Memorandum Opinion

The ICA issued a Memorandum Opinion vacating the circuit court's judgment dismissing UPW's First Circuit Complaint, and remanded the case with instructions to stay the action pursuant to the primary jurisdiction doctrine, so that the parties could pursue appropriate administrative remedies before the HLRB. *UPW v. Lingle*, No. CAAP-12-0000505, 129 Hawai'i 451, 303 P.3d 1228 (Haw.App. June 18, 2013) (mem.).

The ICA essentially agreed with the circuit court that the controversy presented to the circuit court raised issues within the HLRB's exclusive jurisdiction over prohibited practice controversies. The ICA concluded that UPW's statutory claims could be raised directly in the circuit court, but that the matter should be referred to the HLRB under the doctrine of primary jurisdiction. *UPW*, mem. op. at 4. Therefore, the ICA concluded that the circuit court had erred in dismissing the action because a stay, rather than dismissal without prejudice, was appropriate under the circumstances.

****607 *195** The ICA concluded that UPW's First Circuit Complaint alleged conduct that was specifically defined as prohibited practices under HRS § 89-13. *UPW*, mem. op. at 8. The ICA concluded that UPW's layoff and privatization claims were based on allegations that Defendants had engaged in the prohibited practices of: (1) discriminating against UPW by laying off employees in retaliation for engaging in protected union activities and filing the Furlough Lawsuit; (2) discriminating against UPW members by failing to take corrective action to terminate current private contractors while implementing the layoff of UPW members; and (3) refusing to bargain collectively regarding the layoff procedures and the privatization. *Id.* The ICA thus reasoned that UPW's layoff and privatization claims were essentially prohibited practice claims. *Id.*

The ICA reasoned that this court's decisions in *HGEA* and *HSTA* reflect a concern that, "when a plaintiff presents to the circuit court a controversy that is identical to one which could have and should have been presented to the HLRB, the circuit court's exercise of jurisdiction necessarily involves a risk of interfering with the HLRB's exclusive jurisdiction over prohibited practice controversies." *Id.*

The ICA concluded, "UPW correctly asserts that its statutory claims could be raised directly in the circuit court." The ICA cited *Konno* for this assertion, indicating that it was referring to the civil service claims under HRS Chapter 76. *Id.* The ICA held that the doctrine of primary jurisdiction applies when a court and an agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency; therefore, the doctrine of primary jurisdiction applied to UPW's "statutory claims." *UPW*, mem. op. at 9. The ICA concluded that under the doctrine of primary jurisdiction, however, dismissal is only appropriate if the parties would not be unfairly disadvantaged. *Id.* Because the statute of limitations could prevent UPW from refileing its claims at the conclusion of the HLRB proceedings, the ICA concluded that the proper remedy was to stay the case pending the outcome of the administrative process. *Id.*

III. Standard of Review

[1] [2] [3] The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard. *HGEA*, 124 Hawai'i at 202, 239 P.3d at 6. Accordingly, a court's decision to invoke the primary jurisdiction doctrine is reviewed de novo as well. *Pac. Lightnet, Inc.*

v. Time Warner Telecom, Inc., 131 Hawai'i 257, 275, 318 P.3d 97, 115 (2013). "If the court determines that the primary jurisdiction doctrine applies, the court, in its discretion, may determine whether to stay the litigation or dismiss without prejudice." *Id.*

IV. Discussion

A. The Primary Jurisdiction Doctrine

UPW asserts in its Application that HLRB's exclusive original jurisdiction is limited to prohibited practices related to collective bargaining: "*HGEA v. Lingle* and *HSTA v. Abercrombie* decisions were narrow rulings that related only to the constitutional right to collective bargaining, which is implemented by HRS Chapter 89." UPW argues that the decisions "did not set out a broad rule that any claim that involves facts that could also make out a 'prohibited practice' must be presented to the HLRB even if the plaintiff is not alleging a prohibited practice but a violation of other statutory or constitutional provisions."

We agree with UPW to the extent that it argues that *HGEA* and *HSTA* were narrow rulings relating only to claims alleging violations of the rights to collective bargaining. In *HGEA*, the plaintiffs based their request for relief on HRS Chapter 89 and the constitutional right to collective bargaining under article XIII, section 2 of the Hawai'i Constitution. 124 Hawai'i at 200, 239 P.3d at 4. We concluded that although the plaintiffs' complaint did not expressly use the words "prohibited practice," a prohibited practice could be logically inferred because the plaintiffs' complaint essentially alleged that in instituting a unilateral statewide furlough plan, Defendant Lingle had committed a prohibited ***196 **608** practice when she refused to bargain collectively in good faith as required by HRS Chapter 89. Accordingly, we held that the HLRB had exclusive jurisdiction over the plaintiffs' claims pursuant to HRS § 89-14.

Unlike the plaintiffs in *HGEA*, the plaintiffs in *HSTA* deleted all references to HRS Chapter 89 in their complaint and based their request for relief solely on the constitutional right to collective bargaining under article XIII, section 2 of the Hawai'i constitution. *HSTA*, 126 Hawai'i at 322, 271 P.3d at 617. Nonetheless, we reiterated our holding in *HGEA* and emphasized that the legislative purpose of having the administrative agency with expertise in these matters decide them in the first instance is "frustrated if the HLRB's jurisdiction can be defeated by characterizing issues that fall within the scope

of HRS Chapter 89 as constitutional claims and then addressing them directly to the circuit court.” *HSTA*, 126 Hawai'i at 322, 271 P.3d at 617 (citing *HGEA*, 124 Hawai'i at 208, 239 P.3d at 12).

In the instant case, however, UPW's claims are based on the HWPB and the Free Speech Clause, both of which are within the original jurisdiction of the circuit court and do not facially involve violations of the constitutional or statutory rights to collective bargaining. Thus, *HGEA* and *HSTA* do not control the narrow question presented in the instant application, which essentially requires that we determine whether the primary jurisdiction doctrine applies to UPW's claims.

1. History of the Primary Jurisdiction Doctrine

The primary jurisdiction doctrine originated from the United States Supreme Court's decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.* (“*Abilene*”), 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). In *Abilene*, a shipper sued a carrier in state court claiming that a carrier's interstate freight rate was “unjust and unreasonable.” 204 U.S. at 433, 27 S.Ct. 350. The United States Supreme Court considered whether, consistent with the Interstate Commerce Act, the court had power “to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission.” *Abilene*, 204 U.S. at 432, 27 S.Ct. 350.

The Court opined that if the power to originally hear complaints on the subject existed in both courts and the Commission, there might be a divergence between the action of the Commission and the decision of a court. 204 U.S. at 441, 27 S.Ct. 350. The Court stated, “the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus, a conflict would arise which would render the enforcement of the act impossible.” 204 U.S. at 441, 27 S.Ct. 350. Accordingly, the Court held, “a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule[.]” 204 U.S. at 448, 27 S.Ct. 350 (emphasis added).

In *United States v. Western Pacific Railroad Company* (“*Western Pac. R.R.*”), 352 U.S. 59, 77 S.Ct. 161, 1

L.Ed.2d 126 (1956), the United States Supreme Court further refined the doctrine of primary jurisdiction. Presented with the question of whether the Court of Claims had correctly allocated the issues in a suit between the jurisdiction of the Interstate Commerce Commission and that of the court, i.e., whether the court properly applied the primary jurisdiction doctrine, the Court explained that the primary jurisdiction doctrine was concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties. 352 U.S. at 63–64, 77 S.Ct. 161. The Court held that unlike the exhaustion principle, which applies when a claim is cognizable in the first instance by an administrative agency alone, primary jurisdiction:

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under *197 **609 a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Western Pac. R.R., 352 U.S. at 63–64, 77 S.Ct. 161 (citing *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433, 60 S.Ct. 325, 84 L.Ed. 361 (1940) (holding that the District Court had jurisdiction over the action in assumpsit; however, in light of the provisions of the Interstate Commerce Act, “it should not have proceeded to adjudicate the rights and liabilities of the parties” in the absence of a decision by the Interstate Commerce Commission with respect to the validity of the practice involved)).

Thus, the doctrine of primary jurisdiction arose from a concern that an established rate schedule could be found reasonable by the agency tasked with this determination, but unreasonable by a court, thereby triggering a conflict that could render the enforcement of the Interstate Commerce Act impossible. *Abilene*, 204 U.S. at 441, 27 S.Ct. 350. The doctrine was later refined to include the principle that in cases raising issues of fact not within the conventional experience of judges or requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. *Western Pac. R.R.*, 352 U.S. at 77, 77 S.Ct. 161; *Far East Conference v. United States*, 342 U.S. 570, 574, 72 S.Ct. 492, 96 L.Ed. 576 (1952) (holding that the Federal Maritime Board's primary jurisdiction over

matters concerning the Shipping Act of 1916 precluded the District Court for New Jersey from passing on the merits of the lawsuit, which was brought under the Sherman Anti-Trust Act).

2. Primary Jurisdiction in Hawai'i

This court adopted the doctrine of primary jurisdiction directly from *Western Pac. R.R.*, holding that primary jurisdiction applied "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 168 (1987) (citing *Western Pac. R.R.*, 352 U.S. at 63-64, 77 S.Ct. 161). We concluded, "[w]hen this happens, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* (citing *Western Pac. R.R.*, 352 U.S. at 64, 77 S.Ct. 161). We opined, "[i]n effect, the courts are divested of whatever original jurisdiction they would otherwise possess. And 'even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine.'" 69 Haw. at 93, 734 P.2d at 168-69 (citing B. Schwartz, *Administrative Law* § 8.24, at 488 (2nd ed. 1984) (emphasis omitted)).

In *Kona Old*, the plaintiffs' invoked the circuit court's jurisdiction pursuant to HRS §§ 91-14(a),²⁴ 205A-6,²⁵ and 603-21,²⁶ seeking a ruling that the director had violated the Coastal Zone Management Act ("CZMA") in issuing a special management area ("SMA") minor use permit, and an order voiding the *198 **610 permit and enjoining an authorized construction of real property situated within the special management area of Kailua-Kona. 69 Haw. at 89, 734 P.2d at 166. We concluded that the issuance of a SMA minor permit and its enforcement required the resolution of issues which, under CZMA's regulatory scheme, had been placed within the special competence of the county planning department. *Id.* at 93, 734 P.2d at 169. We held, "the request for judicial intervention in the administrative process should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in issuing the minor permit was proper." *Id.* Accordingly, this court applied the doctrine of primary jurisdiction and affirmed the circuit court's dismissal of the case. *Id.*

We have similarly applied the doctrine of primary jurisdiction to claims originally cognizable in the circuit court but containing issues that first require a determination by an administrative agency. See *Chun v. Emps. Ret. Sys. of State of Haw.*, 73 Haw. 9, 13, 828 P.2d

260, 262 (1992) (holding that the considerations of uniformity and consistency in a specialized agency's administration of the Employees' Retirement System, mandated suspension of the judicial process pending an initial review of the issues by the administrative body). See also *Jou v. Nat'l Interstate Ins. Co. of Haw.*, 114 Hawai'i 122, 128, 157 P.3d 561, 567 (App.2007) (applying the primary jurisdiction doctrine and referring the question of whether a workers' compensation carrier acted unreasonably or in bad faith to the Director of the Department of Labor and Industrial Relations before proceeding with a bad faith tort claim in circuit court). But see *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 202, 891 P.2d 279, 289 (1995) (holding that the doctrine did not apply where (1) a pure question of law is at issue and technical matters calling for the special competence of the administrative expert are not involved; and (2) cases in which the constitutionality of the agency's rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority).

Notwithstanding, "[n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pac. R.R.*, 352 U.S. 59, 64, 77 S.Ct. 161.

B. UPW's Retaliation Claims

1. Framework for the Application of the Primary Jurisdiction Doctrine

As discussed above, this court adopted the doctrine of primary jurisdiction directly from the United States Supreme Court's opinion in *Western Pac. R.R.*, 352 U.S. 59, 77 S.Ct. 161. The plaintiffs in *Western Pac. R.R.* had brought suit in the Court of Claims under the Tucker Act²⁷ to recover money from the United States. 352 U.S. at 60 n. 1, 77 S.Ct. 161. The United States Supreme Court was specifically presented with the question of whether the Court of Claims had properly applied the doctrine of primary jurisdiction; that is, whether it had correctly allocated the issues in the suit between the jurisdictions of the Interstate Commerce Commission and that of the court. 352 U.S. at 64, 77 S.Ct. 161. We are similarly presented in the instant case with the question of whether the ICA properly applied the doctrine of primary jurisdiction to UPW's claims, even when the circuit court had original jurisdiction over those claims. Accordingly, the Court's reasoning in its application of the doctrine is particularly instructive to the instant case.

In *Western Pac. R.R.*, the Court explained that the determination of whether a lower *199 **611 court had properly applied the doctrine of primary jurisdiction required an examination of whether the Act conferring jurisdiction upon the Interstate Commerce Commission, the Interstate Commerce Act, required the agency to first pass on the issue in dispute, which in turn depended on whether the controversy in dispute raised "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." 352 U.S. at 65, 77 S.Ct. 161. Based on these factors, the Court held that the issues presented in the claim were initially matters for the Commission's determination, even if the suits had been brought under the Tucker Act, and not the Interstate Commerce Act. *Id.* at 70, 77 S.Ct. 161.

UPW's retaliation claims are unquestionably cognizable in the circuit court. UPW alleges, however, that Defendant Lingle retaliated against UPW members for filing the Furlough Lawsuit. The Furlough Lawsuit was an assertion of the Employees' right to collective bargaining, alleging that Defendant Lingle violated collective bargaining laws by unilaterally imposing statewide furloughs. Although UPW's retaliation claims do not specifically assert the right to collective bargaining, prohibited practice claims under HRS § 89-13 nevertheless appear to be implicated by virtue of UPW's allegation that Defendants implemented the layoffs in retaliation for the Furlough Lawsuit.

An examination of the law governing the HLRB's jurisdiction under HRS Chapter 89, therefore, is necessary to determine whether the doctrine of primary jurisdiction applies. Specifically, HRS Chapter 89 must be examined to determine whether it requires the HLRB to first pass on the controversy, which in turn depends on whether the controversy raises policy issues concerning matters that ought to be considered by the HLRB in the interests of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89.

a. The Regulatory Scheme of HRS Chapter 89, Collective Bargaining in Public Employment

HRS Chapter 89 is titled "Collective Bargaining in Public Employment." HRS § 89-1(a) outlines the following legislative findings:

[J]oint decision-making is the

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modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.

HRS § 89-1(a). HRS § 89-1(b) states in part, "it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." HRS § 89-1(b). HRS § 89-1(b) also notes that this policy is best effectuated by:

- (1) Recognizing the right of public employees to organize for the purpose of collective bargaining;
- (2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to section 76-1;
- and (3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

The Committee on Human Resources explained that the legislature had created the HLRB, formerly the Hawai'i Public Employment Relations Board, "to administer the provisions of Chapter 89 in an effort to promote cooperative relations between the government and its employees and to protect the public by ensuring orderly

government operations.” *200 **612 *HGEA*, 124 Hawai'i at 204, 239 P.3d at 8 (citing S. Stand. Comm. Rep. No. 597–82, in 1982 Senate Journal, at 1202). Thus, the policy motivating Chapter 89 was the promotion of cooperative relations between government and its employees, and the HLRB was specifically created to administer this policy.

The retaliation claims in the instant case clearly involve relations between the government and its public sector employees. The crux of UPW's allegation is that, because it exercised its right to collective bargaining by filing a lawsuit opposing unilateral statewide furloughs, Defendants retaliated against UPW members by laying off these members. If UPW's allegations are true, Defendants have violated the employees' right to collectively bargain by retaliating against them for asserting such rights by filing the Furlough Lawsuit. HRS Chapter 89 specifically protects the rights of public employees to exercise collective bargaining. Pursuant to HRS § 89–1, the HLRB was created to administer the provisions of Chapter 89.

In addition, HRS § 89–14 specifically supports the conclusion that UPW's retaliation claims raise issues of public employment policy that ought to be considered by the HLRB. As we explained in *HGEA*, HRS § 89–14 was amended in 1982 in response to the ICA opinion in *Winslow v. State*, 2 Haw.App. 50, 625 P.2d 1046 (1981), which conferred concurrent jurisdiction to the HLRB and circuit court over public employee prohibited practice complaints. 124 Hawai'i at 203, 239 P.3d at 7. The legislature explained that the purpose of the bill was to make the jurisdiction of the HLRB exclusive in controversies relating to prohibited practices. S. Stand. Comm. Rep. No. 597–82, in 1982 Senate Journal, at 1202. In a Report issued by the Committee on Public Employment and Government Operations, the committee explained that the phrase, “exclusive original jurisdiction” may also be referred to as “exclusive primary or initial jurisdiction.” H. Stand. Comm. Rep. No. 134–87, in 1982 House Journal, at 944. The committee explained that under the bill as amended:

[A] person with a prohibited practice complaint must first file with the HLRB which would then conduct proceedings on the complaint and issue a decision or order. The complainant would not have the option of either filing the prohibited practice complaint with HLRB or in the circuit court or of filing the same complaint

concurrently with both the HRLB and the court.

Id. In the report issued by the Committee on Human Resources, the committee stated that it believed that the original intent of HRS § 89–14 was to allow the HLRB to have primary jurisdiction of prohibited practice complaints because the HLRB was “the administrative agency with the expertise in public employment relations.”¹⁴ S. Stand. Comm. Rep. N. 597–82, in 1982 House Journal, at 1202 (emphasis added).

Accordingly, as amended, HRS § 89–14 provides: “Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377–9; provided that the board shall have exclusive original jurisdiction over such a controversy[.]” Thus, HRS § 89–14 expressly requires that the HLRB first pass on prohibited practice controversies.

UPW alleges that Defendants violated the HWP by retaliating against UPW and its members for filing and pursuing the Furlough Lawsuit in circuit court. Pursuant to HRS § 89–13(a)(4), it is a prohibited practice to: “Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization.” Viewing UPW's allegations in light of HRS § 89–13(a)(4), UPW essentially presents a prohibited practice controversy.

Thus, UPW's retaliation claims raise issues of public employment policy that ought to be considered by the HLRB in the interest of a *201 **613 uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89. Moreover, the legislature explicitly conferred exclusive or “initial jurisdiction” to the HLRB over prohibited practices, such as discharging employees for filing complaints, because it recognized that the HLRB possessed expertise in matters concerning public employment. Therefore, HRS Chapter 89 requires the HLRB to first pass on UPW's retaliation claim, thus triggering the primary jurisdiction doctrine.

b. The ICA Properly Applied the Primary Jurisdiction Doctrine to UPW's Retaliation Claims

¹⁴ ¹⁵ The circuit court has original jurisdiction over UPW's HWP and Free Speech retaliation claims, and

therefore, UPW has a right to pursue claims under these laws. Based on the reasons above, however, we hold that the primary jurisdiction doctrine is applicable to UPW's retaliation claims. Thus, pursuant to *Kona Old*, UPW's right to have these claims considered by the courts yields to the overriding policy promoted by the doctrine of primary jurisdiction. 69 Haw. at 93, 734 P.2d at 168 (citing B. Schwartz, Administrative Law § 8.24, at 488 (2nd ed. 1984)).

The mere fact that the issues were phrased in UPW's complaint as HWP and free speech claims are not determinative on this issue. See *Western Pac. R.R.*, 352 U.S. at 68–69, 77 S.Ct. 161 (“[T]he mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue.”). As the United States Supreme Court stated, such would make the doctrine of primary jurisdiction an “abstraction to be called into operation at the whim of the pleader.” 352 U.S. at 59, 77 S.Ct. 161.

The United States Supreme Court expressly rejected such an approach in *General American Tank*, when it held that, while the action was an ordinary one in assumpsit on a written contract, “[w]hen it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission’s determination[.]” 308 U.S. at 433, 60 S.Ct. 325. The Court concluded that the policy of the Act was that reasonable allowances and practices were to be fixed and settled after full investigation by the Commission. *Id.* at 432–33, 60 S.Ct. 325. Thus, the Court held that although the District Court had jurisdiction of the subject matter and of the parties, the issues before the District Court, the reasonableness and legality of the practices of the parties, raised questions that were subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. *Id.*

¹⁶¹ The dissent argues that it is well-established that the agency and the court must have concurrent jurisdiction over a claim in order for the primary jurisdiction doctrine to apply. Dissenting Opinion at 211, 325 P.3d at 623 (citing *Aged Hawaiians*, 78 Hawai'i at 202, 891 P.2d at 289). Respectfully, we disagree. The primary jurisdiction doctrine does not presume that a claim must be originally cognizable by both the court and the agency. The agency and the court need not have concurrent jurisdiction over the claims, as long as the agency and the court have concurrent jurisdiction over issues presented in the claims. In *Aged Hawaiians* and in *Kona Old*, we held that the doctrine of primary jurisdiction applies “where a

claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Aged Hawaiians*, 78 Hawai'i at 202, 891 P.2d at 289; *Kona Old*, 69 Haw. at 93, 734 P.2d at 168–69 (emphasis added). Accordingly, we recognized that the emphasis in the application of the doctrine of primary jurisdiction was on the issues raised by the claim, rather than the claim itself.

The retaliation allegations in UPW's complaint provide a basis for both a prohibited practice claim and claims under the HWP and Free Speech Clause; however, one issue is determinative of all these claims, namely, whether Defendants' decision to lay off government employees was motivated by the *202 **614 Furlough Lawsuit. Thus, the question of whether Defendants violated the HWP and Free Speech Clause are inextricably intertwined with the question of whether Defendants engaged in a HRS § 89–13(a)(4) prohibited practice. Under these circumstances, we conclude that the HLRB must be the first to pass on the motivations for Defendants' decision to implement the layoffs. Cf. *In re United Pub. Workers*, 131 Hawai'i 142, 315 P.3d 768, 777 (App.2013) (“The HLRB's jurisdiction clearly extends to determining whether, in a particular instance, specified employer conduct constitutes a ‘prohibited practice’ under HRS § 89–13.”).

This is consistent with the reasons for the existence of the primary jurisdiction doctrine, avoiding the risk of divergent decisions between an administrative agency and a court on certain administrative questions. Moreover, it is consistent with the purposes the primary jurisdiction doctrine serves, that of (1) uniformity which would obtain if a specialized agency initially passed on certain types of administrative questions, and (2) deference to the expert and specialized knowledge of administrative agencies specifically created by the legislature for regulating certain subject matter. Thus, as stated in *Western Pac. R.R.*, 352 U.S. at 64–65, 77 S.Ct. 161:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained

through experience, and by more flexible procedure.

(Citing *Far East Conference*, 342 U.S. at 574–75, 72 S.Ct. 492).

The regulatory scheme laid down by HRS Chapter 89 specifically contemplates that issues concerning governmental and employee relations ought to be considered by the HLRB in the interest of uniform and expert administration. Moreover, HRS § 89–14 expressly requires that the HLRB first pass on the issues presented in UPW's complaint because UPW's allegations raise a prohibited practice controversy.

Accordingly, we hold that the ICA properly applied the doctrine of primary jurisdiction to UPW's retaliation claims.

2. A Stay Is Appropriate Under the Circumstances

¹⁷¹ Under the doctrine of primary jurisdiction, a court has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. *Reiter v. Cooper*, 507 U.S. 258, 268–69, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).

In *Reiter*, the United States Supreme Court rejected the defendant's argument that the primary jurisdiction doctrine required plaintiffs to initially present their claims to the administrative agency, rather than the court. 507 U.S. at 268, 113 S.Ct. 1213. On the contrary, the Court held that the doctrine was specifically applicable to "claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.* The Court further held that "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Id.* at 268–69, 113 S.Ct. 1213.

The dissent states that our conclusion that UPW's retaliation claims concerns prohibited practices conflicts with our conclusion that the court may decide whether to stay or dismiss the action because HRS § 89–14 expressly provides that the HLRB has "exclusive original jurisdiction" over prohibited practices. *See* Dissenting Opinion at 216, 325 P.3d at 628. As discussed *supra*, application of the primary jurisdiction was necessary because UPW's claims were brought under the HWP

and the Hawai'i Constitution over which the circuit court has jurisdiction. Subsumed within these claims, however, *203 **615 were prohibited practice controversies; therefore, under HRS Chapter 89's regulatory scheme, the HLRB was required to make an initial determination before the circuit court could adjudicate claims over which it has jurisdiction.

¹⁸¹ In the instant case, the ICA concluded that UPW's First Circuit Complaint alleged that Defendants had essentially engaged in prohibited practices by implementing the layoffs and privatization, but that UPW's statutory claims could be raised directly in the circuit court. The ICA held, therefore, that pursuant to the primary jurisdiction doctrine, a stay rather than a dismissal of UPW's claims was appropriate because the statute of limitations could prevent UPW from refiling its claims at the conclusion of the HLRB's proceedings. As to UPW's retaliation claims, we agree.

Therefore, we affirm the ICA's judgment staying UPW's retaliation claims pending the outcome of the administrative process.

C. UPW's Privatization Claims

UPW alleged in its First Circuit Complaint that Defendants privatized public work in violation of civil service merit principles protected by article XVI, section 1 of the Hawai'i Constitution and Hawaii's civil service laws, HRS Chapters 76 and 77,²⁹ "by contracting out civil service work—for example, work at the Kulani Correctional Facility—to private companies at the same time that public employees who were available to perform that work were being subjected to layoffs." UPW asserts in its Application that in *Konno*, 85 Hawai'i 61, 937 P.2d 397, this court "expressed no doubt that these claims were properly cognizable in an original suit before the circuit court." UPW argues, therefore, that the ICA erred in concluding that UPW's privatization claims, which UPW asserts are identical to the claim brought in *Konno*, contained issues within the specialized expertise of the HLRB.

1. Hawaii's Civil Service Laws

In *Konno*, the central issue was the privatization of public services, namely the validity of a contract entered into by the County of Hawai'i to privatize the operation of a landfill. 85 Hawai'i 61, 64, 937 P.2d 397, 400. We held that the County violated civil service laws and merit principles but had not violated collective bargaining laws. *Id.*

We explained in *Konno* that article XVI, section 1 of the Hawai'i Constitution provides, "[t]he employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle." We concluded that by its express terms, article XVI, section 1 simply means that "civil service," however defined, was to be governed by merit principles. 85 Hawai'i 61, 70, 937 P.2d 397, 406. We stated, however, that article XVI, section 1 of the Hawai'i Constitution did not define the precise scope of the civil service, i.e., the particular job positions that are within civil service. We explained: "Instead, article XVI, section 1 expressly refers to other sources for a definition of 'civil service.' It states: 'civil service, as defined by law' " *Id.* (emphasis in original) (ellipsis in original).

We held that in order to determine the scope of the term "civil service," statutory and case law had to be examined; therefore, the constitution did not establish an independently enforceable right to the protection of merit principles. We concluded, however, that civil service positions were also subject to the civil service statutes contained within HRS Chapters 76 and 77. 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997). Thus, we concluded that HRS Chapters 76 and 77 provided civil servants with an enforceable right to the protection of merit principles guaranteed by article XVI, section 1 of the Hawai'i constitution.

We then concluded that under HRS § 76-77,³⁰ landfill worker positions were within the civil service under the "nature of the services *204 **616 test."³¹ 85 Hawai'i at 74, 937 P.2d at 410. Accordingly, we held that the County violated civil service laws and merit principles, and instructed the circuit court to fashion injunctive relief requiring the landfill to be transferred from private to County operation, and also to monitor the transition and impose sanctions for non-compliance. *Id.* at 79, 937 P.2d at 415. We expressed no doubt that the issues raised in the privatization claims were within the original jurisdiction of the circuit court, and not the HLRB.

At the time *Konno* was decided, HRS § 76-1 (1985) stated that it was the policy of the State that the personnel system be applied and administered in accordance with certain merit principles.³² Act 253 of 2000 ("Act 253") repealed numerous sections of HRS Chapter 76 and repealed Chapter 77 in its entirety. In addition, Act 253 established a Merit Appeals Board ("MAB") and amended the definition of "merit principle" in HRS § 76-1. HRS § 76-1, as amended, defines the merit principle as "the selection of persons based on their fitness and ability for public employment and the

retention of employees based on their demonstrated appropriate conduct and productive performance." HRS § 76-1 (Supp.2000).

Defendants argue that after the enactment of Act 253, UPW and the State have apparently argued over "whether original jurisdiction over claimed violations of HRS § 76-16(b),³³ as it relates to contracting out claims³⁴ rests with the HLRB pursuant to HRS §§ 89-5 and 89-9(d), or with the various merit appeals boards pursuant to HRS §§ 76-16(a),³⁵ 76-14(a), (b) and (e),³⁶ and 76-47."³⁷ Accordingly, we address whether UPW's privatization claims require the resolution *205 **617 of issues placed within the special competence of either the HLRB or the MAB.

2. Civil Service Laws Do Not Require Privatization Claims to be Determined by the HLRB

¹⁹¹ HRS § 89-5(a) (2012) states that the HLRB was created to ensure that (1) collective bargaining is conducted in accordance with HRS Chapter 89, and (2) the merit principle under HRS § 76-1 is maintained. However, we concluded in *Konno* that, pursuant to HRS § 89-9(d), "The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle[.]" Thus, we held that the County and UPW were barred from bargaining over both the privatization decision and its effects because we concluded that County's privatization effort violated civil service laws and merit principles. 85 Hawai'i at 78, 937 P.2d at 414 ("It would be absurd for us to hold that the County violated collective bargaining laws by refusing to negotiate with the UPW when both parties were expressly barred from negotiating [the County's privatization effort] by statute.").

The HLRB, therefore, only has jurisdiction over issues related to HRS Chapter 89, such as collective bargaining and prohibited practice controversies, to the extent they do not violate merit principles. UPW alleged in its First Circuit Complaint that Defendants unlawfully abolished civil service positions and contracted out positions that have historically and customarily been performed by civil servants under the merit system. These allegations may constitute violations of civil service laws and merit principles. Pursuant to *Konno* and HRS § 89-9(d), UPW and Defendants were expressly barred from bargaining over either the decision to privatize or its effect if privatization violated civil service laws or merit principles. Thus, the question of whether privatization violated civil service laws and merit principles is a threshold question that must be determined by the circuit court before the HLRB's specialized expertise in

addressing prohibited practices is implicated.

Moreover, the purpose of Act 253 was “to reform the public employment laws that were enacted to implement two constitutional mandates—that there be civil service based on merit and that public employees have the right to bargain collectively.” 2000 Haw. Sess. L. Act 253, § 1 at 853. Act 253 sought to repeal Hawaii’s civil service and collective bargaining laws and to create a new comprehensive public employment law. S. Stand. Comm. Rep. No. 2686, in 2000 Senate Journal, at 1104. The Joint Labor and Environmental and Ways and Means Standing Committee Report states: “Public employment is governed by two often contradictory set of laws—those for civil service and those for collective bargaining. While these laws once clearly delineated the difference between the two, changes over many years have blurred the lines of responsibility and authority.” *Id.* The report further states “that one of the keys to successful modernization and a more responsive, adaptive government, is to restore the ‘bright line’—the clear delineation between civil service and collective bargaining.” *Id.* Thus, the legislative history of Act 253 reflects an intent to distinguish issues related to civil service and merit principles from collective bargaining.

Therefore, we hold that HRS Chapter 89 does not require that the HLRB first pass on controversies related to privatization. The ICA erred in staying UPW’s privatization claims to pursue administrative remedies before the HLRB under the primary jurisdiction doctrine.³⁸

****618 *206 3. The Merit Appeals Board’s Jurisdiction Over Civil Service Laws**

¹⁰⁰ Defendants also argue that original jurisdiction over claimed violations of HRS § 76–16 as it relates to “contracting out claims” rests with the HLRB or in the alternative, the various merit appeals boards pursuant HRS §§ 76–14, 76–16, and 76–47. This assertion lacks merit.

HRS § 76–47 requires that each jurisdiction³⁹ “establish a merit appeals board that shall have exclusive authority to hear and decide appeals relating to matters set forth in section 76–14 concerning the civil service of the jurisdiction.” HRS § 76–14 then provides in relevant part:

§ 76–14. Merit appeals board; duties, and jurisdiction

(a) The merit appeals board of each jurisdiction shall decide appeals from any action under this chapter

taken by the chief executive, the director, an appointing authority, or a designee acting on behalf of one of these individuals, relating to:

- (1) Recruitment and examination;
- (2) Classification and reclassification of a particular position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization;
- (3) Initial pricing of classes; and
- (4) Other employment actions under this chapter, including disciplinary actions and adverse actions for failure to meet performance requirements, taken against civil service employees who are excluded from collective bargaining coverage under section 89–6.

(b) Any person suffering legal wrong by an action under subsection (a)(1) or aggrieved by such action shall be entitled to appeal to the merit appeals board. Any employee covered by chapter 76 suffering legal wrong by an action under subsection (a)(2) or (3) shall be entitled to appeal to the merit appeals board. Only employees covered by chapter 76, who are excluded from collective bargaining, suffering legal wrong by an action under subsection (a)(4) shall be entitled to appeal to the merit appeals board. Appeals under this section shall be filed within time limits and in the manner provided by rules of the merit appeals board.

Although “any person” can appeal HRS § 76–14(a)(1) “recruitment and examination” issues to a MAB under HRS § 76–14(b)(1), only “employees” can bring appeals under subsections (a)(2) to (a)(4), and UPW is not an employee. In any event, privatization issues do not relate to “recruitment and examination.”

In addition, privatization does not relate to “classification and reclassification of a particular position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization,” or “initial pricing of classes” under HRS §§ 76–14(a)(2) and (a)(3). Even if privatization could, under HRS § 76–14(a)(4), be characterized as “other employment actions under this chapter, including disciplinary actions and adverse actions for failure to meet performance requirements, taken against civil service employees who are excluded from collective bargaining coverage under section 89–6,” this is an issue we need not and do not address. This is because UPW would not be able to bring privatization claims under HRS §§ 76–16, 76–14, or 76–47 to a merit appeals board because under HRS §

76–14(b), claims under HRS § 76–14(a)(4) can only be brought by “employees covered by chapter 76, who are excluded from collective bargaining.” (Emphasis added). HRS § 76–11 provides that an “ ‘Employee’ or ‘public employee’ means any person holding a position in the service of a jurisdiction, irrespective of status or type of appointment; provided that, if the context clearly applies only to an employee who is a member of the civil service, ‘employee *207 **619 means a civil service employee.’” To repeat, UPW is not an “employee.”

Finally, HRS § 76–16 requires all positions in the civil service systems be filled through civil service recruitment procedure based on merit principles, and includes public employees within civil service unless specifically excluded or exempted; however, it contains no reference to the merit appeals boards. Having determined that UPW’s privatization claims are not subject to HRS § 76–14, Defendants’ alternate argument that the primary jurisdiction doctrine requires referral of UPW’s privatization claims to Chapter 76 merit appeals board is devoid of merit.

IV. Conclusion

We hold that the primary jurisdiction doctrine was applicable to UPW’s retaliation claims because the claims required the resolution of issues that have been placed within the special competence of the HLRB under HRS Chapter 89’s regulatory scheme. In addition, we hold that a stay, rather than a dismissal, was appropriate under the circumstances.

We also hold that the primary jurisdiction doctrine was not applicable to UPW’s privatization claims because they did not contain any issues which, under Hawaii’s collective bargaining and civil service laws, had been placed within the specialized competence of either the HLRB or the MAB. Therefore, the circuit court erred in dismissing UPW’s privatization claims, and the ICA erred in referring the claims to the HLRB.

Accordingly, we affirm the ICA’s judgment on appeal to the extent that it vacated the circuit court’s order dismissing UPW’s complaint, and agree with the ICA’s remand instructions to the extent that it ordered the circuit court to stay UPW’s retaliation claims pursuant to the primary jurisdiction doctrine. We disagree, however, that the primary jurisdiction doctrine applies to UPW’s privatization claims, and therefore, instruct the circuit court to proceed with the privatization claims consistent with this opinion.

**UNITED PUBLIC WORKERS, AFSCME, LOCAL
646, AFL–CIO, Petitioner/Plaintiff–Appellant,**

vs.

**NEIL ABERCROMBIE,¹ Governor, State of Hawai‘i;
Kalbert K. Young, Director, Department of Budget
and Finance, State of Hawai‘i; Barbara A. Krieg,
Director, Department of Human Resources
Development, State of Hawai‘i; Ted Sakai, Director,
Department of Public Safety, State of Hawai‘i,²
Respondents/Defendants–Appellees.**

Concurring and Dissenting Opinion by ACOBA, J., In
Which POLLACK, J., Joins.

In my view, respectfully, (1) the majority’s formulation and application of the doctrine of primary jurisdiction is incorrect in view of Hawai‘i Revised Statutes (HRS) § 89–14 (1993) and precedent, (2) jurisdiction on the constitutional claims rests with the circuit court, (3) jurisdiction of the Hawai‘i Whistleblower’s Protection Act (HWPB), HRS Chapter 378, lies with the circuit court, and (4) collateral estoppel would apply to limit litigation and avoid conflicts where jurisdiction may be asserted on the underlying conduct of a claim filed in both the circuit court and with an agency.

I.

A.

On August 27, 2009, Petitioner/Plaintiff–Appellant the United Public Workers, AFSCME, Local 646, AFL–CIO (UPW) filed *208 **620 a “First Amended Prohibited Practice Complaint” with the Hawai‘i Labor Relations Board (HLRB) (HLRB Complaint) alleging a number of violations of HRS § 89–13(a) (Supp. 2003). Specifically, UPW stated that then-Governor Linda Lingle (Governor Lingle), Marie Laderta, Director of the Department of Human Resources Development, and Clayton Frank,

Director of the Department of Public Safety (collectively, "Defendants") willfully:

- a. Interfered, restrained, and coerced employees in the exercise of rights guaranteed under chapter 89 in violation of Section 89-13(a)(1)³, HRS;
- b. Discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of Section 89-13(a)(3)⁴, HRS, ...;
- c. Refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of Section 89-13(a)(5)⁵, HRS, ...;
- d. Refused to comply with provisions of chapter 89, including Sections 89-3, 89-9(a), (c) and (d), HRS, in violation of Section 89-13(a)(7)⁶, HRS; and
- e. Violated the terms of the unit 1 and 10 collective bargaining agreements ... in violation of Section 89-13(a)(8)⁷, HRS.

On September 16, 2009, UPW filed a complaint in the circuit court of the first circuit (the court)⁸, alleging the following four counts against Defendants, as well as Linda Smith, chief policy advisor to Governor Lingle, and Georgina Kawamura, director of the Department of Budget and Finance:

COUNT I—VIOLATIONS OF THE HAWAII WHISTLEBLOWERS' PROTECTION ACT

....

75. Defendants' conduct alleged herein constitutes acts of retaliation, reprisal, and intimidation in violation of Hawaii's Whistleblowers' Protection Act and was undertaken knowingly, intentionally, maliciously, wantonly and oppressively.

76. By the aforementioned conduct and other acts and deeds to be established during the proceedings herein Defendants have violated the rights of employees under Section 378-62⁹, HRS, for retaliatory *209 **621 threats, reductions in force, discrimination, discharge, and other unlawful adverse actions.

....

COUNT II—VIOLATIONS OF ARTICLE I, SECTION 4 OF THE HAWAII CONSTITUTION

81. The Hawai'i State Constitution, in Article I, Section 4, guarantees "the freedom of speech" and "the right of the people ... to petition the government for a redress of grievances."¹⁰ Included within the rights protected by Article I, Section 4 are the rights to object to and challenge illegal government action in a court action.

82. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 by seeking relief in the circuit court against illegal government action that would unilaterally implement mandatory unpaid furloughs of three days per month for all state employees for a two-year period.

83. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 in their capacity as citizens, rather than in the course of their official duties as public employees.

....

86. By retaliating against UPW and its members for objecting to and reporting illegal government action, Defendants deprived UPW and its members of rights guaranteed by Article I, Section 4 of the Hawai'i Constitution.

COUNT III—VIOLATIONS OF MERIT PRINCIPLES

....

89. In *Konno v. County of Hawai'i*, 85 Hawai'i 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil servants represented by UPW violates the merit principle.

....

93. On and after June 30, 2009 Defendants have refused to terminate contracts which are contrary to public policy in contravention of Article XVI, Section 1 of the Hawaii State Constitution.¹¹

94. Defendants, by the foregoing acts, and other acts to be established during the course of the proceeding herein have violated the merit principle mandated by Article XVI, Section 1 of the Hawaii State Constitution.

....

COUNT IV—VIOLATIONS OF CIVIL SERVICE LAWS

....

96. HRS Chapters 76 and 77 require that all blue collar, non-supervisory positions and institutional, health and correctional positions within the State of Hawai'i, to be governed by the merit principles and that employees be hired and retained in accordance with the provisions thereof[.]

97. It is a fundamental requirement of the merit principle under Section 76-1¹², HRS, that civil servants be afforded reasonable job security.

****622**

***210** 100. The contracting out and privatization of corrections work by Defendants is not justified under Section 76-16, HRS

....

102. Defendants violated the rights of employees under Section 76-43, HRS, by refusing to negotiate the criteria, procedures, timing, and manner of handling mass layoffs for reasons other than "lack of work" or lack of "funds" with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees.

....

B.

The relevant question is whether the court¹³ properly granted Defendants' September 14, 2011 Motion to Dismiss. In granting the Motion to Dismiss, the court had determined that the facts in UPW's complaint were essentially the same as those alleged by the UPW in its "prohibited practice" claims brought before the HLRB. It stated that "it would be wholly inconsistent with HLRB's exclusive, original jurisdiction for the [court] to hear the same underlying factual disputes and allegations and create the possibility of inconsistent judgments." The court further concluded that "the statutory scheme mandates that those facts, allegations and claims raised by UPW in its prohibited practice complaint be heard to conclusion by the HLRB first and subject to judicial review by a court of competent jurisdiction operating in its appellate capacity[.]" and that it "lack[ed] primary subject matter jurisdiction¹⁴ over [claims concerning

potential prohibited practices], since exclusive, original jurisdiction over such controversies rests with the HLRB."

Finally, the court found that "to the extent that the instant complaint raise [d] constitutional or statutory claims over which the HLRB lacks subject matter jurisdiction to address, such claims may be rendered moot in the event that the HLRB issues a ruling against UPW on the key factual and legal questions...." On May 15, 2012, the court filed an order dismissing all of UPW's claims.

C.

UPW subsequently appealed the circuit court's order to the Intermediate Court of Appeals (ICA). *United Public Workers, AFSCME, Local 646, AFL-CIO v. Lingle*, No. CAAP-12-0000505, 2013 WL 3063803, at *1 (App. June 18, 2013). The ICA first concluded that "this case raises issues within the HLRB's exclusive jurisdiction over prohibited practices controversies." *Id.* at *2. It also stated that "UPW correctly asserts its statutory claims could be raised directly in the circuit court." *Id.* at *5 (citing *Konno v. Cnty. of Hawai'i*, 85 Hawai'i 61, 937 P.2d 397 (1997)). The ICA then noted that "[w]hen a court and an agency have concurrent original jurisdiction to decide issues that have been placed within the competence of an administrative agency, the primary jurisdiction doctrine applies and a court should refer the issues to the agency before proceeding." *Id.* (citing *Fratinaro v. Employees' Ret. Sys.*, 121 Hawai'i 462, 468, 220 P.3d 1043, 1049 (App.2009)). Finally, the ICA concluded that primary jurisdiction applies, and that the court erred in dismissing the case rather than staying the claims pending the outcome of the HLRB proceedings. *Id.*

II.

Contrary to the ICA and majority's holding, primary jurisdiction is not applicable to this case. Respectfully, the majority's formulation of the primary jurisdiction doctrine will enable courts to perfunctorily stay or dismiss claims for "primary jurisdiction" any time a particular claim or the "issues" underlying that claim are directly or tangentially related to an administrative agency.¹⁵ Rather ***211** ****623** than serving as a "catch-all," the primary jurisdiction doctrine should be reserved for the more limited cases where an agency, rather than a court, should determine "reasonableness" or other policy

considerations, and where inconsistent judgments may result in policy conflicts.¹⁶

Our law is well-established that “primary jurisdiction presumes that the claim at issue is originally cognizable by both the court and the agency.” *Pacific Lightnet, Inc. v. Time Warner Telecom, Inc.*, 131 Hawai'i 257, 269, 318 P.3d 97, 109 (2013) (emphasis in original) (citing *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 202, 891 P.2d 279, 289 (1995)). In determining what course to follow in that event, “the court must first determine whether the agency has exclusive original jurisdiction[.]” *Id.* “If not, and the court finds that it does possess jurisdiction over the matter, the court can then decide if it is appropriate to apply the doctrine of primary jurisdiction.” *Id.* (citing Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 Wash. & Lee L. Rev. 707, 750–55 (2007)).

In deciding on whether to refer the case to the agency, the court must first decide whether the case “‘rais[es] issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion[.]’” *Id.* (quoting *Kona Old Hawaiian Trails Grp. v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987)). The question is “whether the claim presented ‘falls squarely within the experience and expertise of courts generally[.]’” *id.* at 276, 318 P.3d at 116 (internal quotation marks and citation omitted), or if, “instead, the claims are premised on ‘technical matters calling for the special competence of the administrative expert [.]’” *Id.* (quoting *Aged Hawaiians*, 78 Hawai'i at 202, 891 P.2d at 289). Special competence relates “to the rationales behind the doctrine, to promote uniformity and to prevent courts from engaging in the types of policy-making decisions that administrative agencies must make.” *Id.* at 276, 318 P.3d at 116.

The second question for the court “is whether applying the primary jurisdiction doctrine will ‘promote uniformity and consistency in the regulatory process.’” *Id.* at 278, 318 P.3d at 118 (quoting *Aged Hawaiians*, 78 Hawai'i at 202, 891 P.2d at 289). For example, in the context of public utility rate-making or interstate transportation carrier regulation, a decision by the court as to “reasonableness” could conflict with a particular policy of an administrative agency. *See, e.g., United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) (stating that “because we regard the maintenance of a proper relationship between the courts and the [Interstate Commerce Commission] in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire [as to the

reasonableness of rates]”). Consequently, “[t]he court’s decision to invoke primary jurisdiction is reviewed on the basis of the[se] dual rationales underlying the primary jurisdiction doctrine.” *Pacific Lightnet*, 275, 318 P.3d at 115.

Once a court has determined that the primary jurisdiction doctrine should be applied, a referral to the agency does not deprive the court of jurisdiction. *212 **624 *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993). Instead, the court has discretion to retain jurisdiction, or dismiss without prejudice, so long as the parties would not be unfairly disadvantaged.¹⁸ *Pacific Lightnet*, 271–72, 318 P.3d at 111–12 (citing *Fratinaro*, 121 Hawai'i at 469, 220 P.3d at 1050); *Reiter*, 507 U.S. at 268, 113 S.Ct. 1213.

III.

The majority is concerned with the potential to subvert the statutory scheme of HRS Chapter 89, and hence the jurisdiction of the HLRB, through artful pleading. *See Hawai'i State Teachers Ass'n v. Abercrombie*, 126 Hawai'i 318, 322, 271 P.3d 613, 618 (2012) (“*HSTA*”) (“[T]he legislative purpose of providing the HLRB with exclusive original jurisdiction over chapter 89 complaints is frustrated if plaintiffs can recast their statutory claims as constitutional claims and proceed directly to circuit court.”).

A.

HRS § 89–14 provides:

Any controversy concerning prohibited practices may be submitted to the [HLRB] in the same manner and with the same effect as provided in section 377–9 [(Supp. 2004)]; provided that the [HLRB] shall have exclusive original jurisdiction over such a controversy, except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section [89–12(c)] or (2) the judicial review of decisions or orders of the [HLRB] in prohibited practice controversies in accordance with section 377–9 and chapter 91. All references in section 377–9 to “labor organization” shall include employee organization.

(Emphases added.) The plain language gives “exclusive original jurisdiction” to the HLRB over prohibited

practices "controversies", HRS § 89-14. Yet, despite HRS § 89-14, as will be discussed *infra*, the majority deems that some of UPW's allegations "present[] a prohibited practices controversy", majority's opinion at 200, 325 P.3d at 612, but concludes that the court also has jurisdiction over these claims.¹⁹ Majority's opinion at 198, 325 P.3d at 610. This determination is directly contrary to the HLRB's "exclusive" jurisdiction over such controversies mandated by statute.

B.

In *Hawai'i Government Employees Association v. Lingle*, 124 Hawai'i 197, 239 P.3d 1 (2010) (*HGEA*), a majority of this court engaged in an extensive discussion of the legislative history of HRS § 89-14. See 124 Hawai'i at 203, 239 P.3d at 7. *HGEA* related the following relevant legislative history:

At the time *Winslow* [*v. State*, 2 Haw.App. 50, 625 P.2d 1046 (1981)] was decided, HRS § 89-14 provided: "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9. All references in section 377-9 to 'board' shall include the Hawaii public employment relations board and 'labor organization' shall include employee organization." 2 Haw.App. at 56-57, 625 P.2d at 1051 (quoting HRS § 89-14).[]

However, in 1982, Hawaii's legislature amended HRS § 89-14 to "legislatively ... overrule[]" *Winslow* because it disagreed with the ICA's interpretation of HRS § 89-14 and HRS § 377-9. A standing committee report was issued by the Committee on Public Employment and *213 **625 Government Operations that stated, in pertinent part, as follows:

The purpose of this bill is to make the jurisdiction of the [HPERB] in controversies relating to prohibited practices exclusive except as otherwise provided in Chapter 89, [HRS].

....

Recently, the [ICA], in [*Winslow*], construed sections 89-14 and 377-9, HRS, and concluded that the jurisdiction of the [HPERB²⁰] over controversies concerning prohibited (unfair labor) practices in the public sector is not exclusive, and that a prohibited practice complaint or action may be brought either before HPERB or in circuit court. In other words, the [ICA] concluded that under these two statutory

sections, HPERB and the circuit courts have concurrent jurisdiction over prohibited practice complaints in the public sector.

By making the jurisdiction of HPERB exclusive in controversies concerning prohibited practices, this bill legislatively rectifies or overrules the judicial conclusion or statutory construction enunciated in [*Winslow*].

H. Stand. Comm. Rep. No. 134-82, in 1982 House Journal, at 943 (emphases in original, brackets added).

A separate standing committee report was issued by the Committee on Judiciary, which stated:

The purpose of this bill is to clarify that the [HPERB], rather than the courts, has primary jurisdiction over prohibited practice complaints filed under Chapter 89, Hawaii Revised Statutes.

A recent Hawaii Court of Appeals decision interprets Section 89-14 and 377-9, Hawaii Revised Statutes, to give HPERB and the circuit courts concurrent jurisdiction over prohibited practice complaints. This bill will make it clear that HPERB has exclusive original jurisdiction over prohibited practice complaints. Appeals from HPERB will continue to be filed in Circuit Court.

H. Stand. Comm. Rep. No. 589-82, in 1982 House Journal, at 1164 (brackets added).

As further explained by the Committee on Human Resources:

In 1970, the Legislature created the [HPERB] to administer the provisions of Chapter 89 in an effort to promote cooperative relations between the government and its employees and to protect the public by ensuring orderly government operations. Thus, the board was given jurisdiction of prohibited practice cases. Your Committee believes the original intent of this provision was to allow the board, who is the administrative agency with the expertise in public employment relations, to have primary jurisdiction of prohibited practice complaints. However, a recent Hawaii Court of Appeals decision interprets Section 89-14 and 377-9, Hawaii Revised Statutes, to give HPERB and the circuit court concurrent jurisdiction over

prohibited practice complaints.

This bill will make it clear that HPERB has exclusive original jurisdiction over prohibited practice complaints. Appeals from HPERB will continue to be filed in Circuit Court.

S. Stand. Comm. Rep. No. 597–82, in 1982 Senate Journal, at 1202 (brackets added).

As enacted, the pertinent portions of HRS § 89–14 were amended to read as it does today.[] See 1982 Haw. Sess. Laws Act 27, § 1 at 38.

In light of the foregoing, the legislature clearly intended for the HLRB to have exclusive original jurisdiction over prohibited practice complaints, and the ICA's contrary interpretation in *Winslow* was incorrect. See, e.g., H. Stand. Comm. Rep. No. 134–82, in 1982 House Journal, at 943.

Id. at 203–204, 239 P.3d at 7–8 (emphases added). Based on the above, it is abundantly clear that the majority in *HGEA* held that the legislature, in legislatively overruling *Winslow*,²¹ intended that the HLRB have *214 **626 exclusive original jurisdiction, and that court involvement would be by way of appeal from the HLRB, filed in circuit court under HRS Chapter 91, or HRS § 377–9²². See *id.* (citing S. Stand. Comm. Rep. No. 597–82, in 1982 Senate Journal, at 1202).

The majority states that “HRS Chapter 89 must be examined to determine whether it requires the HLRB to first pass on the controversy, which in turn depends on whether the controversy raises policy issues concerning matters that ought to be considered by the HLRB in the interests of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89.” Majority opinion at 199, 325 P.3d at 611. Respectfully, this analysis undermines the legislature’s intention.

The question is simply whether the claim presented is a “controversy concerning prohibited practices.” HRS § 89–14 (emphasis added). Plainly disputed issues would constitute a “controversy.” Hence, a so-called “issue” is subsumed within a “controversy.”²³ If a particular claim does present such a controversy, then the HLRB has exclusive original jurisdiction to decide the controversy, and the circuit court has no original jurisdiction. However, once the HLRB has rendered a determination, a party may appeal to the circuit court pursuant to the procedures of HRS Chapter 91 and HRS § 377–9. *Id.* If the claim is not a “controversy concerning prohibited practices,” then HRS § 89–14 will not provide the HLRB with jurisdiction. Pursuant to the language of the statute,

the inquiry is straightforward and either the HLRB has exclusive original jurisdiction, or it does not. In light of HRS § 89–14, respectfully, the majority cannot have it both ways.

The majority concludes that “HRS § 89–14 expressly requires that the HLRB first pass on prohibited practice controversies.” Majority opinion at 200, 325 P.3d at 612. However, the majority’s interpretation effectively reads the word “exclusive” out of the statute, a word that was explicitly added by the legislature in 1985. See H. Stand. Comm. Rep. No. 134–82, in 1982 House Journal, at 943. Despite acknowledging that the legislature amended HRS § 89–14 in 1985, in order to invalidate *Winslow*’s conclusion that the HLRB had concurrent jurisdiction with the circuit court, majority’s opinion at 220–21, 325 P.3d at 632–33, the majority goes on to find concurrent jurisdiction in the HLRB and the court over the claims in this case, in derogation of HRS § 89–14 and the legislative history overruling *Winslow* and establishing exclusive jurisdiction only in the HLRB.

It must be noted that every time the term “primary” is used in connection with the term “jurisdiction”, it is not necessarily referencing the primary jurisdiction doctrine. See, e.g., Nicholas A. Lucchetti, *One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review is Appropriate for It?*, 59 Admin. L. Rev. 849, 853 (2007) (noting that “primary jurisdiction” is “neither primary nor jurisdictional”). The Reports cited to by the majority stating that “exclusive original jurisdiction” may also be referred to as “exclusive primary or initial jurisdiction[,]” see H. Stand. Comm. Rep. No. 134–87, in 1982 House Journal, at 944, stand for the proposition that the agency must first, i.e. “primari[ly]”, or “initial[ly]”, decide prohibited practices controversies, and that the circuit court may only decide such controversies on appeal via HRS Chapter 91 or HRS § 377–9, i.e., secondarily.²⁴

***215 **627 IV.**

A.

Respectfully, the majority relies on an issue/claim distinction that is not relevant for purposes of determining whether concurrent jurisdiction exists. See majority opinion at 201–02, 325 P.3d at 613–14. In the context of primary jurisdiction, a court may consider whether issues require resolution by an agency. *Kona Old*, 69 Haw. at 93,

Contrary to *Kona Old*, the majority concludes, referencing *Kona Old*, that “the agency and the court need not have concurrent jurisdiction over the claims, as long as the agency and the court have concurrent jurisdiction over the issues presented in the claims.” Majority’s opinion at 92, 734 P.2d at 167 (emphasis added). However, first, *Kona Old* held that there was concurrent jurisdiction over the *claims*, when it established that the cause of action presented a claim that was “cognizable in the courts.” *Id.* at 93, 734 P.2d at 169 (citation omitted). *Kona Old* then considered whether certain “issues” should be resolved by the agency, but only after it established that there was concurrent jurisdiction over the claims.

internal quotation marks omitted)). Then, it considered whether the questions and issues presented should be referred to the agency, concluding briefly that “[d]eference to the agency is particularly inappropriate in cases like this one, in which the constitutionality of the agency’s rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority.” *Id.* Thus, *Aged Hawaiians* first established original jurisdiction in the court, then considered whether it was appropriate to apply the primary jurisdiction doctrine. *See id.*

Second, even assuming, *arguendo* that there is some distinction between “issues” and “claims” with respect to deciding whether concurrent jurisdiction exists between the court and the agency, it is clear in this case that the agency and the court do not have concurrent jurisdiction over the “issues” presented. If the “issues” in this case are “subsumed” within HLRB’s claims as prohibited practices controversies, as the majority avers, majority opinion at 203, 325 P.3d at 615, then the HLRB alone would have jurisdiction over those “issues” subsumed within the “controversies” under HRS § 89–14, and the court could not retain concurrent jurisdiction.

Although characterized as “primary jurisdiction”, the majority is essentially requiring that UPW exhaust its administrative remedies, by mandating that the HLRB decide certain issues as a “first pass”, and only then allowing the court to render its decision. The concept of a “first pass”, as used by the majority, is inimical to primary jurisdiction, and instead suggests that the UPW must submit issues to the agency for a decision before the court may consider any issues presented by UPW’s complaint. There is no support for requiring a “first pass”, as it is characterized.

Next, the *in vitro* and *in vivo* studies were performed. The *in vitro* study was performed using a modified *in vitro* model of the human gut. The *in vivo* study was performed using a modified *in vivo* model of the human gut.

and the public, and improper, inasmuch as "[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[" *Hawai'i Insurers Council v. Lingle*, 120 Hawai'i 51, 71–72, 201 P.3d 564, 584–85 (2008) (internal quotation marks and citation omitted); *Kona Old*, 69 Haw. at 93, 734 P.2d at 169; *see also*, *HSTA*, 126 Hawai'i at 325, 271 P.3d at 620 (Acoba, J., dissenting). Here, under the majority opinions in *HSTA*, *HGEA*, and HRS § 89–14, the "issues" are cognizable in the administrative agency alone, and thus the majority appears to be applying a primary jurisdiction/exhaustion hybrid, which, respectfully, mixes the two distinct doctrines.

As discussed, it is well-established that the agency and the court have concurrent jurisdiction in order for the primary jurisdiction doctrine to apply. At the very least, the court must have subject matter jurisdiction, because it is the court that decides whether to stay or dismiss the action before it. And, the court must have concurrent jurisdiction in order to effectuate a stay of the proceedings. Therefore, the majority's holding that the court should stay the claims, pending a "first pass" by the HLRB, majority opinion at 202, 325 P.3d at 614, conflicts with its determination that the issues asserted in the Complaint were essentially prohibited practices issues, *see* majority opinion at 203, 325 P.3d at 615. For, the court could not retain jurisdiction to stay the action unless it had concurrent jurisdiction with HLRB, but conversely, in considering prohibited practices issues, the HLRB has exclusive jurisdiction. Clearly, then, where the agency, such as the HLRB, is said to have exclusive original jurisdiction over particular controversies, the primary jurisdiction doctrine is not applied.²⁵

The majority's citation to *Reiter* in support of its assertion that the court had discretion to either retain jurisdiction or dismiss the case without prejudice, majority opinion at 202–03, 325 P.3d at 614–15, is, respectfully, *217 **629 incorrect. The majority refers aspects of the claims to the HLRB as prohibited practices "issues," and yet, holds that the court still has jurisdiction to stay the claims. As explained, this is contrary to HRS § 89–14, which gives the HLRB exclusive original jurisdiction over prohibited practices "controver[sies]," thereby divesting the court of jurisdiction.

Reiter is distinguishable. In *Reiter*, the agency did not have exclusive original jurisdiction over the relevant policy issues on which the court could apply primary jurisdiction. 507 U.S. at 269, 113 S.Ct. 1213. It was also clear that the court in *Reiter* did have jurisdiction, so there was no difficulty presented by the court choosing whether

to stay or to dismiss the case inasmuch as the court had jurisdiction to do so. *Id.* Hence, *Reiter*'s holding that the "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction," *id.* at 268, 113 S.Ct. 1213, followed from its conclusion that the court had jurisdiction over the claims presented. Here, by contrast, the referral of any prohibited practices "controversies" to the HLRB would deprive the court of jurisdiction, because of the exclusive, original jurisdiction granted to the HLRB pursuant to HRS § 89–14. Thus, *Reiter* would hold, contrary to the majority's position, that the court in this case would have no jurisdiction to decide whether to effectuate a stay or dismiss the claims.

V.

Moreover, the precedent of this court is plainly contrary to the application of primary jurisdiction in this case. First, the majority opinions in *HGEA* and *HSTA* were consistent in holding that only HLRB had jurisdiction, because it had exclusive, original jurisdiction, *i.e.*, that there was not concurrent jurisdiction with the court. Hence, logically, primary jurisdiction did not apply in either *HGEA* or *HSTA*. The majority in *HGEA* held that the HLRB had "exclusive original jurisdiction," 124 Hawai'i at 204, 239 P.3d at 8, over the statutory issues raised by the plaintiffs under HRS Chapter 89–9(a) and (d), *id.* at 206, 239 P.3d at 10, but that the HLRB lacked jurisdiction to decide the constitutional issues presented. *Id.* at 207, 239 P.3d at 12.

The majority in *HSTA* held that "[t]he plaintiffs' complaint states claims relating to 'prohibited practices' because it ultimately challenges [the governor's] ability to unilaterally impose furloughs without collectively bargaining." 126 Hawai'i at 322, 271 P.3d at 617 (citation omitted). *HSTA* explained that "[d]eleting references to chapter 89 does not change the fact that the dispute ultimately relates to a prohibited practice[.]" and "[t]herefore, the plain language of HRS § 89–14 indicates that the HLRB has exclusive original jurisdiction over the plaintiffs' claims." *Id.* (emphasis added).

Second, the majority's conclusion that the privatization claims alleged in UPW's circuit court complaint are cognizable in the circuit court, majority's opinion at 202, 325 P.3d at 614, clashes with its determination that the primary jurisdiction doctrine applies to the retaliation claims.²⁶ The majority concludes that based on *Konno*, the HLRB "only has jurisdiction over issues related to chapter 89, such as collective bargaining and prohibited practices controversies, to the extent they do not violate merit

principles." Majority opinion at 205, 325 P.3d at 617.

Respectfully, it is not clear how the majority's analysis is a determination that UPW's privatization claims "do not contain issues within the specialized expertise of HLRB." *Id.* at 204, 325 P.3d at 616. Instead, in *Konno*, this court decided whether the privatization efforts at issue violated civil services laws and merit principles. 85 Hawai'i at 78, 937 P.2d at 414. Having determined that there was a violation, *Konno* held that there was no need to reach the HRS Chapter 89 arguments, because "our collective bargaining statutes expressly state that parties are barred from negotiating upon and agreeing to proposals that violate merit principles." *Id.* The court had jurisdiction first to determine whether the privatization effort was contrary to law, because "collective bargaining *218 **630 statutes do not require negotiation over topics that are contrary to duly enacted laws." *Id.* Thus, *Konno* clearly holds that the circuit court had jurisdiction to determine the validity of privatization efforts under civil service laws and merit principles, without consideration of whether such issues were within the "specialized expertise" of the HLRB.

Accordingly, the majority's application of the primary jurisdiction doctrine is not supported in this case. The discussion does not take into account the fundamental jurisdictional prerequisites that must be established before the doctrine can be considered as a possibility in any given case.

VI.

As noted, UPW alleges two claims in its complaint with respect to retaliation; first, that the Defendants' actions violated the employees' rights as guaranteed by the Free Speech Clause, Haw. Const. art. I, § 4, and second, that the Defendants' actions constituted acts of retaliation, reprisal, and intimidation in violation of the HWP. Both of these claims are unquestionably cognizable before the court alone, and thus there is no need to turn to primary jurisdiction.

A.

1.

As to constitutional claims, it is axiomatic that

Next

administrative agencies do not have jurisdiction to decide constitutional claims. Count II of UPW's complaint specifically alleged a constitutional violation of article I, section 4 of the Hawai'i constitution, specifically that, "[b]y retaliating against UPW and its members for objecting to and reporting illegal government action, Defendants deprived UPW and its members of rights guaranteed by Article I, Section 4 of the Hawai'i Constitution."²⁷ As in *HGEA* and *HSTA*, UPW's allegations manifestly challenged the constitutionality of actions taken by Defendants. *See HGEA*, 124 Hawai'i at 218, 239 P.3d at 22 (Acoba, J., dissenting); *HSTA*, 126 Hawai'i at 323, 271 P.3d at 618 (Acoba, J., dissenting).

Just as in those two cases, the court here had jurisdiction over the constitutional question presented by UPW. This court has held that "[a]lthough an administrative agency may always determine questions about its own jurisdiction it generally lacks power to pass upon the constitutionality of a statute." *HOH Corp. v. Motor Vehicle Indus. Licensing Bd.*, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (internal brackets, quotation marks, and citations omitted); *Morgan v. Planning Dep't., Cnty. of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) "[a]n administrative agency can only wield powers expressly or implicitly granted to it by statute." (internal quotation marks and citation omitted).

In *HGEA*, the union alleged a constitutional claim in a complaint to the circuit court. 124 Hawai'i at 212, 239 P.3d at 16. As noted, the majority in *HGEA* characterized the complaint as alleging a prohibited practice, and held that HLRB had exclusive original jurisdiction. *Id.* at 205, 239 P.3d at 9. However, it did not explain how HLRB could have jurisdiction over the union's complaint, because HLRB has no jurisdiction over constitutional issues. *See id.* at 225, 239 P.3d at 29 (Acoba, J., dissenting). The dissent noted that "[g]iven that [the union's] complaint plainly alleged that the [provision at issue] was unconstitutional and the HLRB lacks any jurisdiction over constitutional matters, the HLRB could not have original exclusive jurisdiction over [the union's] complaint." *Id.* at 225–26, 239 P.3d at 29–30. Similarly, here, UPW's Complaint plainly alleges that Defendants' actions were unconstitutional, and thus the HLRB lacks jurisdiction, because there is no way in which HLRB could have original exclusive jurisdiction over UPW's constitutional claim. *See id.*

Moreover, "the determination of the [constitutional] issue is not only of primary, but of paramount importance, inasmuch as any supposed separate HLRB prohibited practice *219 **631 decision would always be subject [to] and inferior to the resolution by the court and this

court of the constitutional question.” *Id.* at 229, 239 P.3d at 33. While this court has noted that “ ‘deference will be given to decision of administrative agencies acting within the realm of their expertise[.]’ ” *id.* (quoting *Maha’ulepu v. Land Use Comm’n*, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990)), “such deference does not extend to matters over which the agencies do not have jurisdiction [.]” including constitutional claims. *Id.* (emphasis added).

In the event that UPW had alleged its Free Speech claim before the HLRB, the agency would have been powerless to declare Defendants’ actions “unconstitutional” or “constitutional”, and thus, inasmuch as HLRB could *not* have provided a remedy, the court had jurisdiction over the constitutional Free Speech claim as alleged in UPW’s complaint. Thus, the majority’s characterization of UPW’s complaint as alleging “prohibited practices” is incorrect. *See HSTA*, 126 Hawai’i at 324, 271 P.3d at 619 (Acoba, J., dissenting) (noting that the court had sole and exclusive jurisdiction over the constitutional claims presented, despite the majority’s recharacterization of those claims as an HRS Chapter 89 action). UPW properly pled a claim under article 1, section 4 of the Hawai’i Constitution, and accordingly, should be able to seek the remedies available under the Hawai’i Constitution in a timely manner.²⁸

2.

This case poses the problem of delay when a claim that only the circuit court can remedy is incorrectly referred to an administrative agency before the circuit court is permitted to exercise its original exclusive jurisdiction. *See, e.g., HGEA*, 124 Hawai’i at 223, 239 P.3d at 28 (Acoba, J., dissenting) (noting that “requiring HGEA to seek a determination from the HLRB on whether the Governor’s actions were a prohibited practice before it could seek injunctive relief from the court would result in unjustifiable delay,” where the court was the only entity that could have granted such relief “in conjunction with the constitutional question”); *HSTA*, 126 Hawai’i at 323, 271 P.3d at 618 (Acoba, J., dissenting) (explaining that requiring the parties to engage in proceedings before the HLRB before the constitutionality of the Governor’s actions could be considered “invites the possibility of unnecessary delay and a waste of judicial and party resources”). Moreover, unlike in *HSTA* and in *HGEA*, a prohibited practices action has already been filed before the HLRB in the instant case and was pending for two years before UPW filed its Complaint with the court, and no final decision to date has been made by the HLRB. Therefore, there is no final agency action from which

UPW could appeal pursuant to HRS Chapter 91. Respectfully, this case exemplifies why the approach chosen by the majority will only promote more cost and delay, to the parties’ and the public’s detriment.

3.

UPW did not raise any statutory claims under HRS Chapter 89, and thus under the majority’s holding, there are no clear parameters as to what the HLRB must decide with respect to “prohibited practices.” Is the majority suggesting that the court wait until UPW’s HLRB Complaint is addressed in full, or should it simply wait until the agency has made a separate determination on the factual issues that it states are implicated? Regardless, HLRB’s Complaint does not present ***220 **632** “prohibited practices”, and 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 Kaua’i ex rel. Nakazawa v. Baptiste*, 115 Hawai’i 15, 60, 165 P.3d 916, 927 (2007) (Acoba, J., dissenting, joined by Duffy, J.). As in other cases, the claim should be allowed to be decided in court, rather than being pre-characterized by this court, thus giving due consideration to the good faith requirement binding on every pleader.

B.

1.

As to the HWPB violation alleged, the court also clearly had sole original jurisdiction over UPW’s claim. The HWPB, at HRS § 378–63, states as follows:

(a) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, or actual damages, or both within two years after the occurrence of the alleged violation of this part.

(b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.

(c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney fees.

(Emphases added.)

The legislature manifestly intended for plaintiffs to bring actions enforcing the HWP, HRS §§ 378-61 to 378-69, in court. Under the plain language of HRS § 378-62, the Act protects all "employees" against changes in the "employee's compensation, terms, conditions, location, or privileges of employment" in retaliation for reporting a violation of law. To enforce such violations, "a person who alleges a violation" "may [bring an action] in the circuit court where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business." HRS § 378-63. Finally, under HRS § 378-64, "[a] court, in rendering a judgment in an action brought pursuant to this part, shall order" remedies "as the court considers appropriate [.]". (Emphases added.)

Thus, the plain language of the HWP provides that any "person" alleging a violation of the Act "may" sue in either the circuit court where the alleged violation occurred, or the circuit court where the complaint resides, or the circuit court where the defendant resides, but the complainant must sue in one of these courts. Moreover, the subsequent section plainly contemplates that a court will issue remedies for violations of the Act. Thus, the plain language of the statutes mandates that plaintiffs enforcing violations would sue in court.

Additionally, the language used by the legislature in broad and all-inclusive, indicating that all persons, including employees, were entitled to sue in court for violations of the HWP. Had the legislature intended to allow such actions to also be enforced in the HLRB with respect to employees, it would have said so, but did not. Thus, HWP manifestly applies even in those situations in which employee grievances would be governed by collective bargaining agreements ostensibly within the jurisdiction of the HLRB.

2.

This conclusion is reinforced by the Act's legislative history, which explained that Act "provides an employee with a basis for going to court to seek an injunction or other redress for unfair retaliation." S. Stand. Comm. Rep. No. 711, in 1987 Senate Journal, at 1442 (emphases

added). Moreover, the legislative history indicates that the HWP was intended to govern a wide spectrum of conduct inclusive of matters otherwise related to collective bargaining in public employment under HRS Chapter 89.

In HRS § 89-1, the legislature "declare[d] that it is the public policy of the State to promote harmonious and cooperative relations between the government and employees and to protect the public by assuring effective *221 **633 and orderly operations of government." These policies were "best effectuated" by, *inter alia*, "[r]ecognizing the right of public employees to organize for the purpose of collective bargaining." HRS § 89-1(b)(1). Thus, HRS Chapter 89 generally governs disputes between the government and its employees related to collective bargaining.

In contrast, the legislative history of the HWP indicates that "the purpose of the [HWP] is to prohibit retaliatory employment actions against employees in the private and public sectors who either report suspected violations of law or rule to government authorities or who are asked to participate in investigative efforts of our government." H. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090; *accord* S. Stand. Comm. Rep. No. 711, in 1987 Senate Journal, at 1442. Plainly, government employees may "report suspected violations of law or rule" that are related to the collective bargaining process or to "harmonious and cooperative relations between the government and employees." Thus, it is apparent that the scope of conduct the legislature intended to prohibit under the HWP includes conduct covered by HRS § 89-1, and that actions for violation of such conduct under the HWP must be brought in court. Hence, the Act's legislative history confirms that the legislature intended that actions under the Act would be brought in court despite the existing governance procedures under collective bargaining agreements that would be within the ostensible jurisdiction of the HLRB.

3.

As demonstrated above, the language and legislative history of the HWP do not admit of extracting the prohibited practices "issue" for the so-called "first pass" by the HLRB. To reiterate, the language of the Act states that actions must be brought in court, and the legislative history confirms that such actions were intended to be heard by the courts. To permit the HLRB to make a so-called "first pass" on some of the issues pivotal to resolve the HWP claim would frustrate the legislative

intent that such claims would be resolved in court.

Additionally, HRS § 378–62 provides that “[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee.” (Emphases added.) Similarly, the legislature noted that the HWPB covers “retaliatory employment actions against employees in the private and public sectors[.]” *see* H. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090 (emphasis added). Thus, it was apparent to the legislature that the issues raised in HWPB claims could relate to disputes between employees and the government regarding collective bargaining, *i.e.*, those issues covered by HRS Chapter 89. The legislature nevertheless determined that such issues should be heard by the courts. To require that the HLRB resolve issues central to the HWPB claim would therefore undermine the legislature’s rejection of this option. In fact, the statute refers to conflict between employers and employees without ever mentioning the HLRB, and the legislative history indicates the legislature specifically intended that the HWPB cover retaliatory employment actions against employees in the “public sectors”. *Id.* Thus, it is apparent that the legislature considered the scenario wherein employees would bring a HWPB claim based on conflicts with the government but nevertheless determined that such claims should be brought in court.

Consequently, the crux of the HWPB claim may not be decided outside of the court. The statute provides for the circuit court resolution without reference to HLRB, and an HWPB claim is not the type of claim over which the HLRB would have any specialized expertise on predicate factual issues. Instead, the legislature required that actions brought under the HWPB be filed, and thus plainly be tried, in the circuit court.

In sum, the majority incorrectly characterizes UPW’s HWPB claim as a “prohibited practices” issue, where the jurisdiction over HWPB claims is firmly committed to the court. In mandating that such a claim be referred to the HLRB, the majority abrogates the express statutory right to file a claim under the HWPB in court, a right given to plaintiffs by the legislature in its enactment of the HWPB.

VII.

Respectfully, similar to *HSTA*, here, there is a fundamental defect in allowing the court *222 **634 to stay its proceeding, pending an HLRB determination, where, on the other hand, the majority has determined that HLRB has exclusive original jurisdiction over the dispute. *See id.* at 323, 271 P.3d at 618. As noted *supra*, a court

cannot stay a claim unless it has concurrent jurisdiction over that claim. Further, a court may not “refer” a claim to an agency if that agency has no jurisdiction over the claim, such as in this case, where HLRB can have no jurisdiction over constitutional claims or the HWPB. Instead, as discussed, concurrent jurisdiction should be a prerequisite to the application of the primary jurisdiction doctrine.

VIII.

There are two systems of decision-making implicated by this case. The first is the court, which, as explained, has exclusive original jurisdiction over the claims presented in UPW’s Complaint. The second is the HLRB, which has exclusive original jurisdiction over the claims presented by UPW’s HLRB Complaint, pursuant to HRS § 89–14.

Inasmuch as there were parallel proceedings in this case, or where there might be in other cases in the future, the doctrine of collateral estoppel would apply to prevent relitigation of issues decided by the agency and the court, and vice versa. “Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy.” *Eastern Savings Bank, FSB v. Esteban*, 129 Hawai’i 154, 158, 296 P.3d 1062, 1066 (2013) (citation omitted). “[I]ssue preclusion ... prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action.” *Id.* (citation omitted).

If HLRB decides facts pertaining to the subject matter before the court, then the only question is whether collateral estoppel would apply. If either forum rendered a judgment as to the merits, then that judgment would prevent the parties from relitigating particular issues in the other forum. Of course, should the HLRB render a judgment first, UPW could appeal to the circuit court as provided in HRS Chapter 91. Although, in effect, the decision would be rendered by the forum which first decides the case, that is the risk that UPW assumed when it decided to file both an HLRB Complaint and a Complaint in the circuit court. The doctrine of collateral estoppel would therefore prevent relitigation of issues in this case, and accordingly, would act as a barrier to inconsistent judgments as between the court and agency.²⁹

IX.

All Citations

In accordance with the above, I would hold that all of UPW's claims as alleged in its Complaint are originally, exclusively cognizable in the court. I therefore concur in part and dissent in part.

133 Hawai'i 188, 325 P.3d 600, 198 L.R.R.M. (BNA) 2771

Footnotes

- 1 During the pendency of this appeal, Neil Abercrombie, Governor of the State of Hawai'i, succeeded Linda Lingle. Thus, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(c), Abercrombie has been substituted automatically for Lingle in this case.
- 2 Kalbert K. Young, Director, Department of Budget and Finance, State of Hawai'i; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawai'i; and Ted Sakai, Director, Department of Public Safety, State of Hawai'i have been substituted as parties to this appeal pursuant to HRAP Rule 43(c). UPW also listed Linda Lingle's Chief Policy Advisor, Linda Smith, as a Defendant. This title does not exist in Governor Abercrombie's current cabinet.
- 3 In relevant part, the HWPB prohibits an employer from discharging, threatening, or otherwise discriminating against an employee regarding the employee's compensation, terms, conditions, location, or privileges because:
(1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of ... [a] law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States[.]
HRS § 378-62 (2011).
- 4 "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Haw. Const. art. I, § 4.
- 5 "The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle." Haw. Const. art. XVI, § 1.
- 6 "When it is necessary to release employees due to lack of work, lack of funds, or other legitimate reasons, employees with permanent appointments in civil service positions shall have layoff rights. Layoffs shall be made in accordance with procedures negotiated under chapter 89 or established under chapter 89C, as applicable." HRS § 76-43.
- 7 These facts are from UPW's complaint to the circuit court and are undisputed by the Defendants.
- 8 "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." Haw. Const. art. XIII, § 2.
- 9 On June 18, 2009, UPW amended its complaint restating its claims for violations of the state constitution.
- 10 The Honorable Karl K. Sakamoto presided.
- 11 UPW does not provide any examples of Defendants' alleged unlawful privatization of civil service positions other than Kulani Correctional Facility.
- 12 The original complaint contained "prohibited practice" allegations against Defendant Laderta only.
- 13 HRS § 89-3 (Supp.2008) states:
Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage

in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

14 HRS § 89-9(a) (Supp.2008) states:

The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund or voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement as specified in section 89-10, but the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

15 HRS § 89-9(c) (Supp.2008) states:

Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

16 HRS § 89-9(d) (Supp.2008) prohibits negotiation of matters of classification, reclassification, benefits of but not contributions to the Hawai'i employer-union health benefits trust fund or voluntary employees' beneficiary association trust; recruitment; examination; initial pricing; and retirement benefits except as provided in HRS § 88-8(h) (Supp.2008). In addition, this section prohibits agreeing on any proposals that would be inconsistent with the merit principle, the principle of equal pay for equal work pursuant to section 76-1, or agreeing on proposals that would interfere with a number of rights and obligation of a public employer listed in HRS §§ 89-9(d)(1)-(d)(8).

17 UPW alleged the following regarding Defendants' violations of merit principles:

89. In *Konno v. County of Hawai'i*, 85 Hawai'i 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil servants represented by UPW violates the merit principle.

90. On November 20, 2002 in the Matter of the Arbitration Between the *United Public Workers, AFSCME, Local 646, AFL-CIO v. County of Hawaii*, contracting out or privatization of bargaining unit work was found to violate, inter alia, the constitutional merit principle. Said award was confirmed by the circuit court in S.P. No. 02-1-0514 and constitutes a final judgment which is binding on all public employers who are parties to the unit 1 and 10 collective bargaining agreements.

91. The services performed by bargaining unit 1 and 10 employees in positions which are being abolished by the Defendants have historically and customarily been performed by civil servants under the merit system.

92. On June 8, 2009 Defendants Lingle and Laderta were requested by UPW to terminate all contracts for services which have historically and customarily been performed by civil servants in bargaining units 1 and 10 no later than June 30, 2009, and to cease and desist from undermining the job security of civil servants contrary to the merit principle.

93. On and after June 30, 2009 Defendants have refused to terminate contracts which are contrary to public policy in contravention of Article XVI, Section 1 of the Hawaii State Constitution.

18 UPW alleged the following regarding Defendants' violations of civil service laws:

96. HRS Chapters 76 and 77 require that all blue collar, non-supervisory positions and institutional, health and correctional positions within the State of Hawaii, to be governed by the merit principles and that employees be hired and retained in accordance with the provisions thereof, unless specifically exempt under HRS § 76-16.

97. It is a fundamental requirement of the merit principle under Section 76-1, HRS, that civil servants be afforded reasonable job security.

98. HRS § 76-16 defines the merit system as follows:
§ 76-16 Civil service and exemptions.

...

(b) The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter established and embrace all personal services performed for the State, except the following:

...

(2) Positions filled by persons employed by contract where the director of human resources development has

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certified that the service is special or unique or is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform the service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year; ...

99. At no time has Defendant Laderta certified pursuant to Section 76–16(b)(2), HRS, for exemption the services performed by private contractors or otherwise authorized contracting out in units 1 and 10.

100. The contracting out and privatization of corrections work by Defendants is not justified under Section 76–16, HRS, when unit 1 and 10 employees are laid off, displaced, discharged, and subject to other adverse actions by Defendants.

101. Section 76–43, HRS, affords to employees with permanent appointments in civil service positions rights under the civil service laws as follows: Whenever it is necessary to release employees due to lack of work, lack of funds, or other legitimate reasons, employees with permanent appointments in civil service positions shall have layoff rights. Layoffs shall be made in accordance with procedures negotiated under chapter 89 or established under chapter 89C, as applicable.

102. Defendants violated the rights of employees under Section 76–43, HRS, by refusing to negotiate the criteria, procedures, timing, and manner of handling mass layoffs for reasons other than "lack of work" or lack of "funds" with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees.

103. Defendants, by the foregoing acts, have abrogated the Civil Service Laws of the State of Hawaii.

19 The Honorable Derrick H.M. Chan presided.

20 In *HGEA*, two unions sought relief under both statutory and constitutional provisions to enjoin the Governor from unilaterally imposing furloughs or new layoff procedures on public employees. This court held that the HLRB had exclusive original jurisdiction over the statutory issues raised in the unions' complaint, and that the circuit court had erred in addressing the constitutional issues without first giving the HLRB the opportunity to address the statutory questions.

21 In *HSTA*, the teachers union brought an action alleging that the governor's furlough plan violated state constitutional rights. This court held that the dispute concerning whether the state constitutional provision granting public employees the right to unionize permitted the Governor to unilaterally impose furloughs, was within the exclusive jurisdiction of the HLRB.

22 The Honorable Patrick W. Border presided.

23 The circuit court did not comment on whether its decision was based on the primary jurisdiction doctrine or exhaustion of administrative remedies.

24 HRS § 91–14(a) (1985) stated:

Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

25 HRS § 205A–6 (1985) read in pertinent part:

(a) Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency:

(1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or

(2) Has failed to perform any act or duty required to be performed under this chapter; or

(3) In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter.

Kona Old, 69 Haw. at 86, 734 P.2d at 165.

26 "HRS § 603–21 formerly defined the jurisdiction of circuit courts." *Kona Old*, 69 Haw. at 89, 734 P.2d at 166.

27 The Tucker Act governed the adjudication of money claims against the United States. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 608 (2003). It conferred the Court of Claims jurisdiction over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and also expanded that court's authority to hear suits based upon

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the Constitution. *Id.* "Moreover, the Tucker Act granted the then-circuit courts (today the District Courts) concurrent jurisdiction with the Court of Claims over monetary claims not exceeding \$10,000 in amount." *Id.*

28 We recognize that the legislature's use of the term "primary" in connection with the term "jurisdiction" is not synonymous with the primary jurisdiction doctrine. The legislature's use of the term was clearly intended to confer the HLRB with "exclusive original jurisdiction" over prohibited practice complaints.

29 HRS Chapter 77 was repealed in its entirety in 2000 by Act 253.

30 HRS § 76–77 states in relevant part: "The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county ... [.] HRS § 76–77 then lists a number of exemptions to these civil service positions.

31 According to this approach, "services that have been 'customarily and historically provided by civil servants' cannot be privatized, absent a showing that civil servants cannot provide those services." *Konno*, 85 Hawai'i at 69, 937 P.2d at 405 (citing *Wash. Fed'n of State Emps., AFL-CIO v. Spokane Cmty Coll.*, 90 Wash.2d 698, 585 P.2d 474, 477 (1978) (en banc)).

32 HRS § 76–1 (1985), before it was amended, provided the following merit principles:
(1) Equal opportunity for all regardless of race, sex, age, religion, color, ancestry, or politics. No person shall be discriminated against in any case because of any disability, in examination, appointment, reinstatement, reemployment, promotion, transfer, demotion, or removal, with respect to any position the duties of which, in the opinion of the director of human resources development may be efficiently performed by a person with such a disability; provided that the employment will not be hazardous to the appointee or endanger the health or safety of the appointee's co-workers or others;
(2) Impartial selection of the ablest person for government service by means of competitive tests which are fair, objective, and practical;
(3) Just opportunity for competent employees to be promoted within the service;
(4) Reasonable job security for the competent employee, including the right of appeal from personnel actions;
(5) Systematic classification of all positions through adequate job evaluations; and
(6) Proper balance in employer-employee relations between the people as the employer and employees as the individual citizens, to achieve a well-trained, productive, and happy working force.

33 HRS § 76–16(b) is the State counterpart to HRS § 76–77, the statute governing civil service positions in the county, as interpreted in *Konno*, 85 Hawai'i 61, 937 P.2d 397. HRS § 76–16(b) states: "The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter established and embrace all personal services performed for the State ... [.] HRS § 76–16(b) then provides a number of exemptions to these civil service positions, none of which apply here.

34 Defendants use the term "contracting out" claims interchangeably with "privatization" claims.

35 HRS § 76–16(a) states:
(a) The state constitution mandates that the employment of persons in the civil service, as defined by law, be governed by the merit principle. The legislature declares that the public policy of the State is that all positions in the civil service systems of the respective jurisdictions shall be filled through civil service recruitment procedures based on merit and that the civil service system of the respective jurisdictions shall comprise all positions, whether permanent or temporary, in the jurisdiction now existing or hereafter established and embrace all personal services performed for the jurisdiction, except employees or positions exempted under this section, or sections 46–33 and 76–77.

36 HRS § 76–14 provides the duties and the jurisdiction of the MAB.

37 HRS § 76–47 provides the appointment, authority, and the procedures of the MAB.

38 Defendants argue that UPW's privatization claims are within the HLRB's jurisdiction because the claims were bound up with its central claim that Lingle was retaliating against UPW members. Defendants also argue that UPW is alleging that Lingle was privatizing civil service positions in retaliation for the Furlough Lawsuit. In *Konno*, plaintiffs also argued that the privatization of the landfill was to "punish" the plaintiffs for endorsing former Mayor Inouye in the 1992 primary

election. 85 Hawai'i at 74 n. 10, 937 P.2d at 410 n. 10. We concluded that the County violated constitutionally mandated merit principles and civil service statutes; therefore, it was unnecessary for us to address this argument. Similarly, in this case, the court may resolve UPW's claim that Defendants' privatization actions violated merit principles and civil service laws without having to make a determination on the issue of retaliation. However, if the court concludes that the privatization is not in violation of merit principles or civil service laws, any retaliation allegations would appear to implicate the HLRB's specialized expertise in addressing prohibited practices.

39 "Jurisdiction" is defined by HRS § 76-11 to mean "the State, the city and county of Honolulu, the county of Hawaii, the county of Maui, the county of Kauai, the judiciary, the department of education, the University of Hawaii, and the Hawaii health systems corporation."

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

2 Kalbert K. Young, Director, Department of Budget and Finance, State of Hawai'i; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawai'i; and Ted Sakai, Director, Department of Public Safety, State of Hawai'i have been substituted as parties to this appeal pursuant to HRAP Rule 43(c). UPW also listed Linda Lingle's Chief Policy Advisor, Linda Smith, as a Defendant. This title does not exist in Governor Abercrombie's current cabinet.

3 HRS § 89-13(a)(1) provides that:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter[.]

4 HRS § 89-13(a)(3) provides that it shall be a prohibited practice to:

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization[.]

5 HRS § 89-13(a)(5) provides that it shall be a prohibited practice to:

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9[.]

6 HRS § 89-13(a)(7) provides that it shall be a prohibited practice to:

(7) Refuse or fail to comply with any provision of [HRS Chapter 89.]

7 HRS § 89-13(a)(8) provides that it shall be a prohibited practice to:

(8) Violate the terms of a collective bargaining agreement[.]

8 The Honorable Derrick H.M. Chan presided.

9 HRS § 378-62 (Supp.2002) provides, in relevant part, as follows:

§ 378-62 Discharge of, threats to, or discrimination against employee for reporting violations of law. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of:

(A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States; or

(B) A contract executed by the State, a political subdivision of the State, or the United States, unless the employee knows that the report is false[.]

10 The full text of Haw. Const. art. I, § 4 states:

No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

11 The Haw. Const. art. XVI, § 1 provides that:

The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle.

- 12 HRS § 76–1 (Supp.2000) provides, in part, that:
It is the purpose of this chapter to require each jurisdiction to establish and maintain a separately administered civil service system based on the merit principle. The merit principle is the selection of persons based on their fitness and ability for public employment and the retention of employees based on their demonstrated appropriate conduct and productive performance. It is also the purpose of this chapter to build a career service in government, free from coercive political influences, to render impartial service to the public at all times, according to dictates of ethics and morality and in compliance with all laws.
- 13 The Honorable Patrick W. Border presided over the September 14, 2011 Motion to Dismiss.
- 14 It is noted that "primary subject matter jurisdiction" is dissimilar from the "primary jurisdiction doctrine", which does not involve subject matter jurisdiction.
- 15 It is noted that the ICA has been applying the primary jurisdiction doctrine with some frequency. See, e.g., *UPW*, 2013 WL 3063803, at *5; *Hawai'i State Teachers Ass'n v. University Laboratory School*, No. CAAP12–0000295, — Hawai'i —, — P.3d —, 2013 WL 1578338 (App. April 15, 2013); *Pacific Lightnet, Inc. v. Time Warner, Inc.*, No. 28948, 2013 WL 310149 (App. Jan. 25, 2013); *Dancil v. Arakawa*, No. CAAP–11–0001020, 132 Hawai'i 472, 323 P.3d 116, 2012 WL 6003715 (App. Nov. 16, 2012); *Pavsek v. Sandvold*, 127 Hawai'i 390, 279 P.3d 55 (App.2012).
- 16 Overuse of primary jurisdiction may result in undue delay to litigants because claims will be more frequently stayed pending administrative resolution. See e.g., *Pacific Lightnet*, 268, 318 P.3d at 108 (noting that " 'wise use of the [primary jurisdiction] doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.' " (quoting *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 321, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973))).
- 17 The majority's test for when to apply primary jurisdiction seems to be, " 'whenever enforcement of the claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body.' " Majority opinion at 93, 734 P.2d at 168 (quoting *Kona Old*, 69 Haw. at 93, 734 P.2d at 168). This diminishes the doctrine, inasmuch as the agency's "special competence" has its own set of considerations, and other factors come into play as well. See generally, *Pacific Lightnet*, 276–78, 318 P.3d at 115–18.
- 18 As explained *infra*, the majority's application of the doctrine concludes that UPW's claims raise policy issues that the HLRB should consider "in the interest of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89." Majority's opinion at 200–01, 325 P.3d at 612–13 (emphases added). Respectfully, it is not at all clear how resolution of these specific claims either requires agency expertise, or will lead to a uniform regulatory scheme, and thus it is not evident why they "ought to be considered by the HLRB". *Id.*
- 19 It is assumed that the majority's use of "first pass" means that the court stays the proceedings to allow the HLRB to resolve the underlying factual issues relating to prohibited practices controversies, rather than exclusive jurisdiction. But under such an approach, HLRB would have non-exclusive jurisdiction over prohibited practices controversies, rather than exclusive jurisdiction, in contravention of HRS § 89–14. As noted, HRS § 89–14 requires exclusive jurisdiction, to the exclusion of any other body exercising jurisdiction.
- 20 The HPERB became the HLRB in 1985. See 1985 Haw. Sess. Laws Act 251, § 6 at 479–80.
- 21 It is also noted that "by legislatively overruling *Winslow*, the legislature did not divest the courts of the power to address constitutional issues unless and until the statutory issues are decided by the HLRB." *HGEA*, 124 Hawai'i at 229, 239 P.3d at 33 (Acoba, J., dissenting).
- 22 HRS § 377–9(f) provides, in relevant part, that:
(f) Any person aggrieved by the decision or order of the [HLRB] may obtain a review thereof as provided in chapter 91 by instituting proceedings in the circuit court of the judicial circuit in which the person or any party resides or transacts business, subject, however, to the general provisions of law for a change of the place of trial or the calling in of another judge.
- 23 "Controversy" is defined as "[a] disagreement or dispute [.]" or "[a] justiciable dispute." *Black's Law Dictionary* 379 (9th ed. 2009).
- 24 As noted *supra*, however, HLRB's determination over controversies involving prohibited practices is more than a "first

pass", it is the exclusive, original forum for jurisdiction over those controversies. See HRS § 89–14.

- 25 Although at one point, primary jurisdiction did apply where there was exclusive agency jurisdiction, that is no longer the case. Commentators have described a shift from the original conception of "primary jurisdiction" to the modern primary jurisdiction doctrine. Compare *Far E. Conference v. United States*, 342 U.S. 570, 573–74, 72 S.Ct. 492, 96 L.Ed. 576 (1952) with *W. Pac. R.R. Co.*, 352 U.S. at 62, 77 S.Ct. 161. "After *Far East Conference*, applying the primary jurisdiction doctrine is no longer equivalent to a finding of exclusive agency jurisdiction[.]" Lockwood, *The Primary Jurisdiction Doctrine*, 64 Wash. & Lee L. Rev. at 713. Moreover, the U.S. Supreme Court, "provided lower courts the option of either to stay the proceedings while the agency action is pending, or to dismiss the proceedings entirely[.]" and thus, "presumes that the claim is originally cognizable by both the court and agency[.] because otherwise, dismissal would have been mandatory." *Id.* at 714 (emphasis added) (citing *Far E. Conference*, 342 U.S. at 576–77, 72 S.Ct. 492).
- 26 Accordingly, in connection with the privatization claims presented in this case, I concur with the majority as to the result, but not as to the rationale.
- 27 It may become appropriate to resolve UPW's claim under art. 1, § 4 on a motion for summary judgment. However, this has no bearing on the court's original jurisdiction to hear the constitutional claim.
- 28 This court has taken jurisdiction over alleged constitutional violations in other cases, without requiring that the parties first submit those claims as prohibited practices to the HLRB. For example, in *United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi*, 101 Hawai'i 46, 62 P.3d 189 (2002), the question was whether employment terms affecting wages, hours, and other conditions should have been subject to collective bargaining as required by the constitution. 101 Hawai'i at 48, 62 P.3d at 191. This court did not first require a ruling from the HLRB before deciding the constitutional issue. See *id.* at 54, 62 P.3d at 197. Similarly, in *Malahoff v. Saito*, 111 Hawai'i 168, 140 P.3d 401 (2006), the plaintiffs challenged the implementation of an "after-the-fact" payroll plan that had the effect of delaying the dates on which certain public employees were paid. 111 Hawai'i at 171, 140 P.3d at 404. On appeal, *Malahoff* determined whether the measure violated the employees' constitutional right to collective bargaining, without first requiring that the HLRB decide an alleged prohibited practice issue. *Id.* at 181, 140 P.3d at 414.
- 29 As such, the majority's concern with inconsistent decisions is not valid on this basis as well. See majority's opinion at 201, 325 P.3d at 613 (noting that part of its decision was based on "avoiding the risk of divergent decision between an administrative agency and a court").

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N. ANAYA
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

United Public Workers, AFSCME, Local 646, AFL-CIO,)	Civil No. 09-1-2145-09 JHC
	)	(Other Civil Action)
Plaintiff,)	
vs.	)	STIPULATION OF THE PARTIES AND
	)	ORDER FOR ALTERNATIVE DISPUTE
	)	RESOLUTION
Linda Lingle, Governor, State of Hawaii;)	
Linda Smith, Chief Policy Adviser to)	
Linda Lingle, State of Hawaii; Georgina	)	Status Conference:
Kawamura, Director, Department of	)	Date: November 6, 2014
Budget and Finance, State of Hawaii;	)	Time: 9:00 a.m.
Marie Laderta, Director, Department of	)	Honorable Jeannette H. Castagnetti
Human Resources Development, State of)	
Hawaii; Clayton Frank, Director,	)	Trial date:
Department of Public Safety, State of)	
Hawaii; State of Hawaii; and Doe	)	No trial date set
Defendants 1-10 (2009-045),)	
Defendants.)	

()


**STIPULATION OF THE PARTIES AND ORDER FOR
ALTERNATIVE DISPUTE RESOLUTION**

COMES NOW the United Public Workers, AFSCME, Local 646, AFL-CIO (Plaintiff) and Linda Lingle, Linda Smith, Georgina Kawamura, Marie Laderta, and Clayton Frank (Defendants), by and through their undersigned counsel and pursuant to Rule 12.2 of the Hawaii Rules of the Circuit Court hereby enter into the following stipulation:

ATTACHMENT

4

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.


Clerk, Circuit Court First Circuit

4-1

1. The parties agree to participate in the Alternative Dispute Resolution (ADR) pursuant to Rule 12.2 (a), Haw. R. Cir. C., in the above-entitled matter.

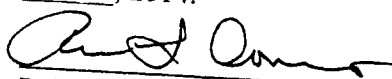
2. The parties have selected Walter Ikeda to serve as the neutral, subject to his acceptance, pursuant to Rule 12.2 (c), Haw. R. Cir. C. Upon the entry of this stipulation and order the parties will notify Mr. Ikeda of his selection and ask that he disclose his hourly rate and make his disclosures pursuant to Rule 12.2 (d), Haw. R. Cir. C.

3. The expenses of the neutral shall be borne equally by the parties. See Rule 12.2 (b) (2), Haw. R. Cir. C.

4. To facilitate the ADR the Defendants through their counsel shall produce an updated and current listing of all "Act 90 Contracts" in the form previously submitted to Plaintiff United Public Workers AFSCME, Local 646, AFL-CIO by Defendant Marie Laderta by December 31, 2014 unless further time is needed.

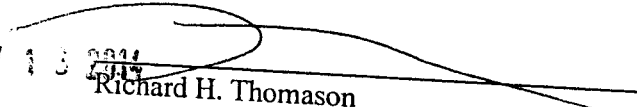
5. The initial ADR conference shall be convened in January 2015. Lead counsel for each party shall attend in person at all conferences scheduled by the neutral. The parties need not attend the conference so long as counsel for that party has reasonable access to the person who has full settlement authority. If the neutral determines it appropriate, the neutral shall have reasonable access to the person who has full settlement authority. See Rule 12.2 (e), Haw. R. Cir. C.

6. The Court will convene a status conference at 11:30 a.m. on March 4, 2015.
Dated: Honolulu, Hawaii, November 7, 2014.



Rebecca L. Covert
Herbert R. Takahashi
Attorneys for Plaintiff

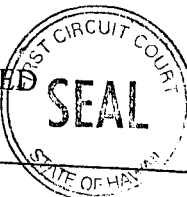
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Richard H. Thomason
Attorney for Defendants

APPROVED AND SO ORDERED
JEANNETTE H. CASTAGNETTI

Judge of the above-entitled Court

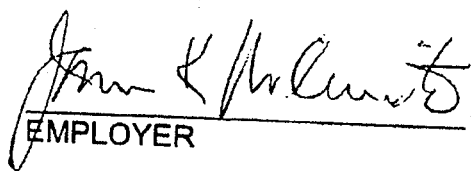



LETTER OF UNDERSTANDING

This Letter of Understanding ("LOU") is entered into this 29th day of June 2015 by and between the Executive Branch of the State Of Hawaii ("Employer"), and the United Public Workers, Local 646, AFSCME, AFL-CIO ("Union") (collectively referred to as "Parties").

1. The Parties agree to a moratorium on all matters arising out of Prohibited Practice Complaints CE-01-712a, CE-10-712b, CE-01-720a and CE-10-720b; Class Grievances DMN-07-11 and DMN-07-12 and Civil No. 09-1-2145-09 JHC. The Parties also agree that Prohibited Practice Complaints CE-01-712a, CE-10-712b, CE-01-720a and CE-10-720b; Class Grievances DMN-07-11 and DMN-07-12 and Civil No. 09-1-2145-09 JHC will be held in abeyance during the moratorium period.
2. During the moratorium, the Department of Human Resources Development (DHRD) Director shall notify all Executive Branch Departments that all contracts involving work historically performed by BU1 and/or BU10 employees shall not be automatically renewed at their contract end date. The Employer will review such contracts to determine the appropriateness of continuing such contracts under HRS § 76-16(b)(2) and/or § 76-16(b)(15), as well as any other mutually agreed upon basis for exemption (e.g., employee safety, unavailability of proper equipment, etc.).
3. Based upon the information obtained via the review described in #2 above, in conjunction with any other available contract information, the Employer will develop a process/procedure that will, going forward, serve to ensure that contracts entered into by the State Executive Branch Departments will correctly apply the statutory and other exemptions set forth in #2 above.
4. The Employer agrees to periodically update the Union on its progress specific to the development of a process/procedure that shall be applied to all Employer departments who are considering private contract services for BU 1 and/or BU 10 work. The final procedure to be utilized shall be mutually agreed to and shall be memorialized in a Settlement Agreement between the Parties.
5. The Union will assist the departments for successful passage of their budget requests that include the additional identified BU 1 and/or BU 10 Employees.
6. The Parties agree and understand that all contracts for services rendered to the Employer by non-civil service Employees will be affected by this LOU. Should a dispute arise with respect to a specific services contract, the matter shall be resolved with the assistance of Mediator/Arbitrator Walter Ikeda or other mutually agreed to Mediator/Arbitrator.

7. The Parties agree that this LOU and any agreements arising out of this LOU shall not constitute an admission of any liability and do not set precedent, and that except as set forth in this LOU each Party shall retain all rights and defenses.
8. This LOU shall be in effect from the date first entered above and shall be continued thereafter, unless either of the Parties terminates this LOU by giving thirty (30) days written notice of termination.


EMPLOYER


UNION

Dozens of contracts by state might break privatization ruling

By Kevin Dayton
kdayton@staradvertiser.com

The state has begun to scrutinize proposed contracts with private companies to determine whether they comply with an 18-year-old court decision that limits privatization of government services in Hawaii, and officials so far have identified 99 contracts that may need to be phased out because they conflict with that ruling.

The state likely will need to hire more government workers to handle tasks being performed under some of the contracts, but state officials have no idea yet how many additional workers could be required or how much the shift to public workers could cost, said Mike McCartney, chief of staff to Gov. David Ige.

McCartney said it is too early to say whether there could be a large-scale phase-out of contracts. "I think we just need to take a look and make that evaluation, and we're just starting to do that," he said. "This agreement is new."

McCartney added, "We need to look at how government is going to function and make sure those services are provided. This is the beginning of the analysis."

State Sen. Sam Slom (R, Diamond Head-Kahala-Hawaii Kai) said he expects the Ige administration will have to ask state lawmakers for more money next year to hire workers to handle what is being done under the existing contracts with private companies.

Slom said that years ago when the counties undertook similar reviews to comply with the 1997 state Supreme Court decision called *Konno v. County of Hawaii*, "we saw that there was additional cost, additional public workers and less choice, and I expect the same thing is going to happen as we take a look at what's happening right now."

In *Konno v. County of Hawaii*, the court ruled it was a violation of state law for state or county agencies to hire private contractors to perform tasks that were traditionally handled by civil servants.

The Ige administration July 1 instructed state departments to submit proposed contracts to the Department of Human Resources Development for review if the work to be done under those contracts has customarily and historically been performed by members of the United Public Workers union.

UPW filed grievances against the state over the contracting issue in 2007, and filed a prohibited labor practice complaint in 2009 in connection with the contracts.

Honolulu and the neighbor island counties reached agreements with UPW to resolve their disputes over similar contracts, but the state and the UPW argued for an additional six years over the issue. McCartney said he did not know why it took the state so long to resolve the dispute.

The Ige administration finally agreed in July as part of a court-ordered mediation process to begin screening contracts before they are given final approval to determine whether they comply with the *Konno* ruling.

According to data released by Ige's office, 506 proposed contracts have been reviewed by Human Resources officials under the new process, and none has been rejected outright.

Of the contracts that were reviewed, 105 that covered areas such as automotive repair, plumbing and tree cutting were approved on an emergency basis to ensure the work is quickly completed.

An additional 99 contracts covering areas such as air conditioning and electrical repairs, janitorial work, refuse disposal and pest control were given conditional approval, meaning the departments are expected to request funding for public workers to handle this work in the future.

Under the "letter of understanding" between the state and UPW that describes the new contract review process, the union "will assist the departments for successful passage of their budget requests that include the additional (UPW) employees" needed to perform the necessary work for the state.

An extra 91 contracts were returned to departments without a decision to obtain additional information, and 158 contracts are pending.

State Sen. Gil Keith-Agaran (D, Waihee-Wailuku-Kahului) said that when the counties made a similar transition, the UPW was flexible about allowing contracts to continue temporarily when there were no public workers to handle the work.

Keith-Agaran, who served as director of public works on Maui, said he did not recall a large increase in costs because of the *Konno* decision, "but it was just a matter of going back and looking at these agreements and seeing if they could be structured in a way that was acceptable to the union."

ATTACHMENT 6