NO. 26347

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

In the Matter of the Arbitration Between
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Union-Appellee,
vs.
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENVIRONMENTAL SERVICES, COLLECTIONS SYSTEM,
Employer-Appellant

(Special Proceedings No. 03-1-0401)

and

In the Matter of the Arbitration Between
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Union-Appellee,
vs.
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENVIRONMENTAL SERVICES, COLLECTIONS SYSTEM
(Grievance of A_P_re: submittal to alcohol breathalyzer test; Section 11 and 63; CZ-02-25; 2002-042),
Respondents-Appellants

(Special Proceedings No. 03-1-0400)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION
(Burns, Chief Judge, Watanabe, and Nakamura, JJ.)

Employer/Respondent-Appellant City and County of Honolulu, Department of Environmental Services, Collections System (the City or the Employer) appeals from the Order filed on December 18, 2003, in the Circuit Court of the First Circuit (the circuit court)[1] that denied the City's motion to vacate an arbitration award and granted a motion by Union-Appellee United

[1] The Honorable Judge Sabrina S. McKenna presided.

Public Workers, AFSCME, Local 646, AFL-CIO (UPW or the Union) to correct a typographical error and confirm the arbitration award.

On appeal, the City contends that the circuit court erred in confirming the arbitration award because the arbitrator exceeded the scope of his authority and because the award violates public policy embodied in Hawai'i statutes and federal regulations. For the reasons discussed below, we vacate the circuit court's order and remand for proceedings consistent with this opinion.

BACKGROUND

I.

During the time period relevant to this case, the following circumstances applied. Aleigh Pearson (Pearson or the Grievant) was a Wastewater Collection System Helper (helper) for the City. Pearson's grievance that underlies this case was governed by the Collective Bargaining Agreement for Bargaining Unit 1 (the CBA) made on December 26, 2000, by and between UPW and the City,[2] which covered the period from July 1, 1999, through June 30, 2003.

Pearson worked as a helper on maintenance crews that traveled to individual sites to perform maintenance on sewer lines. The crews usually consisted of one supervisor, two employees holding the position of Wastewater Collection System Repairer (repairer), and one helper.

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[2] The State of Hawai'i and the Counties of Maui, Hawai'i, and Kauai were also parties to this collective bargaining agreement.

A helper "assist[ed], under supervision, in the construction, demolition, inspection, operation, maintenance, and repair of the City sewage collection systems," including such tasks as installing air blowers and generators, flushing and repairing sewer mains, and using hand tools and power equipment. A repairer "perform[ed] all types of work involving the construction, demolition, inspection, operation, maintenance, and repair of the sewage collection systems," including laying pipe, inspecting sewer mains, repairing sewer manholes, excavating trenches, and driving dump trucks and vacuum trucks to the job site.

Once hired into the entry-level position of helper, a City employee could apply for a promotion from helper to repairer when vacancies arose. The minimum qualifications for this promotion included at least one year of experience as a helper and possession of a valid Type B[3] Commercial Driver's License

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[3] At the time Aleigh Pearson (Pearson or the Grievant) applied for promotion to the position of Wastewater Collection System Repairer (repairer), Hawaii Revised Statutes (HRS) § 286-239 (Supp. 2001) provided in relevant part:

> **§ 286-239 Commercial driver's license.** . . .
>
> (b) Commercial driver's licenses may be issued with the following categories:
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> (1) Category A -- Any combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 pounds or more; provided that the gross vehicle weight rating of the vehicles being towed is in excess of 10,000 pounds;
>
> (2) Category B -- Any single vehicle with a gross vehicle weight rating of 26,001 pounds or more, or if the gross vehicle weight rating of the vehicle being towed is not in excess of 10,000 pounds; and
>
> (3) Category C -- Any single vehicle or combination of vehicles that meets neither the definition of category A nor that of

(CDL), because a repairer, unlike a helper, occasionally needed to operate a Commercial Motor Vehicle (CMV) as part of his or her duties.

Helpers who did not possess a CDL and were interested in making themselves eligible for promotion were required to participate in a driver training program administered by the City. Operating a CMV was considered a safety-sensitive function within the meaning of federal regulations promulgated by the United States Department of Transportation (DOT). The DOT regulations established requirements and procedures for alcohol and controlled substances testing for transportation employees in safety-sensitive positions. 49 Code of Federal Regulations (C.F.R.) §§ 40.1-.413, 382.101-.605 (2006).

II.

In May 2002, the City posted information about four new openings for the repairer position. In August 2002, Pearson, who had been working for the City for approximately seven years, submitted an application for promotion. Pearson had previously

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category B, but that is either:

(A) Designed to transport sixteen or more passengers, including the driver; or

(B) Used in the transportation of hazardous materials which requires the vehicle to comply with 49 Code of Federal Regulations, Part 172, Subpart F.

. . . .

(d) The holder of a valid commercial driver's license may drive all vehicles in the category for which the license is issued, and all lesser categories of vehicles except motorcycles and except vehicles which require an endorsement, unless the proper endorsement appears on the license.

held a CDL but the City learned in April of 2002 that he no longer possessed one. Because Pearson did not possess a current CDL, he requested permission to participate in CDL training. Pursuant to this request, on August 26, 2002, the City sent Pearson to the Diagnostic Laboratory to undergo preemployment testing for both controlled substances and alcohol. Two days later, a Medical Review Officer from the laboratory informed the City that the results from Pearson's breathalyzer test indicated that his alcohol concentration exceeded the acceptable limits established by the DOT. The test results for controlled substances were negative. The City sent a letter to Pearson relaying the alcohol test results and ordering him to undergo an evaluation by a Substance Abuse Professional (SAP) the following week.

The City subsequently discovered that, according to the terms of the CBA, Pearson should not have been subjected to a preemployment alcohol test; he should only have been subjected to a preemployment test for controlled substances. Section 63.04b of the CBA provides: "There shall be no pre-employment alcohol testing." Although Pearson should not have been given the alcohol test, the City concluded that, while it would not implement standard disciplinary procedures for an alcohol testing violation, such as suspension and execution of a last-chance agreement, the test results could not be ignored. Accordingly, the City decided to retain the records for Pearson's test results and require him to undergo an SAP evaluation and, if necessary, a

treatment program prior to permitting him to train for a CDL.

On September 5, 2002, Pearson met with an SAP as scheduled, but on UPW's advice, he did not discuss or accept any counseling. On September 25, 2002, UPW filed a Step 1 Grievance with the City, alleging violations of the CBA for requiring Pearson to submit to a preemployment alcohol test and thereafter prohibiting him from training for a CDL, thus leaving him ineligible for promotion to the position of repairer. The grievance requested that the City destroy the test results and enroll Pearson immediately in a CDL training course. On October 10, 2002, having received no response from the City, UPW filed a Step 2 Grievance.

On October 15, 2002, the City consulted informally over the telephone with the Division Administrator for the Hawai'i Division of the Federal Motor Carrier Safety Administration, who expressed agreement with the City's decision to retain the test results and require Pearson to complete the SAP evaluation process. On October 17 and 18, 2002, the City denied UPW's grievances at Step 1 and Step 2, respectively. On October 23, 2002, the City sent a letter to Pearson informing him that he would not be permitted to enroll in a CDL training course or perform any safety-sensitive functions for the City until Pearson completed an SAP evaluation and any treatment required by the SAP. The City also informed Pearson on January 29, 2003, that he was ineligible for promotion to repairer and would not be considered for one of the four vacant positions posted the

previous May.[4]

III.

On October 29, 2002, UPW exercised its option under the CBA to submit Pearson's grievance to arbitration, and Paul S. Aoki, Esq. (Arbitrator Aoki) was selected as the arbitrator. The parties stipulated to the arbitrability of the grievance. The City conceded that it had violated Section 63.04b of the CBA, which prohibits preemployment alcohol testing, by having Pearson take an alcohol test in connection with his application for promotion to the repairer position. Therefore, the parties agreed that the sole issue for the arbitrator to decide was what the appropriate remedy should be in light of this admitted violation.

At arbitration, UPW characterized the City's post-testing actions as disciplinary and asserted that the City violated Section 63.11d of the CBA, which states, "A test which is not valid as provided in the DOT Rules or violates the Employee's rights shall not be used for discipline." UPW sought a remedy that would reverse the consequences of the City's actions, namely, requiring the City to enroll Pearson in a CDL training course without an SAP evaluation, appoint him in the interim to the repairer position at the higher rate of pay, and destroy the test records. In contrast, the City characterized its post-testing actions as necessary, non-disciplinary measures

[4] Employer/Respondent-Appellant City and County of Honolulu, Department of Environmental Services, Collections System (the City or the Employer) eventually filled those positions later in 2003.

and accordingly argued that no further remedy for the preemployment alcohol test violation was authorized or needed.

Arbitration hearings were held on March 11, 2003, and June 18, 2003, and the parties submitted post-arbitration briefs to Arbitrator Aoki on August 20, 2003. On September 25, 2003, Arbitrator Aoki issued a decision in favor of UPW. Arbitrator Aoki concluded in relevant part that:

> The Employer's position that it has already provided an adequate remedy for its mistake is not valid. The Employer has not allowed Grievant to participate in training to obtain a CDL license or to participate in the promotion process for the repairer position because of the results of the test that it should not have required him to take. The Union cited several decisions in which other arbitrators have defined discipline in a manner which would apply to this situation. The Grievant has suffered adverse consequences as a direct result of Employer's actions which are continuing and this constitutes discipline for which the City has not provided an adequate remedy.

Arbitrator Aoki ordered the following remedy:

1. The Employer shall remove all records pertaining to the alcohol test from Grievant's records and they shall not be used against him in any way.

2. The Employer shall allow Grievant to participate in CDL training.

3. The Employer shall promote Grievant to the position of Wastewater Collection System Repairer.

4. The Employer shall pay Grievant the difference between the Wastewater Collection System Repairer's rate of pay and the pay that he actually received from the date that the four Wastewater Collection System Repairer positions were filled in June 2003 until the date of Grievant's promotion to Wastewater Collection System Repairer.

On October 6, 2003, UPW filed a motion in circuit court to amend a typographical error and confirm the arbitration decision. On October 7, 2003, the City filed a motion to vacate the arbitration decision. The parties stipulated to consolidate these proceedings on November 13, 2003, and on December 18, 2003, the circuit court issued an order granting UPW's motion to amend

a typographical error and confirm the arbitration decision and denying the City's motion to vacate the decision. The City filed a timely notice of appeal.

DISCUSSION

I.

On appeal, UPW suggests that the circuit court lacked jurisdiction to consider the City's motion to vacate Arbitrator Aoki's decision because the City served notice of its motion too late. If the circuit court lacked jurisdiction to consider the City's motion, we likewise have no jurisdiction to entertain the City's appeal of the circuit court's denial of the motion. Gilmartin v. Abastillas, 10 Haw. App. 283, 296, 869 P.2d 1346, 1352 (1994).

Hawaii Revised Statutes (HRS) § 658-11 (1993), the jurisdictional notice provision applicable to this case,[5]

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[5] In 2001, the Hawai'i Legislature repealed Hawaii Revised Statutes (HRS) Chapter 658 and replaced it with the Uniform Arbitration Act, HRS Chapter 658A. Lingle v. Hawaii Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO, 107 Hawai'i 178, 186 n.10, 111 P.3d 587, 595 n.10 (2005). However, HRS Chapter 658, and not HRS Chapter 658A, governs this case because the underlying arbitration was based on an arbitration agreement contained in the Collective Bargaining Agreement for Bargaining Unit 1 (the CBA) made on December 26, 2000, between the City and Union-Appellee United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or the Union). HRS § 658A-3 (Supp. 2006) provides in relevant part:

> (b) This chapter [(HRS Chapter 658A)] governs an agreement to arbitrate made before July 1, 2002, if all the parties to the agreement or to the arbitration proceeding so agree in a record. If the parties to the agreement or to the arbitration do not so agree in a record, an agreement to arbitrate that is made before July 1, 2002, shall be governed by the law specified in the agreement to arbitrate or, if none is specified, by the state law in effect on the date when the arbitration began or on June 30, 2002, whichever first occurred.

HRS Chapter 658 was the state law in effect on June 30, 2002. The arbitration agreement in the CBA does not specify any particular law that is to govern the arbitration agreeement. In the court below, the parties argued the case under HRS Chapter 658. On appeal, they have not cited any reason why

provides in relevant part, as follows:

> Notice of a motion to vacate, modify, or correct an award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. . . . The record shall be filed with the motion as provided by section 658-13.

HRS § 658-11 requires that notice of a motion to vacate an arbitration award be served upon the adverse party or the adverse party's attorney within ten days after the award is made and served. HRS § 658-11 incorporates the provisions of Hawai'i Rules of Civil Procedure (HRCP) Rule 5, which governs the service of written notices and other pleadings in civil actions.[6] HRS § 658-11 also refers to HRS § 658-13 (1993), which sets forth the documents from the arbitration proceeding that comprise the record that must be filed with a motion to vacate.[7]

HRS Chapter 658 should not govern this case. Accordingly, we will decide this appeal under HRS Chapter 658.

[6] Hawai'i Rules of Civil Procedure (HRCP) Rule 5 permits service by mail and specifies that service is complete upon mailing. HRCP Rule 5(b)(1), (3). Rule 5 also permits a motion to be filed with the court within a reasonable time after serve upon the opposing party. HRCP Rule 5(d).

[7] HRS § 658-13 (1993) provides as follows:

> **§ 658-13 Record to be filed with motion.** (a) The party moving for an order confirming, vacating, modifying, or correcting an award shall at the time the motion is filed with the clerk also file the following papers with the clerk:
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> (1) The agreement; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award; and
>
> (2) The award.
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> (b) Each notice, affidavit, or other paper, used or to be used upon an application to confirm, vacate, modify, or correct the award, and a copy of each order of the court upon such an application, shall be filed with the clerk the same as in a civil action.

The City was served with Arbitrator Aoki's decision on September 26, 2003. Ten days later, on October 6, 2003, the City mailed a copy of its motion to vacate Arbitrator Aoki's decision to UPW, sans exhibits containing the record from the arbitration proceeding. On the following day, October 7, 2003, the City filed its motion to vacate with the arbitration record attached as exhibits in the circuit court and hand-delivered a copy of the motion and the exhibits to UPW.

If the City's service of its motion to vacate without the record exhibits was sufficient to constitute "notice of a motion" under HRS § 658-11, then the City timely served its notice of motion. On the other hand, if the City was required to serve both its motion and the record exhibits to comply with HRS § 658-11, then the City served its notice of motion one day too late.

By its terms, HRS § 658-11 requires only that the notice of motion, and not the arbitration record, be served within the ten-day deadline. We conclude that the City timely served notice of its motion to vacate as required by HRS § 658-11 by mailing a copy of its motion to vacate, without the record exhibits, to UPW on October 6, 2006. The City filed its motion to vacate along with the record exhibits with the circuit court the next day, thereby satisfying HRCP Rule 5(d), which permits papers served upon a party to be filed in court within a reasonable time after service. Accordingly, the circuit court had and this court has jurisdiction to assess the merits of the

City's motion to vacate Arbitrator Aoki's arbitration award.

II.

On appeal, the City challenges the portions of Arbitrator Aoki's award that required the City to: 1) promote Pearson to the repairer position, even though he lacked a CDL; 2) remove all records pertaining to the alcohol test from Pearson's records; and 3) allow Pearson to participate in CDL training without first completing the SAP evaluation process. The City argues that in ordering it to take these actions, Arbitrator Aoki exceeded the authority granted to him by the CBA and violated public policy. The City thus claims that the circuit Court erred in denying the City's motion to vacate the award and in granting the Union's motion to confirm the award.

A.

Determining whether the circuit court erred in confirming an arbitration award involves our interpretation of HRS §§ 658-8, 658-9, and 658-10 (1993).[8] See Tatibouet v.

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[8] HRS § 658-8 (1993) provides, in relevant part, as follows:

> **§ 658-8 Award; confirming award.** . . . At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court specified in the agreement, or if none is specified, to the circuit court of the judicial circuit in which the arbitration was had, for an order confirming the award. Thereupon the court shall grant such an order, unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10.

HRS § 658-9 (1993) provides as follows:

> **§ 658-9 Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:
>
> (1) Where the award was procured by corruption, fraud, or undue means;

Ellsworth, 99 Hawai'i 226, 229, 232-33, 54 P.3d 397, 400, 403-04 (2002). "The interpretation of a statute is a question of law reviewable *de novo*." Id. at 233, 54 P.3d at 404. "HRS § 658-8 contemplates a judicial confirmation of the arbitrator's award unless the award is vacated, modified, or corrected in accordance with HRS §§ 658-9 and 658-10." Id. at 233, 54 P.3d at 404 (internal citations and quotation marks omitted).

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(2) Where there was evident partiality or corruption in the arbitrators, or any of them;

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators.

HRS § 658-10 (1993) provides as follows:

§ 658-10 Modifying or correcting award. In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

Under HRS § 658-9(4), the circuit court may vacate an award where the arbitrator exceeded his or her powers. The terms of an arbitration agreement establish the specific parameters of an arbitrator's authority to resolve disputes between the parties. Wayland Lum Constr., Inc. v. Kaneshige, 90 Hawai'i 417, 422, 978 P.2d 855, 860 (1999). In this case, UPW and the City agreed to submit unresolved grievances involving the City's alleged violation of the CBA to binding arbitration. Under the terms of the CBA, the scope of the arbitrator's authority is limited to deciding whether the City "violated, misinterpreted, or misapplied any of the sections of [the CBA]." The CBA further provides that the arbitrator "shall not have the power to add to, subtract from, disregard, alter, or modify any of the sections of [the CBA]" and that "[a] matter that is not specifically set forth in [the CBA] shall not be subject to arbitration."

Judicial review of arbitration decisions is extremely limited, both in deference to the legislative policy of encouraging arbitration instead of litigation and in recognition of the parties' intent to avoid litigation. Id. at 421, 978 P.2d 859; Tatibouet, 99 Hawai'i at 233, 236, 54 P.3d at 404, 407. "As such, a court has no business weighing the merits of the arbitration award." Tatibouet, 99 Hawai'i at 233, 54 P.3d at 404 (internal quotation marks, brackets, and ellipsis omitted). "[T]he fact that an arbitrator may err in applying the law, finding facts, or in construing the contract, or enters an award that is contrary to the evidence adduced, is insufficient grounds

for judicial reversal." Univ. of Hawai'i Prof'l Assembly ex rel. Daeufer v. Univ. of Hawai'i, 66 Haw. 214, 225, 659 P.2d 720, 728 (1983). Indeed, "where the parties agree to arbitrate, they thereby assume all the hazards of the arbitration process, including the risk that the arbitrators may make mistakes in the application of law and in their findings of fact." Daiichi Hawai'i Real Estate Corp. v. Lichter, 103 Hawai'i 325, 336, 82 P.3d 411, 422 (2003) (internal quotation marks and brackets omitted).

The Hawai'i Supreme Court has recognized that "[a]rbitrators . . . normally have broad discretion to fashion appropriate remedies." Hokama v. Univ. of Hawaii, 92 Hawai'i 268, 273, 990 P.2d 1150, 1155 (1999). The court has further noted that arbitrators need flexibility in formulating remedies if the purpose of arbitration to settle disputes without litigation is to be served. Univ. of Hawai'i Prof'l Assembly, 66 Haw. at 223, 659 P.2d at 727.

B.

While courts are generally deferential to arbitration awards, there is a judicial exception, "rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." In re Grievance Arbitration Between State of Hawai'i Org. of Police Officers (SHOPO) ex rel. Mejia v. Hawai'i County Police Dep't, 101 Hawai'i 11, 20, 61 P.3d 522, 531 (App. 2002) (quotation marks omitted); Inlandboatmen's Union of the Pacific, Hawai'i Region, Marine Div. of the Int'l Longshoremen's

& Warehousemen's Union v. Sause Brothers, Inc., 77 Hawai'i 187, 193, 881 P.2d 1255, 1261 (App. 1994) (quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42 (1987)). "Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, 'the question of public policy is ultimately one for resolution by the courts.'" Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers (AFL-CIO), 834 F.2d 1424, 1427 (8th Cir. 1987) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183 (1983)). Therefore, once a party to an arbitration award petitions the circuit court to vacate an award on public policy grounds, the court engages in a form of analysis heretofore unaddressed in the dispute between the parties to the arbitration. On appeal, we review *de novo* the circuit court's legal conclusions with respect to whether the award violates public policy. See Iowa Elec. Light & Power, 834 F.2d at 1427.

The public policy exception does "not sanction a broad judicial power to set aside arbitration awards . . . ." Inlandboatmen's Union, 77 Hawai'i at 193, 881 P.2d at 1261 (internal ellipsis omitted) (quoting Misco, 484 U.S. at 43). In order to apply the public policy exception, the court must determine that "1) the [arbitration] award would violate some explicit public policy that is well defined and dominant, and that is ascertained by reference to the laws and legal precedents

and not from general considerations of supposed public interests, and 2) the violation of the public policy is clearly shown." Inlandboatmen's Union, 77 Hawai'i at 193-94, 881 P.2d at 1261-62 (internal quotation marks, ellipsis, and brackets omitted) (quoting Misco, 484 U.S. at 43).

III.

The City argues that Arbitrator Aoki exceeded his authority in ordering the City to promote Pearson to the repairer position, even though he did not have a CDL, and that this provision of the award also violates public policy. We agree.

In support of its argument, the City cites HRS § 89-9(d), which excludes certain subjects from the scope of collective bargaining in public employment. HRS § 89-9(d) (Supp. 2006) provides, in relevant part, as follows:

> **§ 89-9 Scope of negotiations; consultation. . . .**
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> . . . .
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> (d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust; recruitment; examination; initial pricing; and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal . . . that would interfere with the rights and obligations of a public employer to:
>
> . . . .
>
> 2) Determine qualifications, standards for work, and the nature and contents of examinations[.]

(Emphasis added.)[9] By its terms, HRS § 89-9(d) reserves to public employers the exclusive right to "determine

[9] The quoted language is from the current version of the statute, HRS § 89-9(d) (Supp. 2006). HRS § 89-9(d) was previously amended in 2004 and 2005 in ways that are not material to our analysis.

qualifications," thereby excluding job qualifications from negotiation. A collective bargaining agreement or an arbitration award that interferes with a public employer's right and obligation to determine the qualifications for a particular employment position violates HRS § 89-9(d)(2). See United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Hanneman, 106 Hawai'i 359, 365, 105 P.3d 236, 242 (2005) (concluding that the right to transfer employees is an exclusive management right that is excluded from collective bargaining under prior but functionally identical version of HRS § 89-9(d)); In re Grievance Arbitration, 101 Hawai'i at 19-20, 61 P.3d at 530-31.

Beginning in 1993, the City required the possession of a valid CDL as one of the minimum requirements for the repairer position.[10] The City argues that its right under HRS § 89-9(d)(2) to determine job qualifications is violated by the remedial provision of the arbitration award that orders the City to promote Pearson, without making promotion contingent on Pearson's first obtaining a CDL. This order effectively waives the CDL requirement for Pearson, which the City construes as violating its right to "determine" qualifications by disregarding one already established. UPW disputes the City's characterization of a CDL as a necessary qualification for the

[10] UPW observes that a Position Description form from the Department of Civil Service for the City and County of Honolulu, which was approved by the Director of Civil Service on September 16, 1992, did not list a Commercial Driver's License (CDL) as a required license for the repairer position. The City did not implement the CDL requirement until 1993, however, and a subsequent Position Description form approved by the Director of Civil Service on October 6, 1993, does list a CDL as a required license for the repairer position.

repairer position. Even though the City's Civil Service job description explicitly listed possession of a CDL as a minimum qualification, UPW emphasizes that, in practice, the City allowed employees who did not have a CDL to fill the repairer position.

Pearson's supervisor testified during the arbitration proceedings that five or six repairers in Pearson's district did not possess and were not required to obtain a CDL because they already held their positions when the City first implemented its CDL requirement in 1993. Since the City's personnel seniority list included only twenty-two repairers in Pearson's district, those employees grandfathered into their positions without a CDL constituted a substantial proportion of the repairers employed by the City within Pearson's district.

It was also disclosed at arbitration that the City temporarily assigned helpers without a CDL to the position of repairer in order to fill vacancies when there were not enough repairers present to complete the crews for the day. Under those circumstances, the assignee performed all of the repairer functions except those requiring the operation of a CMV, namely, excavating trenches and operating dump trucks and other heavy vehicles. There was also testimony at the arbitration that for some activities, only one CMV was needed per crew and that "a week or two" could pass without a repairer on a crew needing to operate a CMV.

We do not agree with UPW's argument that the City's temporary assignment program and its covey of grandfathered

repairers nullify the CDL requirement. In fact, having a significant number of grandfathered repairers without a CDL on staff made it even more exigent that the City promote only helpers possessing a CDL, in order to ensure that when a CMV did need to be operated on the job, the crews would be sufficiently staffed to allow them to function properly. In addition, the fact that tasks requiring the operation of a CMV encompassed only a portion of a repairer's overall responsibilities, and that a helper without a CDL could temporarily fill a repairer's position in a pinch, did not lessen the importance of a CDL.

After adopting the CDL requirement in 1993, the City established a CDL as a necessary qualification for all repairers hired subsequently. Pursuant to HRS § 89-9(d)(2), it was within the City's managerial authority to make such a determination, and neither collective bargaining nor an arbitration decision could override the City's establishment of a CDL as a minimum qualification for the repairer position. See Hanneman, 106 Hawai'i at 365, 105 P.3d at 242; In re Grievance Arbitration, 101 Hawai'i at 19-20, 61 P.3d at 530-31. We conclude that in ordering the City to promote Pearson, who did not have a CDL, to the position of repairer, Arbitrator Aoki exceeded his authority and violated the public policy embodied in HRS § 89-9(d)(2). See Univ. of Hawai'i v. Univ. of Hawai'i Prof'l Assembly ex rel. Watanabe, 66 Haw. 232, 234-35, 659 P.2d 732, 734 (1983); Hanneman, 106 Hawai'i at 365, 105 P.3d at 242; In re Grievance Arbitration, 101 Hawai'i at 19-20, 61 P.3d at 530-31.

IV.

The City asserts that the CBA has a "policy of deferral" to the DOT regarding matters concerning alcohol and drug testing of individuals performing or ready to perform safety-sensitive activities. The City construes DOT regulations to require that Pearson's alcohol test records be maintained and that Pearson complete the SAP evaluation process before he is allowed to participate in CDL training. The City therefore argues that Arbitrator Aoki exceeded his authority and violated public policy by ordering the City to: 1) remove all records pertaining to the alcohol test from Pearson's records; and 2) allow Pearson to participate in CDL training without completing the SAP evaluation process. We disagree.

A.

In 1991, the United States Congress passed the Omnibus Transportation Employee Testing Act (OTETA). Pub. L. No. 102-143, Title V, 105 Stat. 952 (1991). The OTETA directed the Secretary of Transportation to prescribe regulations for drug and alcohol testing of employees in various sectors of the transportation industry. Am. Trucking Ass'ns, Inc. v. Fed. Highway Admin., 51 F.3d 405, 407 (4th Cir. 1995).

The Federal Motor Carrier Safety Administration (FMCSA) is an administration within the DOT that oversees transportation safety for CMVs. The FMCSA promulgated regulations, 49 C.F.R. §§ 382.101-.605 (2006), that establish the minimum requirements for drug and alcohol testing of employees who operate CMVs, a

function that the FMCSA classifies as safety-sensitive. 49 C.R.R. § 382.107 (2006) (defining "safety-sensitive function"). FMCSA's alcohol and drug testing regulations apply to employees who operate CMVs and to their employers. 49 C.F.R. §§ 382.103(a), .107 (2006). The stated purpose of the regulations is "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101 (2006). To that end, the regulations prohibit drivers from 1) reporting for duty that requires the performance of safety-sensitive functions with an alcohol concentration[11] of 0.04 or greater, 2) consuming alcohol while performing safety-sensitive functions, and 3) consuming alcohol withing four hours before performing safety-sensitive functions. 49 C.F.R. §§ 382.201, .205, .207 (2006).

The DOT requires regulated employers to conduct alcohol tests on their employees under certain conditions. The DOT defines an "[e]mployee" as "[a]ny person who is designated in a DOT agency[12] regulation as subject to drug testing and/or alcohol testing." 49 C.F.R. § 40.3 (2006). The term "employee" includes "individuals currently performing safety-sensitive functions

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[11] The regulations define "alcohol concentration" to mean "the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a evidential breath test." 49 Code of Federal Regulations (C.F.R.) § 382.107 (2006).

[12] The term "DOT agency" is defined in the regulations as encompassing all United States Department of Transportation (DOT) agencies, including the Federal Motor Carrier Safety Administration (FMCSA). 49 C.F.R. § 40.3 (2006).

designated in DOT agency regulations and applicants for employment subject to pre-employment testing." Id.

The FMCSA requires regulated employers to subject their drivers to a breathalyzer test for prohibited levels of alcohol under various scenarios. 49 C.F.R. § 382.303 (2006) (post-accident testing); § 382.305 (random testing); § 382.307 (reasonable suspicion testing); § 382.309 (return-to-duty testing); § 382.311 (follow-up testing). The term "driver" is defined to mean "any person who operates a commercial motor vehicle." 49 C.F.R. § 382.107. In the preemployment context, however, the FMCSA permits, but does not require, an employer to conduct alcohol testing. 49 C.F.R. § 382.301(d) (2006).[13] In addition, the FMCSA only permits a preemployment alcohol test if the employer adopts a policy of subjecting every prospective CMV

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[13] 49 C.F.R. § 382.301(d)(2006) provides, in relevant part, as follows:

> (d) An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:
>
> (1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).
>
> (2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).
>
> (3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.
>
> . . .
>
> (5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

driver to an alcohol test and if the employer satisfies other conditions. Id. Thus, in the preemployment context, the FMCSA leaves the decision on whether to administer an alcohol test open to determination through the collective bargaining process.

Initially, the DOT and its various administrations proposed to treat a job applicant's alcohol consumption the same as his or her use of illegal drugs by making alcohol tests, like tests for controlled substances, mandatory rather than discretionary in the preemployment context. Am. Trucking Ass'ns, 51 F.3d at 407. However, after reviewing the final rule issued by the Federal Highway Administration (FHWA) that called for mandatory preemployment testing of commercial truck drivers for alcohol use, the United States Court of Appeals for the Fourth Circuit struck the rule down as based on an unreasonable interpretation of the OTETA by the FHWA. Id. at 407, 409, 411-12. The Fourth Circuit noted that the DOT itself had expressed the view that preemployment alcohol testing "is one of the least useful types of tests" because off-duty alcohol use is generally legal and thus "a test result indicating alcohol use may only indicate bad judgment or bad timing." Id. at 407. The court concluded that "the [DOT] agencies [unreasonably] read the [OTETA] as though it unambiguously requires pre-hiring alcohol testing of all applicants without regard for whether a positive test result would indicate use in violation of law." Id. at 411.

While Am. Trucking Ass'ns dealt specifically with a challenge to the FHWA's proposed rule, the mandatory

preemployment alcohol testing policy the court overturned in that case had been incorporated in rules proposed by the DOT's other operating administrations as well. Id. at 407. In the wake of Am. Trucking Ass'ns, the FMCSA promulgated rules that did not impose mandatory preemployment alcohol testing, but instead left the decision regarding preemployment alcohol testing open to determination through collective bargaining. 49 C.F.R. § 382.301.

B.

In support of its argument, the City cites: 1) 49 C.F.R. § 382.401 (2006),[14] an FMCSA regulation detailing an employer's responsibility to retain records pertaining to its drug and alcohol testing programs; 2) 49 C.F.R. § 40.275 (2006),[15] a DOT regulation that addresses the effect of

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[14] 49 C.F.R. § 382.401 (2006) provides, in part, as follows:

> **§ 382.401 Retention of records.**
>
> (a) General requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.
>
> (b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:
>
> (1) Five years. The following records shall be maintained for a minimum of five years:
>
> (i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater[.]

[15] 49 C.F.R. § 40.275 (2006) provides as follows:

> **§ 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?**
>
> (a) As an STT, BAT, employer, or a service agent administering the testing process, you must document any errors in the testing process of which you become aware, even if they are not "fatal flaws" or "correctable flaws" listed in this subpart.

procedural problems that are not sufficient to cancel an alcohol test; and 3) 49 C.F.R. §§ 40.23 and 40.285 (2006),[16] DOT

Decisions about the ultimate impact of these errors will be determined by administrative or legal proceedings, subject to the limitation of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. For example, it is inconsistent with this part to cancel a test based on a minor administrative mistake (e.g., the omission of the employee's middle initial) or an error that does not affect employee protections under this part. Nor does the failure of an employee to sign in Step 4 of the ATF result in the cancellation of the test. Nor is a test to be cancelled on the basis of a claim by an employee that he or she was improperly selected for testing.

(c) As an employer, these errors, even though not sufficient to cancel an alcohol test result, may subject you to enforcement action under DOT agency regulations.

[16] 49 C.F.R. §§ 40.23 and 40.285 (2006) provide, in relevant part, as follows:

§ 40.23 What actions do employers take after receiving verified test results?

. . . .

(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. . . .

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

§ 40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

(b) For purposes of this subpart, a verified positive DOT drug test result, a DOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater . . . or any other violation of the prohibition on the use of alcohol or drugs under a DOT agency regulation constitutes a DOT drug and alcohol regulation violation.

regulations that refer to the steps an employer and employee must take before an employee whose alcohol test revealed an alcohol concentration of 0.04 or higher, or who has otherwise violated a DOT drug and alcohol regulation, can be returned to perform safety-sensitive functions.

C.

Pearson's helper position did not require him to perform safety-sensitive functions. The DOT regulations[17] leave the decision regarding preemployment alcohol testing open to collective bargaining. The CBA between the City and UPW provides that "[t]here shall be no pre-employment alcohol testing." The City conceded that it violated that provision of the CBA by having Pearson take a preemployment alcohol test in connection with his application for promotion to the repairer position.

An arbitrator generally has broad discretion to fashion appropriate remedies. Hokama, 92 Hawai'i at 273-74, 990 P.2d at 1155-56. The DOT regulations did not require individuals in Pearson's situation to take an alcohol test. To remedy the City's conceded violation of the CBA, Arbitrator Aoki ordered the City to remove the results of the alcohol test (that should not have been given) from Pearson's records and to allow Pearson to participate in CDL training. Although we may not have taken the same action if placed in Aribtrator Aoki's position, we cannot

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[17] Our reference to the "DOT regulations" includes the applicable regulations promulgated by DOT agencies and administrations, including the FMSCA.

say that he exceeded his authority in doing so.

The City argues that Arbitrator Aoki's order to allow Pearson to participate in CDL training may potentially require it to enroll Pearson in CDL training even if he cannot qualify for a CDL because, for example, his driver's license is revoked or suspended. When read in context, Arbitrator Aoki's order to allow Pearson to participate in CDL training only means that the City is required to remove any impediment to Pearson's participation in CDL training that it imposed as a consequence of the alcohol test results, such as the condition that he complete the SAP evaluation process. The order does not mean that the City is required to offer Pearson CDL training if it determines that such training is inappropriate for reasons unrelated to the alcohol test results. So construed, Arbitrator Aoki did not exceed his authority in ordering the City to allow Pearson to participate in CDL training.

We further conclude that the DOT regulations do not express a public policy that is sufficiently explicit, well defined, and dominant for us to invalidate, on public policy grounds, Arbitrator Aoki's decision to order the City to remove the alcohol test results from Pearson's records and to allow Pearson to participate in CDL training. See Inlandboatmen's Union, 77 Hawai'i at 193-94, 881 P.2d at 1261-62.[18]

[18] We also reject as without merit the City's contention that Arbitrator Paul S. Aoki failed to render "a mutual, final, and definite award" upon the subject matter submitted.

CONCLUSION

For the foregoing reasons, we vacate the "Order Granting Union's Motion to Correct Typographical Error and to Confirm Arbitrator Paul S. Aoki's Arbitration Decision Dated September 25, 2003 and Denying Employer's Motion to Vacate Arbitrator Paul Aoki's September 25, 2003 Decision" filed on December 18, 2003, in the circuit court, and we remand the case for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, April 17, 2007.

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