

CONCURRING OPINION OF ACOBA, J.,

WITH WHOM RAMIL, J., JOINS

I concur in the result announced by the majority but on the ground that “prudential considerations” militate against recognizing Appellants’ standing.

I.

In Board of Education v. Waihee, 70 Haw. 253, 768 P.2d 1279 (1989), the Board of Education (BOE) and the Hawai’i State Teachers Association (HSTA) filed a suit for declaratory and injunctive relief against the then-Governor and Director of the Department of Budget and Finance, contending, inter alia, that in violation of Hawai’i Revised Statutes (HRS) §§ 37-36 and 37-37(b), “the Governor interfered with ‘the [BOE]’s implementation of the budget passed by the legislature by . . . imposing arbitrary and capricious spending restrictions’ . . . ‘after the budget was approved by both the legislature and the governor[.]’” Id. at 258, 768 P.2d at 1282 (brackets omitted). This court recognized that “the structure of government ordained by the legislature makes the [Department of Education (DOE)] one of the eighteen principal [executive branch] departments<sup>1</sup> and] . . .

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<sup>1</sup> The University of Hawai’i was one of the eighteen departments. See HRS § 26-4 (Supp. 2000).

'[u]nder policies established by the [BOE], the superintendent of education administers programs of education and public instruction throughout the State.'" Id. at 265, 768 P.2d at 1286 (quoting HRS § 26-12) (brackets omitted). In a vein somewhat similar to the lawsuit before us, there "the plaintiffs alleged the Governor interfered with the Board's implementation of the budget approved by the legislature when he imposed a one per cent spending restriction on the DOE. The Governor, the plaintiffs maintain[ed], may impose such restrictions only if sufficient funds are not available." Id. at 268, 768 P.2d at 1288. In Waihee, no question arose as to the standing of the BOE to bring suit. However, as to the HSTA, this court noted its "doubts" as to HSTA's standing to bring the suit, observing that "[t]he defendants challenge HSTA's standing to sue[, and alt]hough we have doubts that the association has standing, we do not find it necessary to discuss this question." Id. at 256 n.1, 768 P.2d at 1281 n.1 (emphasis added).

This case again raises the question of whether parties such as the University of Hawai'i Professional Assembly and, relatedly, any of the other Appellants would have standing to assert claims of an executive department as against the Appellees governor and the finance director. The BOE stands in a position to the DOE similar to that occupied by the Board of Regents (the Board) with respect to the University of Hawai'i. The BOE is

vested under our constitution with "the power, as provided by law, to formulate policy and to exercise control over the public school system," Haw. Const. art. X, § 3, and "jurisdiction over the internal organization and management of the public school system, as provided by law." Id. The Board is constitutionally delegated "the power, as provided by law, to formulate policy, and to exercise control over the university," Haw. Const. art. X, § 6, and has "exclusive jurisdiction over the internal organization and management of the university." Id. Thus, the holding in Waihee suggests that the Board would have "standing" to seek declaratory relief on behalf of the University of Hawai'i, under similar provisions in HRS §§ 37-36 (Supp. 2000) and 37-37 (Supp. 2000).

## II.

In the context of "standing" doctrine, the Waihee case must be read as having implicitly applied the actual injury test. With respect to standing, this court has recognized that "the courts of Hawaii are not subject to a 'cases or controversies' limitation [on their jurisdiction] like that imposed upon the federal judiciary by [a]rticle III, § 2 of the United States Constitution," Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 437, 438 (1981), but "nevertheless believe[s] judicial power to resolve public disputes in a system of

government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.” Id. at 171-72, 623 P.2d at 438 (citation omitted). Additionally, “‘prudential rules’ of judicial self-governance ‘founded in concern about the proper -- and properly limited -- role of courts in a democratic society’ are always of relevant concern.” Id. (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). “Without . . . judicial self-governance the courts would be called upon to decide abstract questions[.]” Warth, 422 U.S. at 500. See also Fujimoto v. Au, 95 Hawai‘i 116, 138, 19 P.3d 699, 721 (2001) (stating that “‘standing . . . consist[s] of two related components: the constitutional requirements of [a]rticle III and nonconstitutional prudential considerations’”) (quoting Franchise Tax Bd. of California v. Alcan Aluminium Ltd., 493 U.S. 331, 335, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990)) (citation omitted), reconsideration denied, 95 Hawai‘i 116, 19 P.3d 699 (2001).

Our analogue of “article III” jurisdictional requirements is the three-part injury test.<sup>2</sup> As the record

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<sup>2</sup> The test is stated as follows:

In deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant’s wrongful conduct; (2) is the injury fairly traceable to the defendant’s actions; and (3) would a favorable decision likely provide relief for plaintiff’s injury.

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evinces and as was evident in oral argument, Appellants failed to satisfy “[t]he three-part jurisdictional limits test.” Id. at 136, 19 P.3d at 721.

### III.

I believe that prudential considerations weigh heavily in sustaining summary judgment in this case. This court has “acknowledged that a party’s standing to litigate a case may be subject to ‘prudential rules’ of judicial self-governance, as well as ‘legislative and constitutional declarations of policy.’” Id. (quoting Citizens for Protection of North Kohala Coastline v. County of Hawai’i, 91 Hawai’i 94, 100, 979 P.2d 1120, 1126 (1999)). In discussing such prudential considerations, the United States Supreme Court has observed, inter alia, that “the plaintiff generally must assert his [or her] own legal rights and interests, and cannot rest his [or her] claim to relief on the legal rights or interests of third parties.” Warth, 422 U.S. at 499 (citations omitted). In this regard, “the source of the plaintiff’s claim to relief assumes critical importance[.]” Id. at 500. The “question . . . is whether the constitutional or statutory provision on which the claim rests properly can be

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<sup>2</sup>(...continued)

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Akinaka v. Disciplinary Bd. of Hawai’i Supreme Court, 91 Hawai’i 51, 55, 979 P.2d 1077, 1081 (1999) (citation omitted).

Fujimoto, 95 Hawai’i at 136, 19 P.3d at 721.

understood as granting persons in the plaintiff's position a right to judicial relief." Id. (footnote omitted). Neither the constitutional nor statutory provisions relevant in the instant case "properly" can be understood as granting Appellants a right to judicial relief.

#### IV.

What Appellants seek is to "restore to the budget of the University of Hawai'i a sum of money which was deducted from it by [the governor and the finance director] in [alleged] violation of state law" or a declaration that such a deduction was illegal under HRS § 37-36. The Board, however, did not bring this suit and has not intervened in it. In arguing in their answering brief<sup>3</sup> that Appellants lack standing to sue, the governor and the finance director maintain that the Board, being constitutionally charged with formulating policy and exercising control over the University, is the body "if at all, who must protest the[ir] actions."<sup>4</sup> This contention is supported by the

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<sup>3</sup> The governor and the finance director made the same argument below in their motion to dismiss complaint or in the alternative for summary judgment.

<sup>4</sup> The governor and the finance director contend as follows:

[I]t is the University of Hawai'i, through its Board of Regents, if at all, who must protest the actions of the Appellees. See Board of Education v. Waihee, 70 Haw. 253, 768 P.2d 1279 (1989). Under the Hawai'i State Constitution, Art. X, sec. 6, "[t]he [B]oard shall have the power . . . to formulate policy, and to exercise control over the

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"exclusive jurisdiction" declaration in article X, § 6 and by the statutory framework governing budget allotments.

Within that framework, the legislature appropriates monies to departments like the University "to meet the requirements of the department." HRS § 37-31 (1993). No appropriation is available to a department unless it prepares an estimate of the amount of funds needed "to carry on the work of the department[.]" HRS § 37-34 (Supp. 2000). Such estimates are to be approved, assuming certain conditions, by the director of finance. See HRS § 37-35 (Supp. 2000). The resulting budgetary "allotment" may be modified or amended by the director of finance, HRS § 37-36, or reduced, following action by the governor, see HRS § 37-37, subject to certain contingencies.

Article X, § 6 and the foregoing statutes indicate that matters concerning the University's budget primarily fall within the internal management purview of the Board. The modification or reduction of the budget complained of by Appellants was not challenged in court by the Board. The determination not to do so was a matter preeminently within its constitutional and statutory power to formulate policy and to exercise control over the

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<sup>4</sup>(...continued)

university through its executive officer, the president of the university . . . ." The University is not the Plaintiff. In fact, the UH apparently acquiesced in the reduction. The Appellants are not the University of Hawai'i or its Board of Regents and have no authority to represent them.

management of the University. Applying prudential principles, I must conclude the statutory provision on which Appellants' claim rests, properly cannot be understood as granting persons in Appellants' position standing to request judicial relief of the nature requested. In light of the constitution and the cited statutes, to allow Appellants to pursue their suit would undermine the University's independence and interfere in its internal management.

V.

While we are faced in the instant case with a suit involving the University's budget, it is difficult to conceive of a proper challenge involving other executive departments under similar circumstances. In my view, we should now confirm the doubt expressed in Waihee as to the standing of parties such as the Appellants: while a party may establish the right to sue in its own right, it has no standing to assert claims that might have been brought by an executive department, pursuant to HRS §§ 37-36 or 37-37, as against the governor and the finance director or either one of them.