CONCURRING OPINION BY LEVINSON, J., WITH WHOM MOON, C.J. JOINS

I concur in the result that the majority reaches but, in the interest of thoroughness, write separately to address two arguments that were, in my view, properly raised by the complainant-appellant Hawaii Government Employees Association (the HGEA), yet not considered by the majority.

I. THE HAWAI'I DEPARTMENT OF TRANSPORTATION'S EMPLOYEES ACTED REASONABLY IN RESTRICTING THE HGEA'S POSTING OF POLITICAL CAMPAIGN MATERIALS ON THE BULLETIN BOARD.

The majority concludes, I believe inaccurately, that "because [the HGEA] is convinced that the bulletin boards constitute, at the very least, a limited public forum, it does not make arguments as to the reasonableness of the prohibition." Majority opinion at 33. In fact, in a footnote in its opening brief, the HGEA argues that the restriction against posting campaign materials on the bulletin board does not "satisfy a 'reasonable' basis test, since the restriction and limitation imposed is contrary to the purpose for which union bulletin boards were created."[1] The purpose of the bulletin board, according to the HGEA, is for "union representational purposes" allowed for under both article 7.B of the HGEA's collective bargaining agreement and Hawai'i Revised Statutes (HRS) § 89-3 (Supp. 2006).

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[1] The HGEA also asserts in its reasonableness argument that the restriction on posting campaign materials violates "the contractual commitment made to [the] HGEA" under section 7B of its collective bargaining agreement, but does not raise the breach of contract issue that was addressed below, as a point of error on appeal. Because the HGEA does not properly present this contention, I do not address it. See Hawai'i Rules of Appellate Procedure Rule (HRAP) 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.").

A. The HGEA's Reasonableness Argument Is Discernable.

The majority contends that "the reference in a footnote of the opening brief to a 'reasonable basis test' posed no discernable argument as to why the prohibition itself, i.e.[,] HRS § 84-13, was unreasonable" and that the HGEA instead "rests on the breach of Article 7B of the collective bargaining agreement." Majority opinion at 33 n.20 (emphasis in original).

The HGEA, however, does more than just cite a test; it applies the test by arguing that article 7.B of the collective bargaining agreement and HRS § 89-3 inform the purpose of the forum and, thus, the reasonableness of the restriction. Specifically, the HGEA maintains that:

> The state ban in this present case does not even satisfy a "reasonable" basis test, since the restriction and limitation imposed is contrary to the purpose for which union bulletin boards were created and in violation of the contractual commitment made to [the] HGEA. . . . "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum[.]'" [Rosenberger v. Rector & Visitors of the Univ. of Va.,] 515 U.S. [819,] 829 [(1995) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985)).] The purpose of a union bulletin board in [article] 7B is for union representational purposes under Section 89-3, HRS.

(Some brackets added and some in original.)

Moreover, as the language of the HGEA's argument demonstrates, the HGEA goes further than simply asserting that article 7.B was breached by the state; it also contends that the article speaks to the purpose of the forum. In particular, the HGEA argues that "the restriction and limitation imposed is [(1)] contrary to the purpose for which union bulletin boards were

created," as evidenced by article 7.B., "and [(2)] in violation of the contractual commitment made to [the] HGEA." (Emphasis added.) The conjunctive "and" establishes that the HGEA's argument is not narrowly confined to the issue of breach, as the majority maintains, see majority opinion at 33 n.20, but rather extends to the purpose of the forum. Hence, while I find the HGEA's reasonableness argument ultimately unpersuasive, I believe that the argument is indeed discernable.

B. The HGEA Has Not Shown That The Restriction Is Unreasonable In Light Of The Forum's Purpose.

Article 7.B of the collective bargaining agreement states that the HGEA "shall be provided adequate space on bulletin boards for posting of usual and customary Union notices." And HRS § 89-3 grants employees the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." Thus, one of the forum's purposes is to facilitate the HGEA's lawful communication with its members through bulletin board notices.

Nevertheless, as the majority correctly observes, the forum is located in a Hawai'i Department of Transportation (DOT) office building and is, therefore, subject to HRS § 84-13 (1993),[2] which, as interpreted by Hawai'i State Ethics Commission Executive Director Daniel J. Mollway, prohibits state employees

[2] HRS § 84-13, entitled "Fair treatment," provides in relevant part that "[n]o legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others."

from allowing individuals to post political campaign materials in a state office[3] See majority opinion at 34; see also id. at 62. I therefore agree with the majority that the DOT employees acted reasonably by restricting the HGEA's posting of campaign materials on the DOT's bulletin board. Id. at 3.

II. THE HLRB DID NOT IMPOSE AN UNCONSTITUTIONAL CONDITION OF EMPLOYMENT ON ARVID YOUNGQUIST.

The majority also does not address the HGEA's argument that the HLRB imposed an "unconstitutional condition of employment upon Arvid Youngquist, as an employee of [the DOT]." The HGEA maintains that HRS § 84-13, see supra note 2, "as construed and applied to Youngquist [by the HLRB,] imposes upon a public employee a requirement that he relinquish his right to post union bulletin board notices critical of his employer," the respondent-appellee Governor Linda Lingle. According to the HGEA, that right is grounded in the first amendment.

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[3] In his testimony before the agency-appellee Hawai'i Labor Relations Board (the HLRB), Director Mollway explained his analysis of HRS § 84-13 in the present matter:

> [I]f you're asking[,] can . . . a union person who is not a State employee over which we have no jurisdiction walk into the office and put something on the bulletin board, . . . we would say that that would be inappropriate because that person would not . . . be allowed on the premises or be allowed to do that without the permission of a State official or employee in the department.
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> And so in that particular case . . . basically an outsider, so to speak, would not be able to do that. If we told the State employee or State official they can't do that, they certainly can't allow other people to come in and do that.

A. The HGEA Reasonably Raised The Unconstitutional Conditions Issue In Its First Point Of Error.

The majority asserts that the HGEA's unconstitutional conditions argument was never raised as a point of error on appeal, because the HGEA failed "to clearly identify the issue as a point of appeal," citing HRAP Rule 28(b)(4). Majority opinion at 36 n.23. The rule does not, however, say that an issue must be "clearly identif[ied]," id. (emphasis added). Instead, HRAP Rule 28(b)(4) provides that an opening brief must contain:

> A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:
> . . . .
> (C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;
> . . . .
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.

Thus, as a textual matter, I do not believe that the rule calls for an issue to be clearly identified and, absent such language, believe that it suffices for an issue to be reasonably identified in a point of error. Indeed, the majority's clear identification standard, see majority opinion at 36 n.23, would be unadvisable because it would, consistent with the plain language of the rule, require this court to disregard all points of error that are anything less than clear and further require this court to notice plain error in order to address such points, see HRAP Rule 28(b)(4). Accordingly, in my view, an issue is properly

raised under HRAP Rule 28(b)(4) when this court can at least reasonably identify the issue within a point of error.

In its first point of error, the HGEA asserts that the circuit court "erred by upholding a State ban on election & campaign postings on an authorized union bulletin board which abridges the right of 'free speech' guaranteed to government employees." The HGEA advanced its unconstitutional conditions argument -- which it asserts is grounded in the right to freedom of speech -- in the circuit court,[4] and the circuit court implicitly rejected this contention in its ruling, which the HGEA quotes at length in its first point of error. To be sure, the HGEA does not assert as a separate point of error that the circuit court erred in concluding that a government employee's right to freedom of speech was violated specifically by virtue of the unconstitutional conditions doctrine. It does, nevertheless, generally contend that the right was violated, and further explains, in the argument section of its opening brief correlating to its first point of error, that one of the bases for that alleged violation is the unconstitutional conditions doctrine. Accordingly, I believe that the HGEA's unconstitutional conditions argument is fairly subsumed within its first point of error.

[4] In fact, the HGEA first raised the unconstitutional conditions issue before the HLRB.

B. Youngquist's Employment Was Not Unconstitutionally Conditioned Upon His Relinquishment Of His Right To Freedom Of Speech.

Turning to the merits, the unconstitutional conditions doctrine provides that:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Perry v. Sindermann, 408 U.S. 593, 597 (1972); see also Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 59 (2006).

The HGEA's argument that Youngquist was required to forgo his right[5] to post the campaign materials on the bulletin board, presupposes that he had that right in the first instance, which, as the majority correctly explains in sections IV-VIII of its opinion, he did not. See majority opinion at 18-36. Simply put, Youngquist had no right that the DOT forced him to relinquish and, consequently, the HLRB could not have imposed an unconstitutional condition of employment upon him. See Legal Aid Soc. of Hawaii v. Legal Servs. Corp., 145 F.3d 1017, 1024-27 (9th Cir. 1998) (holding that a federal statute and its implementing

[5] The right to freedom of speech is guaranteed by the first amendment to the United States Constitution, which applies to the states through the fourteenth amendment, Virginia v. Black, 538 U.S. 343, 358 (2002), and by article I, section 4 of the Hawai'i Constitution.

regulations, which required that legal aid organizations receiving federal funds not use those funds for certain restricted activities, did not unconstitutionally condition the provision of funding to the organizations upon the relinquishment of a first amendment right, because the statute did not forbid the organizations from using non-federal funds to engage in the restricted activities through separate entities); Libertarian Party of Ind. v. Packard, 741 F.2d 981, 988-90 (7th Cir. 1984) (concluding that a state scheme, which gave a portion of personalized license plate revenues to political parties based on the percentage of the vote the parties captured, did not condition the availability of a public benefit (obtaining the license plate) on the surrender of the plaintiff's first amendment rights, inasmuch as the state's provision of public funds to qualifying political parties did not offend those rights).