

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26568

IN THE SUPREME COURT OF THE STATE OF HAWAII

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IN THE MATTER OF

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL
Complainant-Appellant-Appellant,

vs.

KENNETH A. SHIMIZU, DEPUTY DIRECTOR, DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU; ERIC TAKAMURA, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU; KENNETH NAKAMATSU, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES, CITY AND COUNTY OF HONOLULU; AND MUFU HANNEMANN, MAYOR, CITY AND COUNTY OF HONOLULU¹,
Respondents-Appellees-Appellees,

and

HAWAII LABOR RELATIONS BOARD; BRIAN NAKAMURA, CHAIRPERSON, EMORY SPRINGER, BOARD MEMBER, AND SARAH HIRAKAMI, BOARD MEMBER,
Appellees-Appellees.
(CIV. NO. 03-1-0546)

IN THE MATTER OF

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Complainant-Appellant-Appellant,

vs.

KENNETH A. SHIMIZU, DEPUTY DIRECTOR, DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU; ERIC TAKAMURA, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU; KENNETH NAKAMATSU, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES, CITY AND COUNTY OF HONOLULU; AND MUFU HANNEMANN, MAYOR, CITY AND COUNTY OF HONOLULU,
Respondents-Appellees-Appellees,

and

¹ Pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 43(c) (2000), Kenneth A. Shimizu, Eric Takamura, Kenneth Nakamatsu, and Mufu Hannemann have been substituted as parties to the instant appeal in place of Frank J. Doyle, Timothy E. Steinberger, Cheryl Okuma-Sepe, and Jeremy Harris, respectively (in their official capacities); also, nominal appellees Emory Springer and Sarah Hirakami have been substituted in place of Chester Kunitake and Kathleen Rakuya-Markrich, respectively.

HAWAII LABOR RELATIONS BOARD; BRIAN NAKAMURA, CHAIRPERSON, EMORY SPRINGER, BOARD MEMBER, AND SARAH HIRAKAMI, BOARD MEMBER, Appellees-Appellees.
(CIV. NO. 03-1-0552)

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NOS. 03-1-0546 and 03-1-0552)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Complainant-Appellant-Appellant United Public Workers, AFSCME, Local 646, AFL-CIO (hereinafter "UPW") appeals from the Circuit Court of the First Circuit's order,² filed May 6, 2004, denying its motion for order to show cause and for contempt (hereinafter "motion for contempt sanctions") against the above-named Respondents-Appellees-Appellees (collectively the City and County of Honolulu, hereinafter "City"). The circuit court's order was filed on the same day that this court filed an order granting a stay pending appeal in favor of the City as to the exact same subject matter. At issue was the City's alleged noncompliance with an order from the circuit court which ordered the City to take certain affirmative good faith actions towards meeting its employment obligations to UPW and the unionized refuse collection workers whom it represented arising from the automation of the City's refuse collection system.

On appeal, UPW makes the following assertions: (1) there is no dispute that the City had failed to comply with the

² The Honorable Sabrina S. McKenna presided.

circuit court's September 17, 2003 findings of fact, conclusions of law and order ("compliance order") requiring the City to begin good faith restoration and expansion of municipal refuse collection services; (2) the City's appeal in United Public Workers, AFSCME, Local 646, AFL-CIO v. Shimizu, No. 26168 (April 4, 2005) (hereinafter "UPW v. Shimizu") and then-pending motion for stay before this court had no impact upon the City's affirmative duty to comply with the circuit court's order, inasmuch as an unstayed order is fully enforceable pending appeal; and (3) the City had no right to an "automatic stay" from that order; and that because the City's motion for stay before the circuit court was denied, not appealed, and therefore final, the circuit court, pursuant to the "law of the case" doctrine, "had no authority to deny [UPW's] motion for contempt" as a means of revisiting the issue of whether the City was entitled to such an automatic stay.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) The instant appeal is moot. On May 6, 2004, this court filed its order granting a stay from enforcement of the circuit court's September 17, 2003 compliance order (pending appeal in UPW v. Shimizu (decided on April 4, 2005)) -- the same day as the circuit court filed its order denying UPW's motion for contempt sanctions. This court's order was filed before the

circuit court's own order on that day. Therefore, even if the circuit court had ruled in favor of UPW and granted contempt sanctions, its ruling, by virtue of being filed "second in time," would be immediately superceded and invalidated by this court's grant of a stay to the City, inasmuch as the circuit court would have to yield to this court's superior jurisdiction in the face of its unequivocal pronouncement that the status quo shall be maintained until UPW v. Shimizu was decided. As the City correctly points out, "[h]ad the [circuit] court agreed with the UPW's position and forced compliance, it would have destroyed the 'status quo,' which is the very purpose of pursuing a motion for stay."

Given the timing of this court's and the circuit court's rulings, no live controversy remains, because this court's May 6, 2004 order granting of the City's motion for stay precludes the awarding of contempt sanctions in UPW's favor even if this court were to reverse the circuit court's denial of UPW's motion. And it is well-settled that "merely abstract or moot questions will not be determined on appeal" AIG Hawai'i Insurance Co., Inc. v. Bateman, 82 Hawai'i 453, 459, 923 P.2d 395, 401 (1996) (citation omitted) (internal quotation marks omitted). Thus, the only remaining question is whether an exception to the mootness doctrine is applicable. As UPW correctly notes, "[this court has] repeatedly recognized an exception to the mootness doctrine in cases involving questions

that affect the public interest and are 'capable of repetition yet evading review.'" See In re Doe Children, 105 Hawai'i 38, 56-57, 93 P.3d 1145, 1163-64 (2004) (emphases added) (citations omitted).

The phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

Id. at 57, 93 P.3d at 1164 (citations omitted) (some internal quotation marks omitted). UPW asserts that "[d]isputes over whether services in the public sector may be privatized or should be restored to civil servants is 'capable of repetition' and likely to evade review." (Citation omitted.) This generalized argument, however, fails to demonstrate how the complained-of action in the instant case (noncompliance with the circuit court's order to begin good faith restoration and expansion of the City's refuse collection services) will escape review. In fact, said action has already been subject to full review in UPW v. Shimizu.³ Because no exception to the mootness doctrine has been shown or is otherwise apparent, the instant appeal is

³ The UPW v. Shimizu summary disposition order states in pertinent part:

Notwithstanding the circuit court's ruling that the City was bound to "restore collection services for the city which had been privatized and to expand services to businesses, condominiums, and churches and compete with private haulers to contract services for military bases and public schools," the unchallenged language of the HLRB's February 11, 2003 decision, bound the City to the same contractual obligations when this court reversed the HLRB's prior decision in United Public Workers, AFSCME, Local 646, AFL-CIO, v. Hanneman, 106 Hawai'i 359, 362-63, 105 P.3d 236, 239-40 (2005).

dismissed as moot. Therefore,

IT IS HEREBY ORDERED that the instant appeal is dismissed.

DATED: Honolulu, Hawai'i, May 18, 2007.

On the briefs:

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