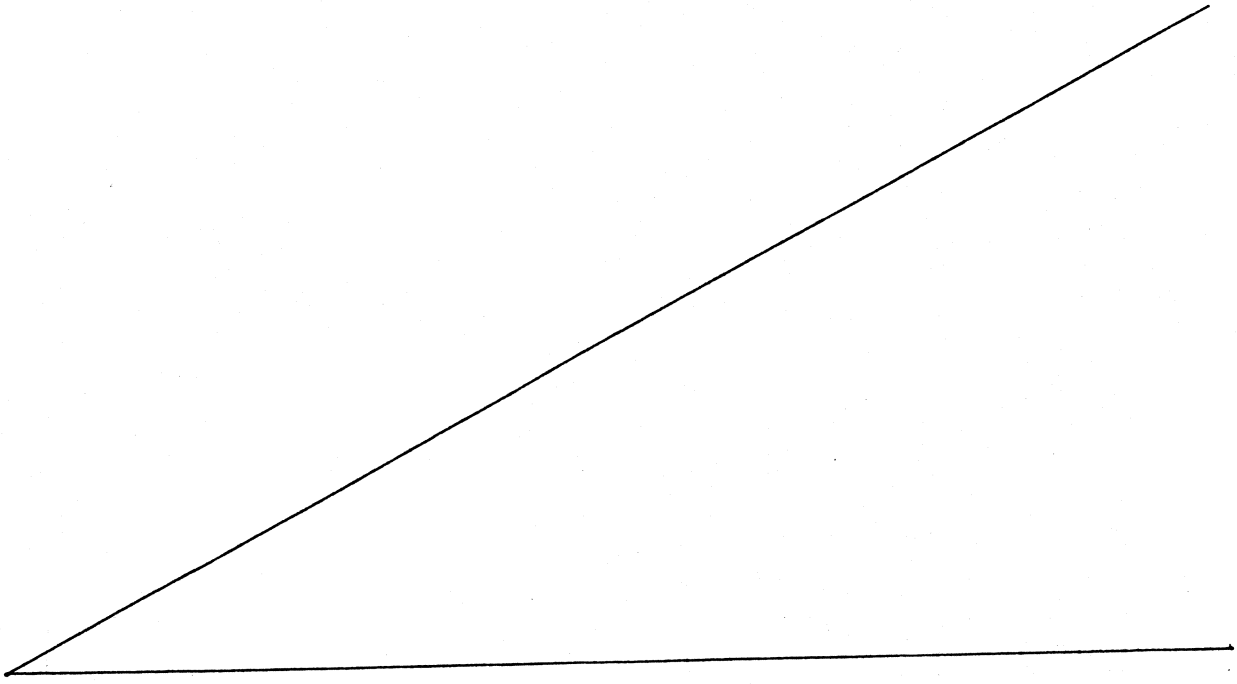
***** FOR PUBLICATION *****

DISSENTING OPINION BY LEVINSON, J.,
IN WHICH MOON, C.J., JOINS

I dissent.

The appellee-appellant Board of Trustees of the Employees' Retirement System (ERS) of the State of Hawai'i [hereinafter, "the ERS Board"] appeals from the final judgment of the first circuit court, the Honorable Allene R. Suemori presiding, entered on July 28, 2000. As points of error, the ERS Board maintains that the circuit court erred in entering, on July 6, 2000, the findings of fact (FOFs) and order reversing the decision of the ERS Board and awarding relief to the appellant-appellee Katsumi Honda [hereinafter, "Katsumi"], Deceased, by Helen S. Honda [hereinafter, "Helen"], Petitioner.

On appeal, the ERS Board argues that the circuit court erred in: (1) finding that Hawai'i Revised Statutes (HRS) §§ 88-



281(a) (1993),[1] 88-282(a) (1993),[2] and 88-283 (1993),[3] which

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[1] HRS § 88-281(a) provided in relevant part that "[a] member who has ten years of credited service and has attained age sixty-two . . . shall become eligible to receive a normal retirement allowance after the member has terminated service."

Effective July 1, 1994, the legislature amended HRS § 88-281 in respects not material to the present matter. See 1994 Haw. Sess. L. Act 276, § 11 at 865. Effective May 18, 2001, the legislature further amended HRS § 88-281 in respects that are relevant to the present matter, as discussed infra in section III.A.2. See 2001 Haw. Sess. L. Act 101, § 1 at 184-85. Effective June 24, 2003, the legislature again amended HRS § 88-281 in respects not pertinent to the present matter. See 2003 Haw. Sess. L. Act 199, § 3 at 455-56. Effective July 1, 2004, the legislature further amended HRS § 88-281 in respects not material to the present matter. See 2004 Haw. Sess. L. Act 179, § 26 at 872-73.

[2] HRS § 88-282(a) provided that "[t]he amount of the annual normal retirement allowance payable to a retired member shall be one and one-fourth per cent of the average final compensation multiplied by the number of years of credited service." Effective May 18, 2001, the legislature amended HRS § 88-282 in respects that are relevant to the present matter, as discussed infra in section III.A.2. See 2001 Haw. Sess. L. Act 101, § 2 at 185.

[3] HRS § 88-283 provided:

> **Retirement allowance options.** (a) A member may elect to have the member's normal, early, or disability retirement allowance paid under one of the following actuarially equivalent amounts:
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> (1) Option A: A reduced allowance payable to the member, then upon the member's death, one-half of the allowance, including fifty per cent of all cumulative post retirement allowances, to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary;
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> (2) Option B: A reduced allowance payable to the member, then upon the member's death, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary; or
>
> (3) Option C: A reduced allowance payable to the member, and if the member dies within ten years of retirement, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary for the balance of the ten-year period.
>
> (b) Any election of a mode of retirement shall be irrevocable.

Effective May 18, 2001, the legislature amended HRS § 88-283 in respects that are relevant to the present matter, as discussed infra in section III.A.2. See 2001 Haw. Sess. L. Act 101, § 3 at 185-86. Effective January 1, 2004, the legislature further amended HRS § 88-283 in respects that are pertinent to the present matter, as discussed infra in sections III.B, III.C.3, and note 16. See 2003 Haw. Sess. L. Act 182, § 2 at 421-22. Effective July 1, 2004, the

(continued...)

related to the retirement benefits of non-contributory class C members of the ERS,[4] were vague, ambiguous, and confusing; (2) finding that the ERS Board incorrectly interpreted HRS §§ 88-281(a), 88-282(a), and 88-283 and that the ERS Board exceeded its statutory authority or jurisdiction by offering "normal," see supra note 2, as a method of distribution of retirement benefits for non-contributory class C members; (3) finding that the ERS Board did not make any attempts to provide reasonable accommodations for Katsumi's disabilities in counseling him with respect to his retirement options; and (4) ordering that Helen, a non-ERS member, could retroactively revise an irrevocable method of retirement allowance distribution, inasmuch as the order exceeded the circuit court's jurisdiction.

(...continued)
legislature again amended HRS § 88-283 in respects that are material to the present matter, as discussed infra in sections III.B, III.C.3, and note 16. See 2004 Haw. Sess. L. Act 179, § 27 at 873-75.

HRS § 88-261(a) (1993) provides in relevant part that the phrase "actuarial equivalent" "shall have the same meaning[] as defined in section 88-21, unless a different meaning is plainly required by the context[.]" Effective June 16, 1997, the legislature amended HRS § 88-261(b) in respects not pertinent to the present matter. See 1997 Haw. Sess. L. Act 212, § 5 at 404-05.

HRS § 88-21 (1993) provides in relevant part that "actuarial equivalent" is "a benefit of equal value to the accumulated contributions, annuity, pension or retirement allowance, when computed upon the basis of the actuarial tables in use by the system." The legislature amended HRS § 88-21 in 1994, 1997, 2002, and 2003, but, inasmuch as those amendments did not affect the definition of "actuarial equivalent," they are not germane to the present matter. See 1994 Haw. Sess. L. Act 108, § 2 at 249, and Act 196, § 2 at 473; 1997 Haw. Sess. L. Act 374, § 1 at 1166-67; 2002 Haw. Sess. L. Act 183, § 5 at 810; and 2003 Haw. Sess. L. Act 199, § 2 at 455. Effective July 7, 2004, the legislature amended HRS § 88-21, revising the definition of "actuarial equivalent" in a manner that is not pertinent to the present matter. See 2004 Haw. Sess. L. Act 182, § 3 at 884-85.

[4] See HRS § 88-47(a)(3) (1993) (defining membership in class A, B and C).

In response, Helen contends: (1) that the circuit court correctly determined that the ERS Board exceeded its statutory authority in treating a "normal" retirement allowance as a distribution option; (2) that the circuit court rightly concluded that the ERS Board incorrectly construed HRS §§ 88-281(a), 88-282(a), and 88-283; (3) that HRS §§ 88-281(a), 88-282(a), and 88-283, as well as the ERS Board's administration of retirement allowances pursuant to the foregoing statutory provisions, were vague, ambiguous, and confusing; and (4) that the circuit court did not exceed its jurisdiction in ordering that Helen could retroactively revise an irrevocable method of retirement allowance distribution.

For the reasons discussed infra in section III, I would hold: (1) that the circuit court wrongly concluded that HRS §§ 88-281(a), 88-282(a), and 88-283 were vague, ambiguous, and confusing; (2) that the circuit court erroneously concluded (a) that the ERS Board incorrectly construed HRS §§ 88-281(a), 88-282(a), and 88-283, and (b) that treating the "normal" retirement allowance as a distribution option exceeded the ERS Board's statutory authority or jurisdiction; and (3) that the circuit court erred in ordering that Helen, a non-ERS member, could retroactively revise an irrevocable method of distribution. I would also reaffirm the proposition, articulated in Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 40 P.3d 73 (2002), that "an appellate court cannot, under the auspices of plain error, sua sponte revisit a finding of fact that neither party has challenged on appeal." Id. at 459, 40

P.3d at 82.

Accordingly, I would vacate the circuit court's final judgment and remand this matter to the circuit court with instructions to affirm the August 16, 1999 final decision of the ERS Board.

I. BACKGROUND

A. The ERS Board's Relevant FOFs

For present purposes, I refer to the following FOFs entered by the ERS Board, which are undisputed except where otherwise noted:

> 1. . . . Helen . . . is the surviving spouse of Katsumi . . . , a deceased retired member of the [ERS].
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> 2. Katsumi . . . was a Class C non-contributory member employed by the Department of Education [(DOE)] at Kīpapa Elementary School as a Custodian II from September 21, 1970 to April 1, 1994.
>
> 3. On November 21, 1993, Katsumi . . . completed an ERS form entitled "Request for Retirement Estimates." In that form, Katsumi . . . noted a definite retirement date of June 1994. At the bottom of the form, Katsumi . . . wrote the following questions:
>
> 1. REQUEST FOR RETIREMENT APPLICATION FORM, FOR I MAY APPLY FOR RETIREMENT EARLIER THAN JUNE/94[.]
>
> 2. SHOULD I RETIRE IN DEC. 31, 1993, EXPECT TO HAVE LUMP SUM PAYMENT FOR VACATION LEAVE. DO I RECEIVE PAYMENT IN 1994 OR IS IT ACCOUNTABLE FOR 1993. THIS IS FOR TAX/REASON.
>
> It is undisputed that Katsumi . . . signed the bottom of this form. . . .
>
> 4. On December 10, 1993, ERS responded to Katsumi[']s . . . Request for Retirement Estimates and sent him estimates of his monthly benefits based upon a retirement date of July 1, 1994. Those monthly benefits differed depending upon which method of retirement Katsumi . . . would elect (i.e., "Normal Option," "Option A (50% Joint and Survivor)," "Option B (100% Joint and Survivor)," or "Ten-Year Guarantee"). In this way, since there were four (4) methods of retirement, there were four (4) monthly benefit amounts designated. In comparison to the other three (3) methods of retirement, the monthly benefit amount under the "Normal Option" was the highest figure at approximately $240.00. . . .

5. Along with the retirement estimates sent to Katsumi . . . , as is the usual practice of the ERS according to the affidavit of Karl Kaneshiro, the Enrollment, Claims, and Benefits Manager for ERS . . . , Katsumi . . . was also provided with an informational pamphlet entitled "Service Retirement Facts." This pamphlet explains in lay terms the various retirement plans and sets out the advantages and disadvantages of each of the plans. The retirement plans explained are: 1) Normal Retirement; 2) Option A (50% joint and survivor); 3) Option B (100% joint and survivor); and 4) Ten-Year Guarantee. For the normal retirement, the pamphlet states:

> The retirant receives a retirement allowance payable for life and in the event of death, there will be no further allowance payable.
>
> Advantages: Provides a maximum life time benefit for the retirant.
>
> Disadvantages: No lifetime survivor benefit for beneficiary(ies).

The explanations for the remaining options make clear that a surviving beneficiary would receive a pension upon the retirant's death. . . .

6. On December 31, 1993, after receiving retirement estimates from ERS, Katsumi . . . completed his "Application for Service Retirement" requesting that his retirement allowance become effective April 1, 1994, thereby changing and advancing his previously noted retirement date of June 1994. On this same form, Katsumi . . . also selected a mode of retirement. Under the statement, "I have read the information on the reverse side of this application and select the following mode of retirement," Katsumi . . . checked the area marked "Normal" as opposed to the remaining three (3) areas marked "Option A (50% Joint and Survivor)," "Option B (100% Joint and Survivor)," and "Option C (Ten-Year Guarantee)." [Helen] was named beneficiary. This document was signed by Katsumi . . . and subsequently notarized on January 3, 1994 pursuant to instructions. . . .

7. The reverse side of the "Application for Service Retirement," which Katsumi . . . was instructed to read in order to select his mode of retirement, outlines the same four (4) modes of retirement. For the normal retirement, it states, "Normal retirement allowance payable for life." There is no reference to a beneficiary being entitled to benefits upon death. In contrast, for Option A, Option B, and the Ten-Year Guarantee, a beneficiary who is entitled to benefits upon the retirant's death is specified. The last sentence of this document reads in capital letters, "ANY ELECTION OF A MODE OF RETIREMENT IS IRREVOCABLE FROM THE EFFECTIVE DATE OF RETIREMENT." . . .

8. As supported in [Helen]'s affidavit, and undisputed by [Helen], in March 1994, Katsumi . . . was diagnosed with cancer and was admitted to Kuakini Medical Center from March 3, 1994 to March 25, 1994. . . . He was again readmitted on April 2, 1994, and passed away on April 6, 1994 at the hospital.

9. Upon being diagnosed with cancer in March 1994, Katsumi . . . did not contact or notify ERS, or make any changes with regard to his retirement plan, including method of retirement. This would also include advancing his retirement date since the uncontroverted evidence shows that he did this in December 1993.[5]

10. There is no evidence that[,] other than submitting two written questions to ERS by mail on his "Request for Retirement Estimates" on November 21, 1993 . . . , Katsumi . . . ever scheduled an office visit or called ERS for information.

11. There is no dispute that at the time of Katsumi['s] . . . death, his selected method of retirement was "normal" and that he had retired on April 1, 1994.

12. Upon the death of Katsumi . . . , his surviving spouse and beneficiary, . . . Helen . . . , was notified by ERS that under the normal retirement method selected by Katsumi . . . , the only benefit payable would be the final payment of pension between the date of retirement to date of death (i.e., April 1, 1994, to April 6, 1994). The estimated and approximated amount was $46.00 and would be payable to [Helen] as named beneficiary.

13. If Katsumi . . . had not died, as a retired member, he would have been receiving the maximum monthly pension permitted due to his selection of the "normal" method of payment of the retirement allowance.

14. Approximately four and one-half years later, on November 17, 1998, [Helen] filed a Petition to the [ERS Board] for Declaratory Order allowing [her] to select a new mode of retirement for . . . Katsumi . . . , to be effective retroactively to April 1, 1994.

15. There is nothing in the documents sent to Katsumi . . . to suggest that election of any of the methods of retirement other than "normal retirement" would result in loss of service credit, loss of accumulated sick leave, and loss of military service.

16. Designating a beneficiary for the "normal" method of retirement is for purposes of informing ERS to whom to pay the balance of the member's pension if the member dies before payment is made to him or her.

17. There is no statutory provision permitting a deceased member's beneficiary to change the deceased member's method of retirement, including unforeseen circumstances.

18. Upon review of the ERS forms and documents completed and submitted by Katsumi . . . , it does not appear that he had trouble understanding the forms or following instructions. There is no credible evidence in the record that Katsumi . . . did not understand.

19. The [ERS] Board finds that [Helen] is speculating on what Katsumi . . . did or intended.

20. The [ERS] Board adopted [Hawai'i Administrative Rules (HAR)] section 6-26-3 which requires all applications

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5 As discussed infra in section I.C, Helen disputed FOF No. 9.

for retirement benefits to contain certain information, including "[t]he mode of retirement which the member elects under any of the plans for receiving retirement allowances described in [HRS] section[s] 88-83 [(1993)],[6] 88-282, and 88-283 . . . ." HAR section 6-26-3(a)(6).

B. The ERS Board's COLs and Final Decision

On August 16, 1999, the ERS Board issued its final decision regarding Helen's November 17, 1998 petition for declaratory order. In addition to the foregoing FOFs, the ERS Board entered the following COLs:

> 1. The general method of paying a retirement allowance is governed by [HRS] section 88-282(a) . . . . [See supra note 2.]
>
> 2. "Retirement allowance" is defined in HRS section 88-21 as:
>
> > [T]he benefit payable for life as originally computed and paid a member at the point of the member's retirement and in accordance with the mode of retirement selected by the member, exclusive of any bonus or bonuses.

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[6] HRS § 88-83 provided in relevant part:

> **Election of mode of retirement allowance.** (a) Maximum allowance: Upon retirement, any member may elect to receive the maximum retirement allowance to which the member is entitled computed in accordance with the provisions described under section 88-74, 88-76, 88-78, or 88-80 and in the event of the member's death, there shall be paid to the member's beneficiary, otherwise to the member's estate, the difference between the balance of the member's accumulated contributions at the time of the member's retirement and the retirement allowance paid or payable to the member prior to death.
>
> In lieu of this maximum allowance, the member may elect to receive the member's retirement allowance under any one of the optional plans described below, which shall be actuarially equivalent to the maximum allowance. . . .

HRS § 88-83 further described five alternative options available to class A and B contributory members of the ERS, all of which were "actuarially equivalent" to the "maximum allowance." See supra note 3 (citing HRS § 88-21, which defines "actuarial equivalent").

Effective July 7, 1998, the legislature amended HRS § 88-83 in respects not material to the present matter. See 1998 Haw. Sess. L. Act 151, § 9 at 543-44. Effective January 1, 2003, the legislature further amended HRS § 88-83 in respects also not germane to the present matter. See 2003 Haw. Sess. L. Act 182, § 1 at 419-21. Effective July 1, 2004, the legislature again amended HRS § 88-283 in respects not pertinent to the present matter. See 2004 Haw. Sess. L. Act 179, § 27 at 873-75.

3. HRS section 88-283(a) permits a Class C non-contributory member to choose a different mode or method of receiving a retirement allowance. If the member does not want to receive the "standard" or "normal" payment as described in HRS section 88-282(a), the member has three options to choose from as provided for in HRS section 88-283(a). . . . [See supra note 3.]

4. The availability of a Class C non-contributory member to choose either a "normal" mode of retirement allowance under HRS section 88-282(a) or one of the three methods described in HRS section 88-283(a), is further supported by the plain language in the opening statement of HRS section 88-282(a) which reads in pertinent part:

> A member may elect to have the member's normal . . . retirement allowance paid under one of the following actuarially equivalent amounts . . . [.]

Options A, B, and C are thereafter listed as "actuarially equivalent" retirement amounts to the "normal" retirement allowance.

5. In Gray v. Administrative Director of the Court, 84 Haw. 138, 931 P.2d 580 (1977), the Hawai'i Supreme Court stated:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Id. at 148. The plain language rule of statutory construction however does not preclude an examination of other sources to determine legislative intent, even when the language appears clear upon perfunctory review. Sato v. Tawata, 79 Haw. 14, 17, 897 P.2d 941, 944 (1995).

6. Among the purposes behind the creation of HRS sections 88-282 and 88-283, was to "provid[e] a typical career public employee with combined system and Social Security benefits substantially equivalent to the employee's pre-retirement income" and "enhanc[e] the opportunities for more individualized retirement planning." . . . Reading together HRS sections 88-282 and 88-283, [the statutes] allow[] Class C non-contributory members who do not wish to designate, or do not have, a beneficiary to maximize their benefits during their lifetime and receive benefits that are "substantially equivalent to the employee's pre-retirement income" when combined with Social Security benefits, by selecting "normal" retirement. Therefore, to adopt [Helen's] interpretation of these sections (i.e., read HRS sections 88-282 and 88-283 separately), would contradict and contravene the legislative purpose behind these statutes.

7. HAR section 6-26-3 designates that all applications for retirement benefits must contain certain information, including "[t]he mode of retirement which the member elects under any of the plans for receiving

> retirement allowances described in [HRS] sections 88-83, 88-282, and 88-283 . . . ." HAR section 6-26-3(a)(6). To implement the non-contributory benefits plan, the ERS adopted administrative rules including HAR section 6-26-3(a)(6)[,] which had been in effect since 1989.
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> 8. "Normal" retirement is a statutorily authorized mode of election of retirement benefits, and is one of four options available for Class C non-contributory members.
>
> 9. The statute regarding retirement of Class C employees and the ERS'[s] method of administering the Class C employees' retirement is not vague, ambiguous or confusing.
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> 10. Katsumi . . . never changed his mode of retirement before he retired on April 1, 1994, and therefore, his election of "normal" is irrevocable in accordance with the plain and unequivocal language of HRS section 88-283(b). HRS section 88-283(b) states that "[a]ny election of a mode of retirement shall be irrevocable."
>
> 11. Accordingly, [Helen] is not entitled to adjust the retirement election of her husband, and his election of "normal" stands.

Based on the foregoing FOFs and COLs, the ERS Board denied Helen's request for a declaratory order allowing her to select a new mode of retirement for Katsumi.

C. The Circuit Court's Judicial Review Of The ERS Board's Decision

On September 15, 1999, Helen filed a notice of appeal to the circuit court of the first circuit pursuant to HRS § 91-14 (1993).[7] In her opening brief, Helen asserted that the ERS Board erred in entering the following COLs and FOFs: (1) COL No. 8, which stated that "normal" retirement allowance is authorized by

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[7] HRS § 91-14(a) provides:

> **Judicial review of contested cases.** (a) 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. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

statute and available to Class C non-contributory members, Helen contending that "the [s]tatutes relating to Class C non-contributory members allow[ed] distribution on only one of three options designated in [HRS] § 88-283(a)"; (2) COL No. 9, which stated that "[t]he statute regarding retirement of Class C employees and ERS'[s] method of administering the Class C employees' retirement [was] not vague, ambiguous, or confusing[,]" Helen arguing that "[t]he manner in which the ERS [Board] . . . use[d] the term 'normal' in reference to the 'type' of retirement (i.e., 'normal,' 'early,' or 'disability') . . . and also for the mode of distribution of retirement benefits (i.e., 'normal,' 'Option A,' 'Option B,' and 'Option C')" was vague, ambiguous, and confusing; and (3) FOF No. 9, which stated that Katsumi did not notify the ERS or change his retirement plan (i.e., mode of allowance and retirement date) after being diagnosed with cancer in March 1994, Helen maintaining that the ERS Board "offered no evidence that [Katsumi] had not communicated to them . . . [his diagnosis, and] the only evidence offered on this topic was the Affidavit of Arlene Kamakana, . . . in which . . . Kamakana stated that she advised [Katsumi's employer at Kīpapa Elementary School] and [a representative of the ERS] of [Katsumi's] anticipated passing."[8]

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[8] Kamakana's affidavit, which became part of the record during the agency proceeding before the ERS Board, stated:

> ARLENE KAMAKANA, being first duly sworn on oath, deposes and says that:
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> 1. Affiant is a resident of the State of Hawaii, the daughter of Retirant Katsumi Honda, deceased (hereafter, "Retirant") and has personal knowledge of the matters attested to herein.

(continued...)

On January 31, 2000, the circuit court heard oral argument from both parties. On February 7, 2000, the circuit court issued a minute order finding for Helen and reversing the ERS Board's final decision, as follows:

> AFTER CONSIDERATION OF THE WRITTEN SUBMISSIONS AND THE FILES HEREIN, THE COURT HEREBY REVERSES THE DECISION OF THE DEPARTMENT AND FINDS THAT: 1) THE LANGUAGE OF THE STATUTE IS VAGUE, ARBITRARY AND CONFUSING, 2) THE [ERS BOARD'S] INTERPRETATION IS STRETCHED, . . . AND 4) NO ATTEMPTS WERE MADE TO PROVIDE REASONABLE ACCOMMODATIONS DUE TO [KATSUMI'S] FEAR OF HEIGHTS.[9]

On April 26, 2000, Helen filed a motion for clarification of the minute order, seeking specification of the relief that the circuit court had granted to her. On July 6, 2000, the circuit court entered FOFs and an order reversing the decision of the ERS Board and awarding relief to Helen:

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[8](...continued)

2. At or about the time of Retirant[']s illness, Affiant contacted Arlene Chow, secretary at Kīpapa Elementary School where Retirant was employed.

3. Ms. Chow had previously assisted Retirant in obtaining papers from the [ERS] from Ms. Corrine Kakuda.

4. Affiant advised Ms. Chow and Ms. Kakuda that her father had been diagnosed with cancer and that we would move his anticipated retirement date from June 1, 1994 to April 1, 1994 as a consequence of his anticipated passing.

[9] Helen's petition to the ERS Board for a declaratory order, filed on November 17, 1998, stated that, "[d]ue to [Katsumi's] fear of heights[,] he would not go to the ERS offices[,]" citing her own affidavit as evidence. In particular, Helen's affidavit, which was attached to her petition, maintained that "[Katsumi] was afraid of heights and would not go to the [ERS] offices because they were not located on the ground floor. Because of that, [Katsumi] completed the calculations and application process by mail, without the assistance of any ERS personnel." During oral arguments before the circuit court, counsel for Helen asserted that "[Katsumi] couldn't get counseling because he had a fear of heights. He couldn't go up the elevator . . . in the City Bank Building. So he worked it over the phone."

Nevertheless, the circuit court did not specifically address Katsumi's fear of heights in its written FOFs and order reversing the ERS Board's final decision.

FINDINGS OF FACT

1. The Statutes relating to the retirement benefits of Class C Employees of the State of Hawaii (H.R.S. § 88-251, et seq.) are vague, ambiguous and confusing.

2. The [ERS Board's] interpretation of the statutes relating to the retirement benefits of Class C Employees of the State of Hawaii is stretched and the offering of a "normal" distribution of retirement benefits is in excess of the statutory authority or jurisdiction of the agency.

3. The [ERS Board] did not make any attempts to provide reasonable accommodations for [Katsumi's] disabilities in counseling him with respect to his retirement options.

. . . .

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Final Decision of the [ERS Board] is hereby reversed.

2. The relief requested by . . . [Helen] in [her] Opening Brief, filed herein on November 19, 1999, shall hereby be granted. The specific grant of relief by this Order is the authorization for . . . Helen . . . to revise . . . Katsumi['s] . . . election of a mode of distribution of retirement allowance to one of the three statutorily authorized methods described in [HRS] § 88-283. Such revision of the election of a method of distribution shall be made within 60 days from the date of entry of this Order and shall apply retroactively to the date of . . . Katsumi['s] . . . retirement, April 1, 1994. Benefits shall be calculated in the following manner:

1) From April 1, 1994 to the date of . . . Katsumi['s] death, the benefits payable shall be based upon [Katsumi's] entitlement as a Class C retirant;

2) After the date of [Katsumi's] death, benefits shall be payed to [Helen] as the beneficiary under the method of distribution selected until [Helen's] rights to such benefits shall terminate as provided under such election.

The payment of such benefits shall be made forthwith.

(Emphases in original.)

On July 28, 2000, the circuit court entered final judgment in favor of Helen and against the ERS Board. On July 31, 2000, the ERS Board timely filed a notice of appeal.

II. STANDARDS OF REVIEW

A. Judicial Review Of The FOFs, COLs, And Final Decisions Of Administrative Agencies

> **1. Secondary appeals**
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> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) [(1993)] to the agency's decision.

Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998) (quoting Bragg v. State Farm Mutual Auto. Ins., 81 Hawai'i 302, 304, 916 P.2d 1203, 1205 (1996)) (alteration in original). HRS § 91-14, entitled "Judicial review of contested cases," provides in relevant part:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
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> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"[U]nder HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." In re Hawaiian Elec. Co., 81 Hawai'i 459, 465, 918 P.2d 561, 567 (1996) (citing Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 638-39, 675 P.2d 784, 789 (1983)).

> **2. Deference to administrative agencies**
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> . . . .
>
> The standard of review for administrative agencies therefore consists of two parts: first, an analysis of whether the legislature empowered the agency with discretion to make a particular determination; and second, if the agency's determination was within its realm of discretion, whether the agency abused that discretion (or whether the agency's action was otherwise "arbitrary, or capricious, or

> characterized by . . . [a] clearly unwarranted exercise of discretion," HRS § 91-14(g)(6)). If an agency determination is not within its realm of discretion (as defined by the legislature), then the agency's determination is not entitled to the deferential "abuse of discretion" standard of review. See, e.g., Allstate[Ins. Co. v. Schmidt], 104 Hawai'i [261,] 265-66, 88 P.3d [196,] 200-01 [(2004)]. If, however, the agency acts within its realm of discretion, then its determination will not be overturned unless the agency has abused its discretion.
>
> . . . .
>
> In summary, when reviewing a determination of an administrative agency, we first decide whether the legislature granted the agency discretion to make the determination being reviewed. If the legislature has granted the agency discretion over a particular matter, then we review the agency's action pursuant to the deferential abuse of discretion standard (bearing in mind that legislature determines the boundaries of that discretion). If the legislature has not granted the agency discretion over a particular matter, then the agency's conclusions are subject to de novo review.
>
> **3. The administrative agency's conclusions of law and findings of fact**
>
> Pursuant to HRS § 91-14(g), an agency's conclusions of law are reviewed de novo, Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984), while an agency's factual findings are reviewed for clear error, HRS § 91-14(g)(5).

Paul's Elec. Serv. v. Befitel, 104 Hawai'i 412, 416-20, 91 P.3d 494, 498-502 (2004).

B. Judicial Review Of the Circuit Court's FOFs And COLs

> This court reviews the [circuit] court's conclusions of law (COLs) de novo under the right/wrong standard. Child Support Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001). "Under this . . . standard, we examine the facts and answer the question without being required to give any weight to the trial court's answer to it. . . . Thus, a [COL] is not binding upon the appellate court and is freely reviewable for its correctness." State v. Kane, 87 Hawai'i 71, 74, 951 P.2d 934, 937 (1998).

Troyer v. Adams, 102 Hawai'i 399, 409-10, 77 P.3d 83, 93-94 (2003) (quoting State v. Entrekin, 98 Hawai'i 221, 225, 47 P.3d 336, 340 (2002) (some brackets in original and some added)).

On the other hand,

> The [circuit] court's [findings of fact (]FOFs[)] are reviewed on appeal under the "clearly erroneous" standard. [In re Jane Doe, Born on May 22, 1976, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996)] (citing State v. Naeole, 80

> Hawai'i 419, 423 n.6, 910 P.2d 732, 736 n.6 (1996)). A FOF "is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citation omitted). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Doe, 84 Hawai'i at 46, 928 P.2d at 888 (quoting State v. Wallace, 80 Hawai'i 382, 391-92, 910 P.2d 695, 704-05 (1996)); see also State v. Kotis, 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999).

Troyer, 102 Hawai'i at 410, 77 P.3d at 94 (quoting In re Jane Doe, Born on June 16, 1994, 101 Hawai'i 220, 227, 65 P.3d 167, 174 (2003)).

C. Statutory And Regulatory Interpretation

> . . . . In construing statutes, we have recognized that
>
> > our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
> >
> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
> >
> > Gray [v. Administrative Dir. of the Court], 84 Hawai'i 138,] 148, 931 P.2d [580,] 590 [(1997)] (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

> Barnett v. State, 91 Hawai'i 20, 31, 979 P.2d 1046, 1057 (1999) (quoting State v. Davia, 87 Hawai'i 249, 254, 953 P.2d 1347, 1352 (1998)).
>
> If we determine, based on the foregoing rules of statutory construction, that the legislature has unambiguously spoken on the matter in question, then our inquiry ends. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). When the legislative intent is less than clear, however, this court will observe the "well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." Brown v. Thompson, 91 Hawai'i 1, 18, 979 P.2d 586, 603 (1999) (quoting Keliipuleole v. Wilson, 85 Hawai'i 217, 226, 941 P.2d 300, 309 (1997)). See also Government Employees Ins. Co. v. Hyman, 90 Hawai'i 1, 5, 975 P.2d 211, 215 (1999) ("[J]udicial deference to agency expertise is a guiding precept where the interpretation and application of broad or ambiguous statutory language by an administrative tribunal are the subject of review." ([Q]uoting Richard v. Metcalf, 82 Hawai'i 249, 252, 921 P.2d 169, 172 (1996)[.])). [Footnote omitted]. Such deference "reflects a sensitivity to the proper roles of the political and judicial branches," insofar as "the resolution of ambiguity in a statutory text is often more a question of policy than law." Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991).
>
> The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. See Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, . . . the agency's decision must be consistent with the legislative purpose."); State v. Dillingham Corp., 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) ("[N]either official construction or usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity. . . ."). Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation. See, e.g., Government Employees Ins. Co. v. Dang, 89 Hawai'i 8, 15, 967 P.2d 1066, 1073 (1998); In re Maldonado, 67 Haw. 347, 351, 687 P.2d 1, 4 (1984).

In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 422-23, 83 P.3d 664, 685-86 (2004) (quoting In re Water Use Permit Applications (Waiāhole), 94 Hawai'i 97, 144-45, 9 P.3d 409, 456-57 (2000) (brackets and ellipsis points in original) (footnote omitted)).

D. Plain Error

In Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973), this court observed that "[i]t is the general rule that an appellate court should only reverse a judgment of a trial court on the legal theory presented by the appellant in the trial court." Id. at 9, 514 P.2d at 570 (internal citations omitted). Nevertheless, Fujioka also articulated the standard of review that we employ in determining whether to notice plain error in civil cases:

> However, we have also said that the rule is not inflexible and that an appellate court may deviate and hear new legal arguments when justice requires. We also stated that in the exercise of this discretion an appellate court should determine [(1)] whether the consideration of the issue requires additional facts, [(2)] whether the resolution of the question will affect the integrity of the findings of fact of the trial court[,] and [(3)] whether the question is of great public import. Greene v. Texeira, 54 Haw. 231, 234-235, 505 P.2d 1169, 1172 (1973); In re Taxes, Hawaiian Land Co., 53 Haw. 45, 53, 487 P.2d 1070, 1076 (1971), appeal dismissed, 405 U.S. 907 . . . (1972). See also, Kennedy v. Silas Mason Co., 334 U.S. 249 . . . (1948); Duarte v. Bank of Hawaii, 287 F.2d 51 (1961), cert. den. 366 U.S. 972 . . . (1961) [(]affirming the territorial Supreme Court's decision in Bank of Hawaii v. Char, 43 Haw. 223 (1959)[)].

55 Haw. at 9, 514 P.2d at 570; see also Montalvo v. Lapez, 77 Hawai'i 282, 290-91, 884 P.2d 345, 353-54 (1994) (noting that "[t]he plain error doctrine represents a departure from the normal rules of waiver that govern appellate review" and reiterating the Fujioka test by way of this court's decision in State v. Fox, 70 Haw. 46, 760 P.2d 670 (1988)); Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 459, 40 P.3d 73, 81 (2002) (quoting Montalvo).

III. DISCUSSION

A. Pursuant To HRS §§ 88-281(a), 88-282(a), And 88-283, The ERS Board Had The Statutory Authority To Offer The "Normal" Mode Of Retirement Allowance.

On appeal, the ERS Board asserts (1) that HRS §§ 88-281(a), 88-282(a), and 88-283, see supra notes 1 through 3, were neither vague, ambiguous, nor confusing and (2) that it correctly interpreted HRS §§ 88-281(a), 88-282(a), and 88-283 and did not exceed its statutory authority or jurisdiction by offering "normal," see supra note 2, as a method of distribution of retirement benefits for non-contributory class C members. I agree with the ERS Board.

1. Plain language analysis

As discussed supra in section II.C, when confronted with issues of statutory interpretation, "our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." In re Wai'ola O Moloka'i, Inc., 103 Hawai'i at 422, 83 P.3d at 685 (internal citations and quotation signals omitted). In other words, "[f]ollowing our well-settled approach to statutory interpretation, we look first to the plain language of the statute." Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 316, 47 P.3d 1222, 1229 (2002).

At the time that the present matter arose, HRS § 88-281(a) was entitled "Eligibility for retirement allowance" and provided that "[a] member who has ten years of credited service and has attained the age of sixty-two . . . shall become eligible to receive a normal retirement allowance after the member has

terminated service." (Emphasis added.) HRS § 88-282(a) was entitled "Amount of allowance" and provided that "[t]he amount of the annual normal retirement allowance payable to a retired member shall be one and one-fourth per cent of the average final compensation multiplied by the number of years of credited service." (Emphases added.) Finally, HRS § 88-283(a), entitled "Retirement allowance options," provided that "[a] member may elect to have the member's normal . . . retirement allowance paid under one of . . . [three] actuarially equivalent amounts . . . ." (Emphases added.)

On its face, therefore, the statutory scheme underlying the modes of retirement allowance for non-contributory class C members of the ERS provided that, once the requirements set forth in HRS § 88-281(a) were met, members became "eligible to receive a 'normal' retirement allowance," the amount of which was defined by HRS § 88-282(a). In lieu of the normal retirement allowance amount defined by HRS § 88-282(a), members were allowed to choose (i.e., "[a] member may elect . . ."), if they so desired, to have their "normal" retirement allowance paid by one of three methodologies that were "actuarially equivalent" to the "normal" retirement allowance. Thus, the ERS Board had the statutory authority to offer Katsumi the "normal" mode of retirement allowance.

2. Ambiguity analysis

Assuming arguendo that there is some "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in" the statutory scheme, we have observed that "[t]he

meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." In re Wai'ola O Moloka'i, Inc., 103 Hawai'i at 422, 83 P.3d at 685 (internal citations and quotation signals omitted). In that connection, the only arguable ambiguity in the present matter is whether, on the one hand, HRS § 88-283 required non-contributory class C members of the ERS to select one of the three options enumerated therein or whether, on the other hand, the statute allowed members to choose one of the options instead of the "normal" retirement allowance.

The "context" of the entire statute, however, leaves no doubt that HRS § 88-283(a) allowed members to voluntarily elect Options A, B, or C as an alternative to the "normal" amount of retirement allowance. In contrast to the wording of HRS § 88-283(a), HRS § 88-283(b) stated that "[a]ny election of a mode of retirement shall be irrevocable." Thus, inasmuch as the statute included the word "shall" to indicate when its provisions were mandatory, I believe that we must construe the phrase, "[a] member may elect . . . [,]" as preceding a non-exclusive list of alternative modes of retirement allowance available to non-contributory class C members. Cf. In re Estate of Rogers, 103 Hawai'i 275, 282-83, 81 P.3d 1190, 1197-98 (2003) (observing that "the term 'may,' as set forth in HRS § 560:2-114(a) . . . is permissive, and not mandatory").

Moreover, we have also noted that "the courts may resort to extrinsic aids in determining legislative intent. One

avenue is the use of legislative history as an interpretive tool." In re Wai'ola O Moloka'i, Inc., 103 Hawai'i at 422, 83 P.3d at 685 (internal citations and quotation signals omitted). Unlike the ERS Board, I do not believe that the legislative history of the relevant statutes in the present matter sufficiently clarifies any alleged ambiguity. See supra section I.B. Nevertheless, we have observed that "[t]his court employs subsequent legislative history [for purposes of statutory construction, but] only 'to confirm its interpretation of an earlier statutory provision.'" State v. Dudoit, 90 Hawai'i 262, 268 n.3, 978 P.2d 700, 706 n.3 (1999) (quoting Macabio v. TIG Ins. Co., 87 Hawai'i 307, 317, 955 P.2d 100, 110 (1998) (citation and internal quotation marks omitted) (emphasis added)); see also In Interest of Doe, 76 Hawai'i 85, 91 n.10, 869 P.2d 1304, 1311 n.10 (1994) (inferring the legislature's original intent based on a subsequent statutory amendment) (citing Franks v. City and County of Honolulu, 74 Haw. 328, 340 n.6, 843 P.2d 668, 674 n.6 (1993) ("[T]his court has used subsequent legislative history or amendments to confirm its interpretation of an earlier statutory provision."); Mollena v. Fireman's Fund Ins. Co. of Hawaii, Inc., 72 Haw. 314, 324-25, 816 P.2d 968, 973 (1991) (subsequent statutory amendment construed to reflect original legislative intent)).

In 2001, after the parties had submitted their respective briefs, the legislature amended HRS §§ 88-281(a), 88-282(a), and 88-283, as follows:

> "**§88-281 [~~Eligibility for retirement allowance.~~] Service retirement.** (a) A member who has ten years of

credited service and has attained age sixty-two, or a member with thirty years credited service who has attained the age of fifty-five, shall become eligible to receive a [~~normal~~] retirement allowance after the member has terminated service. . . ."

. . . .

"**§88-282 [~~Amount of~~] Service retirement allowance.** [~~(a) The amount of the annual normal retirement allowance payable to a retired member shall be one and one fourth per cent of the average final compensation multiplied by the number of years of credited service.~~ . . . Upon retirement from service, a member shall receive a retirement allowance as follows:

(1) If the member has met the requirements in section 88-281(a), (b), or (d) a maximum retirement allowance of one and one-fourth per cent of the average final compensation multiplied by the number of years of credited service; or

(2) If the member has met the requirements in section 88-281(c), an early retirement allowance equal to the maximum retirement allowance reduced by one-half per cent for each month the member is less than age sixty-two at retirement."

. . . .

"**§88-283 Retirement allowance options.** (a) [~~A~~] In lieu of the maximum retirement allowance described in sections 88-282, 88-284, and 88-285, a member may elect to [~~have~~] receive the member's [~~normal, early, or disability~~] retirement allowance [~~paid~~] under one of the [~~following~~] options described below, which shall be actuarially equivalent [~~amounts:~~] to the maximum retirement allowance:

(1) Option A: A reduced allowance payable to the member, then upon the member's death, one-half of the allowance, including fifty per cent of all cumulative post retirement allowances, to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary;

(2) Option B: A reduced allowance payable to the member, then upon the member's death, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary; or

(3) Option C: A reduced allowance payable to the member, and if the member dies within ten years of retirement, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary for the balance of the ten-year period. . . ."

2001 Haw. Sess. L. Act 101, §§ 1-3 at 184-86 (deletions denoted by strikethrough and additions denoted by underlining).

The following legislative history of the 2001 amendments confirms my interpretation of the statutory scheme:

> The purpose of this bill is to clarify the four retirement options in the Noncontributory Plan -- normal retirement, Option A, Option B, or Option C -- by specifying that the normal retirement option, which is the highest retirement benefit a retiree may receive in the Noncontributory Plan, be renamed "maximum allowance," similar to the Contributory Plan.
>
> Your Committee notes that the [ERS] membership has experienced some confusion as to whether the normal retirement allowance in the Noncontributory Plan is an actual retirement option. Your Committee recognizes the need to clarify the retirement options since an option selection by an ERS member upon retirement is irrevocable, and each option has a different survivor benefit in the event of the retiree's death. . . .

Hse. Stand. Comm. Rep. No. 358, in 2001 House Journal, at 1264 (emphasis added).

> The purpose of this bill is to clarify the four retirement options in the noncontributory plan of the [ERS] by renaming the "Normal Retirement Allowance" option, which is the highest retirement benefit a retiree may receive, the "Maximum Retirement Allowance" option. . . .

Hse. Stand. Comm. Rep. No. 742, in 2001 House Journal, at 1404 (emphasis added).

> The purpose of this measure is to clarify that there are four different retirement options in the noncontributory plan offered by the [ERS].
>
> . . . .
>
> Your Committee finds that four retirement options exist for noncontributory members of the [ERS]. Unfortunately, there seems to be confusion over the number and types of options available, particularly over the issue of whether or not receiving a "normal retirement" is considered an actual option. Since an option selection made by a member upon retirement is irrevocable, and each option contains a different survivor benefit in the event of the member's death, your Committee believes that it is important that the options be clearly identified. The measure accomplishes this by renaming the option of "normal retirement," to "maximum retirement," similar to the nomenclature used in the contributory plan, so as to avoid confusion over terms.
>
> Your Committee believes that this measure will clarify the retirement options available to noncontributory members of the [ERS]. . . .

Sen. Stand. Comm. Rep. No. 1033, in 2001 Senate Journal, at 1334-35 (emphases added).

> The purpose of this measure is to make clear that there are four different retirement options in the noncontributory plan offered by the [ERS].
>
> Your Committee finds that retirement options have been confusing in the past for noncontributory retirees because of terminology used for each option. An option once selected is irrevocable and can impact the benefits for a survivor. By renaming "normal retirement" to "maximum retirement," the terms for this option will be similar for both noncontributory and contributory plans and less confusion should result. . . .

Sen. Stand. Comm. Rep. No. 1732, in 2001 Senate Journal, at 1624 (emphasis added).

By virtue of the 2001 amendments, the legislature acknowledged and clarified that the statutory scheme had always provided four options for modes of retirement allowance, including the "normal" benefits plan. Thus, the subsequent legislative history of the statutory scheme confirms my interpretation that the ERS Board possessed the statutory authority and jurisdiction to offer Katsumi the "normal" mode of retirement allowance.[10]

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[10] Based on the analysis set forth supra, it is unnecessary to refer to laws in pari marteria or to apply the principle of judicial deference to agency expertise in administrative construction. See In re Wai'ola O Moloka'i, Inc., 103 Hawai'i at 422-23, 83 P.3d at 685-86.

Nevertheless, I note that "[w]hat is clear in one statute may be called upon in aid to explain what is doubtful in another." In re Wai'ola O Moloka'i, 103 Hawai'i at 422, 83 P.3d at 685. The ERS Board's administrative rule, HAR § 6-26-3(a)(6), provided that all applications for retirement benefits must contain certain information, including "[t]he mode of retirement which the member elects under any of the plans for receiving retirement allowances described in [HRS] sections 88-83, 88-282, and 88-283[.]" See supra sections I.A and I.B (noting the ERS Board's reliance on HAR § 6-26-3(a)(6) in its FOFs and final decision). It is undisputed by both parties that HRS § 88-83 is plain and unambiguous. An in pari materia reading of HRS § 88-83 confirms my analysis.

HRS § 88-83, see supra note 6, provided class A and B members with the default retirement option, "maximum allowance," which was the functional

(continued...)

B. Pursuant To The Plain Language Of HRS § 88-283(b), Katsumi's Election Of The "Normal" Mode Of Retirement Was Irrevocable.

The ERS Board asserts that the circuit court exceeded its jurisdiction in authorizing Helen, a non-ERS member, retroactively to revise an irrevocable method of distribution. I agree.

At the time that the present matter arose, HRS § 88-283(b) provided that "[a]ny election of a mode of retirement shall be irrevocable." See supra note 3. This court need not engage in statutory interpretation to rule that no one, including Katsumi and Helen, could have ever altered the mode of retirement that Katsumi elected.[11] I note, however, that the legislature amended HRS § 88-283 in 2003 and 2004, (1) requiring spousal notification of any retirement benefit option selected by a

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[10](...continued)
equivalent of the "normal" retirement allowance afforded to Katsumi by HRS § 88-282(a). See supra note 2. Moreover, HRS § 88-83 provides that

> [i]n lieu of this maximum allowance, the member may elect to receive the member's retirement allowance under any one of the optional plans described below, which shall be actuarially equivalent to the maximum allowance. . . .

(Emphasis added.) For purposes of HRS § 88-83, "actuarial equivalent" is defined by HRS § 88-21, the same statute which defines "actuarial equivalent" for purposes of HRS § 88-283(a). See supra note 3. As discussed supra in note 6, HRS § 88-83 provided class A and B members five alternative options that were "actuarially equivalent" to the "maximum allowance," which mirrors my interpretation of HRS § 88-283(a) as offering alternatives to the "normal" retirement allowance provided for by HRS § 88-282(a). Thus, an in pari materia reading of HRS § 88-83 indicates that HRS §§ 88-282(a) and 88-283 provide four modes of retirement allowance, including "normal."

[11] The circuit court granted relief to Helen on the basis that, because it believed that the statutory scheme had never authorized the "normal" mode of retirement allowance, equity required that Helen be able to elect one of the three options listed in HRS § 283(a). In light of the analysis set forth supra in section III.A, the circuit court's reasoning fails, and I would apply the plain language of HRS § 88-283(b).

member of the ERS, see 2003 Haw. Sess. L. Act 182, § 2 at 421-22, and (2) providing that, "[i]n the event of the death of the retirant within one year after the date of retirement," a retirant's beneficiary "may elect to receive either" (a) "the death benefit under the retirement option selected by the retirant" or (b) "[t]he death benefit under option B; provided that the difference between the benefit that the retirant received and the benefit that would have been payable to the retirant had the retirant elected to receive a retirement allowance under option B shall be returned to the system," see 2004 Haw. Sess. L. Act 179, § 27 at 875. Nevertheless, the 2003 and 2004 amendments are neither retroactive nor necessary to interpret the original intent of the statute, because the plain language of HRS § 88-283(b), in its 1993 incarnation, is unambiguous. See supra note 3. Helen may not avail herself of the 2003 and 2004 provisions, inasmuch as the "spousal notification requirement" and the special beneficiary election provision were not part of HRS § 88-283(b) at the time that the present matter arose. Thus, based on the plain language of HRS § 88-283(b), the circuit court erred in allowing Helen retroactively to elect a mode of distribution of retirement benefits.

C. Based On The ERS Board's Unchallenged FOF Nos. 18 And 19, Which Are Binding On Appeal, And In Light Of Our Plain Error Standard Of Review, Helen Has No Valid Claims Of Unilateral Mistake Or Negligent Misrepresentation.

The majority contends that the ERS Board failed to fulfill its "fiduciary duty to provide its members . . . with

clear, understandable information concerning retirement benefits[,] . . . [which] may have resulted in Katsumi's unilateral mistake with respect to his chosen mode of retirement and, additionally, constituted negligent misrepresentation." Majority opinion at 1. Based on its review of the record, the majority asserts that, "had Katsumi known that [Helen] would not receive any survivor benefits, he would have modified his selection." Majority opinion at 13.

Nevertheless, Helen has never contended that Katsumi made a "unilateral mistake" or that there was some negligent misrepresentation on the part of the ERS Board. See infra section III.C.1. Furthermore, as noted supra in Section I.A, the ERS Board's FOFs, which were included in its August 16, 1999 final decision, specifically stated in relevant part as follows:

> 18. Upon review of the ERS forms and documents completed and submitted by Katsumi . . . , it does not appear that he had trouble understanding the forms or following instructions. There is no credible evidence in the record that Katsumi . . . did not understand.
>
> 19. The [ERS] Board finds that [Helen] is speculating on what Katsumi . . . did or intended.

(Emphases added.) Helen has never challenged FOF Nos. 18 and 19, either before the circuit court, where she was the appellant, or in the brief that she filed in this court on secondary review.

It is noteworthy that, although the majority has gone to great lengths to avoid framing its analysis as an exercise of "plain error" review, by definition, the means by which the majority engages in its analysis is via the plain error doctrine. See HRAP Rule 28(b)(4) (2000) (characterizing a "plain error" as one that is "not presented"). Indeed, the majority rules that "the ERS Board's findings Nos. 18 and 19 . . . appear clearly

erroneous in view of the reliable, probative and substantial evidence in the whole record," but notes that, even "assuming arguendo the findings were supported by substantial evidence, [the majority is] left with a firm a definite conviction that a mistake was made." Majority opinion at 1-2 (some emphasis added and some in original) (citation omitted). By sua sponte assigning error to the ERS Board's unchallenged FOFs, the majority necessarily employs plain error review.

In refusing to acknowledge that it may only address the arguments it raises sua sponte by way of plain error review, the majority admits that "Helen did not raise these matters before the circuit court," but nevertheless frames its analysis pursuant to, inter alia, "the exercise of our general superintendence of the trial courts, [HRS] § 602-4 (1993),[12] and . . . our power to make such orders and mandates as necessary for the promotion of justice, [HRS § 602-5(7) (1993)[13]]." Majority opinion at 2 (footnotes omitted). As discussed infra in section III.C.4, the majority's exercise of HRS §§ 602-4 and 602-5(7) "review" (1) radically diverges from our plain error jurisprudence by allowing this court to entertain arguments not raised by either party with

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[12] HRS § 602-4 provides that "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

[13] HRS § 602-5(7) provides that "[t]he supreme court shall have jurisdiction and powers"

> [t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

virtually no limitation, thereby eviscerating the raison d'être of the plain error doctrine and (2) places this court in the untenable position of advocating for a particular party via legal theories that neither party has advanced.

For those reasons, I believe that the majority's approach sets a dangerous precedent, and, pursuant to Okada Trucking and our standard of review regarding plain error in civil matters, I would adhere to the ERS Board's unchallenged FOFs. See infra sections III.C.2 through 4.

1. Throughout the present matter, Helen has never alleged unilateral mistake or negligent misrepresentation.

As a preliminary matter, I note that Helen has not raised, at any point during the course of the present matter, the issues of unilateral mistake and negligent misrepresentation. Indeed, the majority concedes that Helen has not advanced either of the foregoing issues. See majority opinion at 2 (admitting that "Helen did not raise these matters before the circuit court"), 10 (acknowledging that Helen "did not specifically label her arguments 'unilateral mistake' or 'negligent misrepresentation'"), and 11 (recognizing that "[t]he arguments in Helen's briefs [before the ERS and the circuit court] . . . [were] not categorized under legal theories of mistake or fiduciary duty").

As recited supra in section I.C, Helen asserted her position before the ERS Board as follows:

> [Helen] contends that: 1) the "normal" mode of election of retirement is not a valid option for Class C employees; 2) the statute governing retirement of class C employees and the [ERS's] method of administering that

> statute are vague, ambiguous and confusing; and 3) equity demands that [Helen] be allowed to adjust the retirement election of retirant Katsumi[,] . . . deceased.

The points of error that Helen raised in the circuit court are similar to the foregoing:

> I. . . . ERS erred in ruling that "Normal" retirement is a statutorily authorized mode of election of retirement benefits, and is one of four options available for Class C non-contributory members.
>
> This conclusion of law is erroneous because the Statutes relating to Class C non-contributory members allows distribution on only one of three options designated in [HRS] § 88-283(a). . . .
>
> II. . . . ERS erred in ruling that The statute regarding retirement of Class C employees and the ERS'[s] method of administering the Class C employees' retirement is not vague, ambiguous or confusing.
>
> The manner in which the ERS administers the statute uses the term "normal" in reference to the "type" of retirement (i.e., "normal," "early" or "disability") . . . and also for the mode of distribution of retirement benefits (i.e., "normal," "Option A," "Option B," and "Option C").
>
> III. ERS erred in ruling that Upon being diagnosed with cancer in March 1994, Katsumi . . . did not contact or notify ERS, or make any changes with regard to his retirement plan, including method of retirement. This would also include advancing his retirement date since the uncontroverted evidence shows that he did this in December 1993.
>
> ERS is clearly in error in respect of this finding. ERS offered no evidence that [Katsumi] had not communicated to them regarding his being diagnosed with cancer. In fact, the only evidence offered on this topic was the Affidavit of Arlene Kamakana, . . . in which Arlene . . . stated that she advised Ms. Chow . . . and Ms. Corrine Kakuda . . . of [Katsumi's] anticipated passing. . . .

Helen's third point of error challenged only one of the ERS Board's FOFs, namely, FOF No. 9. See supra section I.C. Helen also argued in her opening brief that the "ERS was given knowledge of [Katsumi's] impending death yet allowed [him to proceed] without counseling [him] to select a 'normal' retirement

payout and advance his retirement date[,]" thereby "failing to properly advise [Katsumi] as to the effect of his election." Helen's reply brief in the circuit court further maintained "the best interest of [Katsumi] was not considered" and that "the ERS and the immediate employer were aware of [Katsumi's] declining health and yet[] they failed to counsel him with respect to the effect of his selection." It is further noteworthy that the neither the ERS Board, in entering the August 16, 1999 final decision, nor the circuit court, in entering its July 6, 2000 FOFs and order reversing the decision of the ERS Board, applied plain error review. See supra section I.B. and C.

Pursuant to the Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(c) (2000), Helen, as the appellee before this court on secondary appeal, did not need to include a statement of points in her answering brief. Nevertheless, I note that, in her answering brief, Helen merely reiterates the arguments that were subsumed in the points of error that she had previously asserted: (1) that the circuit court correctly determined that the ERS Board exceeded its statutory authority in treating a "normal" retirement allowance as a distribution option; (2) that the circuit court rightly concluded that the ERS Board incorrectly construed HRS §§ 88-281(a), 88-282(a), and 88-283; (3) that HRS §§ 88-281(a), 88-282(a), and 88-283, as well as the ERS Board's administration of retirement allowances pursuant to the foregoing statutory provisions, were vague, ambiguous, and confusing; and (4) that the circuit court did not exceed its jurisdiction in ordering that Helen could retroactively revise an irrevocable

method of retirement allowance distribution.

Thus, inasmuch as Helen has not asserted "unilateral mistake" or "negligent misrepresentation" at any point in the present matter, the majority raises those issues sua sponte and as a matter of plain error.

2. Based on our decision in *Okada Trucking*, this court cannot, *sua sponte* and as a matter of plain error, review an FOF that neither party has challenged on appeal.

We have noted that "the appellate court's discretion to address plain error is always to be exercised sparingly" and have further observed as follows:

> Our reluctance to reach plain error in civil cases is especially heightened in an appeal from an administrative proceeding with respect to questions of fact or mixed questions of fact and law that neither party has challenged at any point in the proceedings. As we have noted, unchallenged factual findings are deemed to be binding on appeal, which is to say no more than that an appellate court cannot, under the auspices of plain error, *sua sponte* revisit a finding of fact that neither party has challenged on appeal.

Okada Trucking, 97 Hawai'i at 458-59, 40 P.3d at 81-82 (emphases added). Okada Trucking is controlling precedent as to the disposition of the present matter.

The ICA's sua sponte, plain error review in Okada Trucking is strikingly analogous to the manner in which the majority now raises and addresses the issues of negligent misrepresentation and unilateral mistake. Okada Trucking began its analysis of the effect of the plain error doctrine on unchallenged FOFs as follows:

> At no point in its opinion did the ICA acknowledge, expressly or impliedly, that it was reviewing, *sua sponte* and as a matter of plain error, the hearing officer's uncontested factual finding that the project entailed some

> work that had to be performed by a duly licensed plumbing subcontractor. Findings of fact, however, that are not challenged on appeal are binding on the appellate court.

97 Hawai'i at 458, 40 P.3d at 81 (emphases added) (citations omitted). In other words, notwithstanding (i.e., as the word "however" in Okada Trucking connotes) that "the ICA [did not] acknowledge, expressly or impliedly, that it was reviewing sua sponte and as a matter of plain error" the FOFs at issue in that case, unchallenged FOFs are always "binding on the appellate court." Id. Moreover, our summary of the relevant factual background in Okada Trucking reflects that, although the ICA did not "expressly or impliedly" frame its analysis as plain error review, we nonetheless observed that the ICA had done so:

> In reaching its holding, the ICA necessarily held sub silentio, as a matter of plain error, that the hearings officer had clearly erred in finding that the project involved work that was required to be performed by a C-37 licensed subcontractor, as well as by duly licensed roofing and reinforcing steel subcontractors.

97 Hawai'i at 457, 40 P.3d at 80 (citations omitted) (emphases added). Okada Trucking also held that

> the ICA erred in holding sua sponte that the hearings officer 'was wrong' in determining that the nature of the project required Inter Island to subcontract with a duly licensed plumbing subcontractor, thereby holding, sub silentio, that the hearings officer had plainly and clearly erred in finding that it did.

Id. at 459, 40 P.3d at 82 (emphasis added).

Just as the ICA in Okada Trucking failed to admit that it was sua sponte engaging in plain error review of the hearing officer's uncontested factual finding, see id. at 458, 40 P.3d at 81, the majority in the present matter likewise does not expressly acknowledge its sua sponte, plain error review of the ERS Board's FOF Nos. 18 and 19, although the majority has

arguably impliedly conceded that point, see supra section III.C. In any event, Okada Trucking recognized that, as is true of the majority in the present matter, see supra section III.C, whether the ICA "acknowledge[d]" that it was reviewing the relevant FOF for plain error or not, 97 Hawai'i at 458, 40 P.3d at 81, by definition, see HRAP Rule 28(b)(4) (characterizing a "plain error" as one that is "not presented"), the only mechanism by which the ICA could have reached the question whether the administrative hearings officer's FOF was clearly erroneous was by employing plain error analysis, inasmuch as the FOF at issue was unchallenged on appeal and, therefore, not foundational to any point of error raised by the appellant. See Okada Trucking, 97 Hawai'i at 457, 40 P.3d at 80.

Applying Okada Trucking to the present matter, it is apparent that the majority "necessarily" issues its holding sua sponte, "sub silentio, [and] as a matter of plain error." Id. Furthermore, because Okada Trucking observed that "[f]indings of fact . . . that are not challenged on appeal are binding on the appellate court," 97 Hawai'i at 458, 40 P.3d at 81, and held that the ICA erred in holding sua sponte and sub silentio that the hearings officer's FOF was plainly and clearly erroneous, see id. at 459, 40 P.3d at 82, the majority's analysis stands as a blatant contravention of the controlling precedent of this court.

Thus, based on our reasoning and holding in Okada Trucking, and mindful that "[o]ur reluctance to reach plain error [in the present matter] is especially heightened" because it is "an appeal from an administration proceeding," I would adhere to

the precedent set in Okada Trucking and would not, "under the auspices of plain error, sua sponte revisit a finding of fact that neither party has challenged on appeal." Id. at 458-59, 40 P.3d at 81-82. Nevertheless, even assuming arguendo that our jurisprudence authorizes plain error review of unchallenged agency findings, I still would not find plain error here because our standard of review precludes us from doing so.

3. I would not invoke plain error in the present matter because to do so would require finding additional facts and, in my view, does not concern an issue of "great public import."

As discussed supra in section II.D, in deciding whether to exercise plain error review, we "determine [(1)] whether the consideration of the issue requires additional facts, [(2)] whether the resolution of the question will affect the integrity of the findings of fact of the trial court[,] and [(3)] whether the question is of great public import." Fujioka, 55 Haw. at 9, 514 P.2d at 570 (internal citations omitted).

As a preliminary matter, if this court were to apply the Fujioka test to the present matter, the second factor would weigh in favor of invoking the plain error rule.[14]

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[14] I note that the relevant FOFs are those of the ERS Board and not the circuit court. The ERS Board acted as the "trial court" in the present matter, and it is the ERS Board's unchallenged FOF Nos. 18 and 19 that are binding on appeal. Simply put, the ERS Board was the trier of fact in the present matter, and the circuit court was the court of primary appeal, conducting judicial review of the contested case pursuant to HRS § 91-14. See supra note 7.

Assuming arguendo that this court were to review the ERS Board's FOF Nos. 18 and 19 for plain error, the integrity of the ERS Board's FOFs would be affected by the resolution of the "plain error," such that the second Fujioka factor would favor the recognition of plain error in the present matter. See, e.g., Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 396 n.12, 31 P.3d 901, 909 n.12 (2001) ("Because the effect of the Forgiveness Act is purely a

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question of law, the outcome of which will affect the integrity of the circuit court's findings of fact, and is a matter of great public import, we will exercise our discretion in addressing the matter." (Emphasis added.)); Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Hawai'i 482, 499-500, 993 P.2d 516, 533-34 (2000) (citing Montalvo, applying the Fujioka test, and declining to notice plain error where "[t]he error . . . did not substantially affect the integrity of the jury's findings" (emphasis added)), overruled on other grounds by Blair v. Ing, 96 Hawai'i 327, 331 n.6, 31 P.3d 184, 188 n.6 (2001); Hill v. Inouye, 90 Hawai'i 76, 82, 976 P.2d 390, 396 (1998) (recognizing plain error where, inter alia, the resolution of the issue "directly affects the family court's outcome in this case" (emphasis added)); Montalvo, 77 Hawai'i at 290-91, 884 P.2d at 353-54 (observing that "[t]he error here meets each of the three Fox [(i.e., Fujioka)] factors" and specifically explaining that, as to the second prong of the Fujioka test, "[t]he error here . . . affects the integrity of the jury's findings" (emphasis added)); Fox, 70 Haw. at 56, 760 P.2d at 675-76 (noting that, "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936) (internal quotation signals omitted)). Indeed, it would be illogical to notice plain error that would not affect the integrity of the trial court's FOFs, inasmuch as such error would be harmless.

It is noteworthy that this court has inconsistently applied the second Fujioka factor. See Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 476, 540 P.2d 978, 985 (1975) (recognizing plain error based upon, inter alia, the observation that "[t]he consideration of this issue raised for the first time on appeal will not affect the integrity of any findings of fact of the trial court"); Fujioka, 55 Haw. at 9, 514 P.2d at 570 (noticing plain error where, inter alia, "there is no material fact in issue"); Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984) (reviewing FOFs entered by the circuit court, citing Earl M. Jorgensen Co. and Fujioka, and declining to notice plain error because, inter alia, "consideration of the new issue will affect the integrity of the findings of fact"); Cabral v. McBryde Sugar Co., Ltd., 3 Haw. App. 223, 226-27, 647 P.2d 1232, 1234 (1982) (reviewing judgment entered on a jury verdict, citing Fujuioka, and erroneously reasoning that plain error review was appropriate because, inter alia, "the resolution of the question will [not] affect the integrity of the findings of fact").

Nevertheless, inasmuch as both Earl M. Jorgensen Co. and Fujioka involved appeals from orders granting summary judgment, there were no FOFs in those cases and the second prong of the Fujioka test did not apply. See Earl M. Jorgensen Co., 56 Haw. at 476, 540 P.2d at 985 ("We have before us an appeal from a summary judgment. On a motion for summary judgment, the trial court does not try factual issues; rather, it determines whether there are any such issues to be tried." (Internal citations omitted.)); Fujioka, 55 Haw. at 9, 514 P.2d at 570 ("Here, the trial court rendered its judgment on a motion for summary judgment. Thus, there is no material fact in issue . . . ."); see also Birmingham v. Fodor's Travel Publications, Inc., 73 Haw. 359, 372 n.7, 833 P.2d 70, 77 n.7 (1992) (citing Earl M. Jorgensen Co. and Fujioka, and reasoning that, inter alia, "[b]ecause . . . the trial court rendered no findings of fact, . . . we would be justified in addressing this issue on

(continued...)

Nevertheless, I would not notice plain error because the first

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(...continued)
appeal even if it had not been raised in the court below" (emphasis added)). In that connection, Hong and Cabral, which mistakenly rely upon Earl M. Jorgensen Co. and Fujioka in determining whether to exercise plain error review of findings by the trial court, do not represent the appropriate application of the second Fujioka factor. See Hong, 5 Haw. App. at 177, 683 P.2d at 837; Cabral, 3 Haw. App. at 226-27, 647 P.2d at 1234.

I also note that Fujioka was based upon Greene v. Texeira, 54 Haw. 231, 234-35, 505 P.2d 1169, 1172 (1973), which stated that this court has the discretion to recognize plain error "[i]f none of [three] factors are present," including "whether the issue goes to the integrity of the fact finding process." (Internal quotation signals and citations omitted). See Fujioka, 55 Haw. at 9, 514 P.2d at 570 (citing Greene). Nevertheless, the Greene court applied the "integrity" factor in a nonsensical manner that is evident from the authority upon which Greene relied. The Greene court cited the flawed analysis of In re Hawaiian Land Co., 53 Haw. 45, 487 P.2d 1070 (1971), which characterized Kawamoto v. Yasutake, 49 Haw. 42, 410 P.2d 976 (1966), as reasoning that this court "would not consider an argument on its merits first raised on appeal because" it would have "go[ne] to the integrity of the fact finding process[,]" i.e., "[i]f the argument were well founded[,] . . . a whole new trial would [have] be[en] required." In re Hawaiian Land Co., 53 Haw. at 53, 487 P.2d at 1076.

In holding that it would not notice plain error, however, the Kawamoto court did not actually employ the analysis described by In re Hawaiian Land Co., inasmuch as Kamamoto reasoned as follows:

> It is unnecessary for this court to consider the merits of defendant's argument . . . . This court will not consider a question which was not raised and "properly preserved in the lower court." Estate of Campbell, 46 Haw. 475, 485, 382 P.2d 920, 934; In re Guardianship of Matsuoka, 45 Haw. 83, 88, 363 P.2d 964, 967; Lindeman v. Raynor, 43 Haw. 299, 301; Clark v. Worrall, ___ Mont. ___ , ___, 406 P.2d 822, 825. As stated in In re Goodfader's Appeals, 45 Haw. 317, 343, 367 P.2d 472, 487, "It is clearly the obligation of counsel in any case to see to it that his objections to or grounds for action are made a part of the record."

Kawamoto, 49 Haw. at 45, 410 P.2d at 978. Indeed, the foregoing quotation does not suggest that this court should recognize plain error where the integrity of the FOFs would not be affected, but rather espouses the same principle as underlies Okada Trucking, to wit, that points of error not argued on appeal are deemed waived. Thus, because the Greene test is founded upon the mistaken interpretation of Kawamoto set forth in In re Hawaiian Land Co., I would adhere to our more recent applications of the second prong of the Fujioka test, as exemplified by Office of Hawaiian Affairs, Shanghai Inv. Co., Inc., Hill, Montalvo, and Fox. See supra.

In any case, although I acknowledge that the "resolution [of the alleged plain error would] affect the integrity" of the ERS Board's FOF Nos. 18 and 19, Fujioka, 55 Haw. at 9, 514 P.2d at 570 (internal citations omitted), the alleged error would not satisfy the first and third prongs of the Fujioka test, as discussed infra.

and third prongs of the Fujioka test would not be satisfied, insofar as (1) I believe that the present matter -- which is unique and unlikely to recur due to the subsequent amendments of HRS §§ 88-281(a), 88-282(a), and 88-283 -- is not "of great public import" and (2) this court cannot consider whether the current "retirement application, forms, and procedures," majority opinion at 20 n.16, constitute negligent misrepresentation or are likely to cause a unilateral mistake, such that they present a continuing issue "of great public import," without "requir[ing] additional facts[.]" Fujioka, 55 Haw. at 9, 514 P.2d at 570 (internal citations omitted).

The amended form of HRS § 88-283 expressly provides that the "normal" retirement allowance (i.e., the "maximum retirement allowance") that Katsumi elected is a distinct option for members of the ERS to choose.[15] See supra section III.A.2;

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[15] The majority declares that, "[w]ere the statutes sufficiently comprehendible, the legislature would have no need to enact clarifications." Majority opinion at 19. Nevertheless, the majority does not expressly challenge my statutory interpretation. See supra sections III.A and III.B. Moreover, the majority's assertions are unpersuasive as to plain error, insofar as this court is less likely to notice plain error if the "retirement application, forms, and procedures," majority opinion at 20 n.16, as they exist today, do not present a continuing problem that could result in unilateral mistake or negligent misrepresentation to parties other than Katsumi. Fujioka, 55 Haw. at 9, 514 P.2d at 570 (internal citations omitted) (noting that we must determine whether "the question is of great public import"). In other words, the question whether the "retirement application, forms, and procedures" that allegedly resulted in Katsumi's loss of retirement benefits constituted negligent misrepresentation and were likely to have caused Katsumi's unilateral mistake is immaterial to our inquiry as to the third Fujioka factor (i.e., focusing upon whether there is a continuing problem "of great public import," thereby implicating the current "retirement application, forms, and procedures").

see also HRS § 88-283(a) (Supp. 2003).[16] The amendments to HRS

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[16] In 2003 and 2004, the legislature amended HRS § 88-283 such that the statute now provides as follows:

> **Retirement allowance options.** (a) In lieu of the maximum retirement allowance described in sections 88-282, 88-284, and 88-285, a member may elect to receive the member's retirement allowance under one of the options described below, which shall be actuarially equivalent to the maximum retirement allowance:
>
> (1) Option A: A reduced allowance payable to the member, then upon the member's death, one-half of the allowance, including fifty per cent of all cumulative post retirement allowances, to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary; provided that for members retiring after November 30, 2004, in the event that the retirant's beneficiary dies at any time after the retirant retired, but before the death of the retirant, the retirant, upon the death of the retirant's beneficiary, shall receive a retirement allowance, including cumulative post retirement allowances, calculated as if the retirant had selected the maximum retirement allowance to which the retirant is entitled;
>
> (2) Option B: A reduced allowance payable to the member, then upon the member's death, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary; provided that for members retiring after November 30, 2004, in the event that the retirant's beneficiary dies at any time after the retirant retired, but before the death of the retirant, the retirant, upon the death of the retirant's beneficiary, shall receive a retirement allowance, including cumulative post retirement allowances, calculated as if the retirant had selected the maximum retirement allowance to which the retirant is entitled; or
>
> (3) Option C: A reduced allowance payable to the member, and if the member dies within ten years of retirement, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary for the balance of the ten-year period.
>
> (b) Any election of a mode of retirement shall be irrevocable and subject to the spousal or reciprocal beneficiary notification requirement under subsection (c).
>
> (c) No election under this section shall take effect unless:
>
> (1) The spouse or reciprocal beneficiary of the member is furnished written notification that:
>
> (A) Specifies the retirement date, the benefit option selected, and the beneficiary designated by the member;
>
> (B) Provides information indicating the effect of the election; and

(continued...)

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(C) Is determined adequate by rules established by the board pursuant to chapter 91; or

(2) The member selects option A or option B and designates the spouse or reciprocal beneficiary as the beneficiary; or

(3) It is established to the satisfaction of the board that the notice required under paragraph (1) cannot be provided because:

(A) There is no spouse or reciprocal beneficiary;

(B) The spouse or reciprocal beneficiary cannot be located;

(C) The member has failed to notify the system that the member has a spouse or reciprocal beneficiary or has failed to provide the system with the name and address of the member's spouse or reciprocal beneficiary; or

(D) Of other reasons, as established by rules of the board pursuant to chapter 91. Any notice provided to a spouse or reciprocal beneficiary, or determination that the notification of a spouse or reciprocal beneficiary cannot be provided, shall be effective only with respect to that spouse or reciprocal beneficiary. The system shall rely upon the representations made by a member as to whether the member has a spouse or reciprocal beneficiary and the name and address of the member's spouse or reciprocal beneficiary.

(d) Each member, within a reasonable period of time before the member's retirement date, shall be provided a written explanation of:

(1) The terms and conditions of the various benefit options;

(2) The rights of the member's spouse or reciprocal beneficiary under subsection (c) to be notified of the member's election of a benefit option; and

(3) The member's right to make, and the effect of, a revocation of an election of a benefit option.

(e) The system shall not be liable for any false statements made by the member.

(f) In the event of the death of a member after the date of the filing of the member's written application to retire, but prior to the retirement date designated by the member, the designated beneficiary, if the member was eligible to retire on the date of the member's death, may elect to receive either:

(1) An allowance that would have been payable if the member had retired and had elected to receive a retirement allowance under option B; or

(2) The allowance under the option selected by the member which would have been payable had the member retired.

The effective date of the member's retirement shall be a first day of a month, except for the month of December when the effective date of retirement may be on the first or last day of the month, and shall be no earlier than the later of thirty days from the date the member's retirement application was filed or the day following the member's date of death. The election may not be made if, at the time of the member's

(continued...)

§ 88-283 also require that, "within a reasonable period of time before the [ERS] member's retirement date," the ERS Board provide the member "a written explanation of" (1) "[t]he terms and conditions of the various benefit options[,]" (2) "[t]he rights of member's spouse or reciprocal beneficiary under subsection (c) to be notified of the member's election of a benefit option[,]" and (3) "[t]he member's right to make, and the effect of, a revocation of an election of a benefit option[,]" HRS § 88-283(d). See supra note 16. In that connection, as discussed supra in section III.B, the "spousal notification requirement" of the amended HRS § 88-283(c) and the special beneficiary election provision of the amended HRS § 88-283(g), see supra note 16,

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death, there are individuals who are eligible to receive death benefits under section 88-286(c) who have made a claim for the benefits; provided that, if the designated beneficiary is an individual eligible to receive benefits under section 88-286(c), the designated beneficiary may receive benefits pursuant to an election under this section pending disposition of the claim for benefits under section 88-286(c). No death benefits will be payable under section 88-286(c) while benefits are paid pursuant to an election made under this section.

(g) In the event of the death of the retirant within one year after the date of retirement, the retirant's beneficiary may elect to receive either:

(1) The death benefit under the retirement option selected by the retirant; or

(2) The death benefit under option B; provided that the difference between the benefit that the retirant received and the benefit that would have been payable to the retirant had the retirant elected to receive a retirement allowance under option B shall be returned to the system.

(h) The increase in the retirant's benefit under options A and B upon the death of the retirant's designated beneficiary shall be effective the first day of the month following the date of death of the designated beneficiary. The retirant shall notify the system in writing and provide a certified copy of the beneficiary's death certificate. The system shall make retroactive benefit payments to the retirant, not to exceed six months from the date the written notification and the certified copy of the death certificate are received by the system. The retroactive payments shall be without interest.

2004 Haw. Sess. L. Act 179, § 27 at 873-75 (emphases added).

ensure that the spouses of ERS members will not face the same misfortune as has befallen Helen. More specifically, individuals like Helen are now afforded both (1) written notification of the retirant's benefit election as a prerequisite to its taking effect, HRS § 88-283(c), and, (2) in the event of the retirant's death within one year after the date of retirement (e.g., as in the present matter, see supra section I.A), the discretion to revise the retirant's election and instead choose "option B," HRS § 88-283(a)(2), which provides the beneficiary a retirement allowance for life, HRS § 88-283(g).

Indeed, based on the amendments to the statutory scheme, I believe that the present matter is not "of great public import" because it clearly affects only Helen and is unlikely to pose a continuing problem. See, e.g., State Farm Mut. Auto. Ins. Co. v. Dacanay, 87 Hawai'i 136, 145 n.14, 952 P.2d 893, 902 n.14 (Haw. App. 1998) (declining to extend plain error review to the appellants' argument regarding unique settlement terms because it was not an "issue is of great public importance"). By contrast to the present matter, this court has only noticed plain errors "of great public import" in appeals concerning issues that would have borne upon individuals other than the parties to those cases. See, e.g., Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 396 n.12, 31 P.3d 901, 909 n.12 (2001) (exercising plain error review "[b]ecause the effect of the Forgiveness Act is purely a question of law, the outcome of which will affect the integrity of the circuit court's findings of fact, and is a matter of great public import" (emphasis added)); Montalvo, 77

Hawai'i at 289-90, 884 P.2d at 352-53 (observing that "failure to instruct [the] jury on the meaning of proximate legal cause, when [the] issue [was] in dispute, [constituted] plain error requiring reversal" because the failure "'seriously affect[ed] the fairness of the . . . proceeding'" (quoting Morris v. Getscher, 708 F.2d 1306, 1311 (8th Cir. 1983) (emphasis added)); Bertelmann v. Taas Associates, 69 Haw. 95, 103, 735 P.2d 930, 935 (1987) (noticing plain error because "the existence of . . . [a] cause of action is of public importance and does not require additional facts" (emphasis added)); Greene v. Texeira, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973) (recognizing plain error because "[t]he great importance to the public of a proper interpretation of Hawaii's Survival Statute is obvious" (emphasis added)); Cabral v. McBryde Sugar Co., Ltd., 3 Haw. App. 223, 226-27, 647 P.2d 1232, 1234 (1982) (holding that the question whether "liability for damage caused by the escape of waters impounded in reservoirs or ponds, or confined in their flow to artificial ditches, depends upon proof of some act of negligence" was of "great public import" (internal quotation signals and citations omitted))).

Notwithstanding the foregoing, the majority contends that "[the] defects [that resulted in the alleged unilateral mistake and negligent misrepresentation] stemmed from the confusing nature . . . of the retirement application, forms, and procedures." Majority opinion at 20 n.16. The majority insists that "the amendments to the statute do not solve the essential problem posed by the failure to adequately ensure that the intricacies of the retirement process must be ordinarily

understood and to mandate that the ERS maintain 'user friendly' administrative practices and procedures for its members." Majority opinion at 20 n.16. For the reasons discussed supra, I disagree. Moreover, inasmuch as there is no evidence in the record as to the current state of the "retirement application, forms, and procedures," the majority has no basis for arguing that the such materials could possibly cause any "unilateral mistake" or "negligent misrepresentation" to present or future ERS members.

In that connection, it is true that my belief that "retirement application, forms, and procedures" no longer pose a question of "great public import" is, in my view, reasonably based upon the implications of the statutory amendments and not upon the record now before us, precisely because the current "retirement application, forms, and procedures" are not part of the record on appeal. Assuming arguendo that, in spite of the protections afforded by the amendments to HRS § 88-283, we were unsure whether this issue present a continuing problem "of great public import," this court cannot evaluate the ERS's current "retirement application, forms, and procedures" without contravening the first Fujioka factor by considering additional facts not in the record on appeal. Fujioka, 55 Haw. at 9, 514 P.2d at 570; see, e.g., Montalvo, 77 Hawai'i at 290-91, 884 P.2d at 353-54 (observing that "[t]he first factor is based on the tenet that an appellate court should not review an issue based upon an undeveloped factual record"). That being the case, the record before us does not reflect that the present matter is "of

great public import." Thus, given the record before us and the amendments to HRS § 88-283, I would hold that the present matter does not concern a "question . . . of great public import," Fujioka, 55 Haw. at 9, 514 P.2d at 570 (internal citations omitted), and I would decline to find plain error even if this court were to engage in such review.

4. The majority's exercise of HRS §§ 602-4 and 602-5(7) "review" sets a dangerous precedent.

As a general matter, it is noteworthy that the majority's analysis represents a significant departure from our plain error jurisprudence. As noted supra in section III.C, the majority raises its arguments as an "exercise of our general superintendence of the trial courts . . . and under our power to make such orders and mandates as necessary for the promotion of justice[.]" Majority opinion at 2 (footnotes omitted) (citing HRS §§ 602-4 and 602-5(7), see supra notes 12 and 13).

The majority's approach confers upon this court the unfettered discretion to resolve matters before it without regard to the points of error actually asserted by the parties in their appellate briefs. Simply put, the majority essentially renders obsolete our plain error standard of review. Pursuant to the majority's reasoning, whenever this court feels that the plain error doctrine is an inconvenient obstacle to achieving its desired outcome, it may simply circumvent the limits to our discretion established in Okada Trucking and Fujioka and proceed on the amorphous pretense of "promot[ing]" whatever "justice" it perceives at the moment.

Moreover, the majority essentially relegates this court to the role of advocating for a party. In exercising its "general superintendence" of the circuit court and in pursuing its view of "justice," the majority takes this court far afield from the arguments that were actually asserted by the parties, see supra sections III.C and III.C.1, and now stands as a surrogate for Helen's counsel.

Thus, mindful of (1) the folly of abandoning our plain error jurisprudence and (2) the importance of exercising judicial review in a manner that does not devolve into blatant advocacy on behalf of a particular party, I emphasize the necessity of adhering to the limits of the plain error doctrine, as set forth in Okada Trucking and Fujioka.

IV. CONCLUSION

In light of the foregoing analysis, I would vacate the circuit court's final judgment and remand this matter to the circuit court with instructions to affirm the August 16, 1999 final decision of the ERS Board.