

SUNSHINE LAW MEETING



HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813

NOTICE OF MEETING OF THE HAWAII STATE ETHICS COMMISSION

Date: March 21, 2019

Time: 10:00 a.m.

Place: Hawaii State Ethics Commission Conference Room
American Savings Bank Tower
1001 Bishop Street, Suite 960
Honolulu, Hawaii 96813

A G E N D A

CALL TO ORDER

I. Consideration and Approval of the Minutes of the February 21, 2019 Meeting

II. Executive Director's Report

1. Education / Training Report

2. Guidance and Assignment Statistics – February 2019

Attachment 2: 2019 Guidance and Assignment Statistics / Website Traffic

3. Miscellaneous Office Projects / Updates

a. Possible state-wide ethics conference

b. Staff – hiring update

III. 2019 Legislative Session

1. Ethics Commission bills (supporting all):

- [HB169](#): Clarifies the State Ethics Code by clarifying provisions regarding gift disclosure statements, retention of financial disclosure statements, and ethics training. (Senate companion, S.B.142, is dead.)
- [HB170](#): Restores statutory protection for legislators when carrying out a legislative function. Clarifies public disclosure requirements for task force members. (Senate companion, S.B.143, is dead.)
- [SB144](#): Removes statutory remnants from when violations of the lobbyist law resulted in criminal penalties. Allows the state ethics commission to assess an administrative fine pursuant to a settlement agreement. (House companion, H.B.171, is dead.)

2. Budget bills (supporting all):

- [HB1](#): Appropriates funds to provide for the expenses of the Legislature, Auditor, Legislative Reference Bureau, Ombudsman, and Ethics Commission. (Signed into law as Act 001 on February 28, 2019.)
- [HB348](#): Makes appropriations for public employment cost items of and cost adjustments for employees of various legislative agencies. Appropriates funds.

3. Other bills (still alive):

- [HB361](#): Prohibits any Governor or county mayor, while holding those offices, to maintain any other employment or receive any emolument, beginning on the sixty-first calendar day after their election or appointment to office.
- [HB391](#): Relating to Ethics. Establishes restrictions on the participation in political activities of certain state employees and officers. Imposes penalties for violations.

[HB615](#): Amends the Board of Education membership by inviting the exclusive representative for bargaining unit (5) (teachers and other personnel of the Department of Education) to appoint a nonvoting public school teacher representative to the Board. (Senate companion, S.B. 340, was deferred.)

[HB1381](#): Prohibits former legislators and executive branch employees subject to senate confirmation from engaging in lobbying for 24 months after termination of employment as a legislator or executive branch employee. Effective 7/1/2021.

[HB1382](#): Defines "contract with the State". Eliminates campaign fundraising on the property of persons that have accepted legislatively appropriated funds, or received or rendered services to the State, with an aggregate value of \$100,000.

[SB955](#): Relating to Public Financial Disclosure Statement. Requires financial disclosure statements of state agency executive directors to be public records available for inspection and duplication.

4. Other bills (no longer alive):

[HB199](#): Relating to Post-Employment. Allows former employees of charter schools to represent the nonprofit organization that supports the charter school that employed the former employee through business or financial transactions.

[SB55](#): Short Form Bill (Relating to Ethics).

[SB447](#): Relating to Elections. Prohibits campaign contributions from certain entities to members of the legislature during the legislative session, for five days following adjournment sine die, and during a special session. Prohibits a member of the legislature from knowingly soliciting or accepting a contribution from a lobbyist or a lobbyist's principal during a legislative session, for five days following adjournment sine die, and during a special session. Prohibits fundraisers for any member of the legislature to be held during any regular legislative session, for five calendar days following adjournment sine die, and during a special session.

[SB1055](#): Relating to Financial Disclosure Statements. Requires the governor, lieutenant governor, members of the legislature, governor-appointed executive of each principal department,

president of the University of Hawaii, superintendent of education, administrative director of the State, administrative director of the courts, and the administrator of the office of Hawaiian affairs to disclose any income of \$1,000 or more received from a business or service, the name of the person or business from whom the income was received, date the income was received, and a description of the services or goods rendered.

[SB1056](#): Relating to Lobbyists. Requires lobbyists and specified individuals to file two additional reports to the Hawaii State Ethics Commission, including one report on the second Friday in August and one report on the first Monday in November in general election years, similarly to the filing frequency that candidates and the treasurer of candidate committees are required to file pursuant to section 11-334, Hawaii Revised Statutes.

[SB1416](#): Establishes procedures for the custody, inventory, and care of protocol gifts received by legislators on behalf of the State or either house of the legislature.

IV. *Akana v. Hawaii State Ethics Commission and Daniel Gluck*, Civil No. 18-1-1019-06 (JHA)

Discussion of case status.

The Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

V. *Akana v. Hawaii State Ethics Commission and Daniel Gluck*, Civil No. 19-1-0379-03 (JHA)

Discussion of case status.

The Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

Attachment 1: 2019-03-07 Notice of Appeal – Statement of Case

Attachment 2: 2019-03-13 Motion to Stay and Declaration

VI. Administrative Rules

Review of proposed edits made after consultation with the Department of the Attorney General.

Attachment 1: Revised proposed amendments to Hawaii Administrative Rules, Title 21, Chapters 1-10

VII. Evaluation of Executive Director Daniel Gluck

The Hawaii State Ethics Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(2) to discuss matters relating to the evaluation of an employee.

VIII. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, please contact the Hawaii State Ethics Commission by telephone at (808) 587-0460, by facsimile at (808) 587-0470 (fax), or via email at ethics@hawaiiethics.org. Requests made as early as possible will allow adequate time to fulfill your request.

Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

Any interested person may submit data, views, or arguments in writing to the Commission on any agenda item. An individual or representative wishing to testify may notify any staff member of the Commission prior to the meeting or, during the meeting itself, may inform a Commissioner or Commission staff of a desire to testify. Testimony must be related to an item that is on the agenda, and the testifier shall identify the agenda item to be addressed by the testimony.

SUNSHINE LAW MEETING
AGENDA ITEM I

MINUTES: CONSIDERATION AND APPROVAL OF THE MINUTES OF THE
FEBRUARY 21, 2019 MEETING

Attachment 1: Sunshine Law Meeting Minutes of the February 21, 2019 Hawaii
State Ethics Commission Meeting

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

STATE OF HAWAII

Date: Thursday, February 21, 2019

Time: 10:00 a.m.

Place: Hawaii State Ethics Commission Conference Room
American Savings Bank Tower
1001 Bishop Street, Suite 960
Honolulu, Hawaii 96813

Present: State Ethics Commission Members

Reynard D. Gaulty, Chair
Ruth D. Tschumy, Vice Chair
Susan N. DeGuzman, Commissioner
Melinda S. Wood, Commissioner
Wesley F. Fong, Commissioner

State Ethics Commission Staff

Daniel M. Gluck, Executive Director
Susan D. Yoza, Associate Director
Nancy C. Neuffer, Staff Attorney
Virginia M. Chock, Staff Attorney
Kee M. Campbell, Staff Attorney

CALL TO ORDER

The meeting was called to order at approximately 10:04 a.m.

Agenda Item No. I: Consideration and Approval of the Minutes of the January 24, 2019 Meeting

Commissioner Wood made and Vice Chair Tschumy seconded a motion to approve the minutes of the January 24, 2019 Sunshine Meeting. The motion carried unanimously (Gaulty, Tschumy, DeGuzman, Wood, and Fong voting).

1 **Agenda Item No. II: Executive Director's Report**

2
3 *Education / Training Report*

4
5 Executive Director Gluck said that staff have been busy with training and that
6 there are many scheduled trainings for the next few months. He also reported that staff
7 would be performing training for all personnel of the Department of Land and Natural
8 Resources Division of Boating and Ocean Recreation on Oahu and the neighbor
9 islands.

10
11 *Guidance and Assignment Statistics – January 2019*

12
13 *Attachment 2: 2019 Guidance and Assignment Statistics*

14
15 Executive Director Gluck referred to the year-to-date statistics for guidance and
16 assignments.

17
18 *Miscellaneous Office Projects / Updates*

19
20 Executive Director Gluck reported that the staff is finalizing a new educational
21 resource – a “Quick Guide” on second jobs – that will be published soon. He also
22 reported that he is in the process of hiring a secretary/paralegal to fill the current vacant
23 position.

24
25
26 **Agenda Item No. III: 2019 Legislative Session**

27
28 Executive Director Gluck reported that the Commission's three bills are still
29 moving ahead (**H.B. 169**, **H.B. 170**, and **S.B. 144**) and gave an update as to the status
30 of each of those measures.

31
32 Executive Director Gluck stated that he requested amendments to two of the bills
33 to address questions regarding access to transcripts of contested case hearings. He
34 explained that current provisions in Hawaii Revised Statutes (“HRS”) chapters 84 and
35 97 seem to be at odds with provisions in HRS chapter 92F (the Uniform Information
36 Practices Act (“UIPA”)); he further reported that he consulted with both the Department
37 of the Attorney General and the Office of Information Practices regarding a recent
38 request to access transcripts from a contested case hearing. The Commission
39 discussed how best to address this issue, and Executive Director Gluck provided the
40 Commission with information regarding UIPA requests the Commission has received in
41 the past. Executive Director Gluck explained that, for now, he was requesting that the
42 Legislature remove certain language in chapters 84 and 97, and then the Commission
43 could address the matter through administrative rule if those statutory amendments are
44 enacted. Chair Gaulty stated that he wanted to ensure that the Commission has a
45 clear policy on this matter before questions arise, rather than having to make ad hoc
46 decisions in response to requests for transcripts.

1
2 In addition to the House budget bill (**H.B. 1**), there is another bill that will fund cost
3 adjustments for staff salaries for legislative branch agencies. The Legislature will use
4 the percentage increases from collective bargaining to calculate salary adjustment
5 amounts for the legislative agencies, including the Commission. The Salary
6 Commission also will meet this spring to set salaries for department heads (which will
7 affect the Executive Director's salary).
8

9 Executive Director Gluck discussed and responded to the Commission's
10 questions regarding some of the other bills that relate to ethics, including **H.B.1**
11 (legislative branch budget; transmitted to the Governor for his signature), **H.B.348** (cost
12 adjustments for staff salaries), **H.B. 199** (exempts charter school employees from post-
13 employment laws; dead), **S.B. 55** (short form bill on ethics); **H.B. 361** (prohibits the
14 governor and county mayors from having other employment; still alive); **H.B. 391**
15 (creates a state-law version of the federal Hatch Act; still alive); **H.B. 615 / S.B. 340**
16 (putting a non-voting teacher on the Board of Education; still alive); **H.B. 1381** (creates
17 additional post-employment restrictions for some government officials; still alive); and a
18 group of bills creating various task forces that include language exempting those new
19 task force members from the requirements of HRS chapter 84.
20
21

22 **Agenda Item No. IV: *Akana v. Hawaii State Ethics Commission and Daniel Gluck,***
23 **Civil No. 18-1-1019 (JHA)**
24

25 Executive Director Gluck had no new information to report on this litigation.
26
27

28 **Agenda Item No. V: Administrative Rules**
29

30 Executive Director Gluck intended to provide the Commission with a red-lined
31 draft, showing the changes made since the last draft reviewed by the Commission.
32 However, the Commissioners did not receive the most recent red-lined version of the
33 draft rules in their meeting folder materials.
34

35 Commissioner Fong made and Vice Chair Tschumy seconded a motion to defer
36 this matter until the next meeting. The motion carried unanimously (Graulity, Tschumy,
37 DeGuzman, Wood, and Fong voting).
38
39

40 **Agenda Item No. VI: Evaluation of Executive Director Daniel Gluck**
41

42 Commissioner Wood agreed to send to the other Commissioners the
43 SurveyMonkey survey used last year to evaluate Executive Director Gluck; this avoids
44 the need for a Permitted Interaction Group ("PIG") and the delays incurred in using a
45 PIG.
46

1 Vice Chair Tschumy made and Commissioner DeGuzman seconded a motion to
2 use the SurveyMonkey survey, to be sent out by Commissioner Wood and completed
3 by the Commissioners, to evaluate Executive Director Gluck. The motion carried
4 unanimously (Graul, Tschumy, DeGuzman, Wood, and Fong voting).
5
6

7 **ADJOURNMENT OF SUNSHINE LAW MEETING**
8

9 At 10:48 a.m., Commissioner Fong made and Commissioner Wood seconded a
10 motion to adjourn the Sunshine Law meeting. The motion carried unanimously (Graul,
11 Tschumy, DeGuzman, Wood and Fong voting).
12

13 The meeting was adjourned at 10:48 a.m.
14

15
16 Minutes approved on: _____

SUNSHINE LAW MEETING
AGENDA ITEM II

EXECUTIVE DIRECTOR'S REPORT

Attachment 1: Executive Director's Report

Attachment 2: 2019 Guidance and Assignments Statistics / Website Traffic

SUNSHINE MEETING
AGENDA ITEM II
EXECUTIVE DIRECTOR'S REPORT
March 21, 2019

1. Education / Training Report

a. Recently held trainings/presentations:

General Ethics Training – Kauai
Friday, March 8, 2019
10:00 a.m. – 11:30 a.m.
Kauai Courthouse
Pu‘uhonua Kaulike Building
Multipurpose Room, First Floor
3970 Ka‘ana Street
Lihue, Hawaii
31 attendees

General Ethics Training – Hilo
Monday, March 18, 2019
10:00 a.m. – 11:30 a.m.
University of Hawaii – Hilo Campus
University Classroom Building 100
200 W. Kāwili Street
Hilo, Hawaii

DLNR-DOBOR Ethics Training – Hilo
Monday, March 18, 2019
12:30 p.m. – 2:30 p.m.
University of Hawaii – Hilo Campus
200 W. Kāwili Street
Hilo, Hawaii

General Ethics Training - Oahu
Tuesday, March 19, 2019
10:00 a.m. – 11:30 a.m.
Mission Memorial Auditorium
550 S. King Street
Honolulu, Hawaii

DLNR-DOBOR Ethics Training – Oahu
Tuesday, March 19, 2019
1:00 p.m. – 3:00 p.m.
Keehi Small Boat Harbor Conference Room
4 Sand Island Access Road
Honolulu, Hawaii

b. Upcoming trainings/presentations:

General Ethics Training – Kona
Monday, April 8, 2019
10:00 a.m. – 11:30 a.m.
Natural Energy Laboratory of Hawaii Authority (NELHA)
Hale Iako Training Classroom, Room #119
Kailua-Kona, Hawaii

DLNR-DOBOR Ethics Training – Kona
Monday, April 8, 2019
12:30 p.m. – 2:30 p.m.
Natural Energy Laboratory of Hawaii Authority (NELHA)
Hale Iako Training Classroom, Room #119
Kailua-Kona, Hawaii

General Ethics Training – Maui
Monday, May 3, 2019
10:00 a.m. – 11:30 a.m.
University of Hawaii Maui College
Ka'a'ike Building, Room 105BCD
310 W. Kaahumanu Avenue
Kahului, Hawaii

DLNR-DOBOR Ethics Training – Maui
Monday, May 3, 2019
1:00 p.m. – 3:00 p.m.
Location TBD

General Ethics Training – Kapolei
Friday, May 17, 2019
10:00 a.m. – 11:30 a.m.
Leeward Community College
ED 201, A/B
96-045 Ala Ike
Pearl City, Hawaii

2. Guidance and Assignment Statistics – 2019

Attachment 2: 2019 guidance and assignment statistics

3. Miscellaneous Office Projects / Updates

- a. Possible state-wide ethics conference
- b. Staff – hiring update

2019	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Year to date
Training statistics													
# of Trainings	7	1											8
# of People Trained	348	7											355
Attorney of the Day	119	84											203
New assignments													
Advisory Opinion	1	1											2
Complaint	5	8											13
Gifts/Invitations/Travel	14	16											30
Guidance	2	5											7
Judicial Selection Comm'n	2	1											3
Training Request	0	0											0
Record Request	2	3											5
Project/Other	1	7											8
Total	27	41	0	0	0	0	0	0	0	0	0	0	68
Closed Assignments													
Advisory Opinion	0	0											0
Complaint	3	5											8
Gifts/Invitations/Travel	9	28											37
Guidance	0	10											10
Judicial Selection Comm'n	0	10											10
Training Request	0	2											2
Record Request	2	3											5
Project/Other	0	6											6
Total	14	64	0	0	0	0	0	0	0	0	0	0	78

Dataset Views

Disclosures	113	105																	218
Lobbyist Registrations	531	436																	967
Organization Expenditures	203	119																	322
Lobbyist Expenditures	159	79																	238
Ethics Advice	94	92																	186
Total	1100	831	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1,931

SUNSHINE LAW MEETING
AGENDA ITEM III
2019 LEGISLATIVE SESSION

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM IV

AKANA V. HAWAII STATE ETHICS COMMISSION AND DANIEL GLUCK,
CIVIL NO. 18-1-1019-06 (JHA)

Discussion of case status.

The Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM V

AKANA V. HAWAII STATE ETHICS COMMISSION AND DANIEL GLUCK,
CIVIL NO. 19-1-0379-03 (JHA)

Discussion of case status.

The Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

Attachment 1: 2019-03-07 Notice of Appeal – Statement of the Case

Attachment 2: 2019-03-13 Motion to Stay and Declaration

BICKERTON LAW GROUP, LLLP
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Attorneys for Appellant

ROWENA AKANA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ROWENA AKANA,

Appellant,

vs.

THE HAWAI'I STATE ETHICS
COMMISSION and DANIEL M. GLUCK,
EXECUTIVE DIRECTOR, in his Official
Capacity,

Appellees.

Civil No. **19-1-0379-03**

Agency Case No. COMPL-C-15-00236

**STATEMENT OF THE CASE;
EXHIBITS "1" – "9"**

Judge: To Be Assigned

STATEMENT OF THE CASE

ROWENA AKANA ("Appellant" or "Ms. Akana"), by and through her undersigned counsel, BICKERTON LAW GROUP, LLLP, hereby respectfully files her Statement of the Case in the above-entitled action and appeal against the Hawai'i State Ethics Commission (the "Commission") and Daniel M. Gluck in his official capacity as the Executive Director of the Hawai'i State Ethics Commission ("Gluck" or "Executive Director Gluck") (together with the

Commission, “Appellees”), pursuant to Hawai‘i Rules of Civil Procedure, Rule 72(e), and avers and alleges for her appeal as follows:

THE PARTIES

1. Appellant is a resident and citizen of Honolulu, Hawai‘i.
2. Ms. Akana was an Office of Hawaiian Affairs Trustee-at-Large for twenty-eight (28) years, and was previously its Chairwoman from 1998 to 2000 and again from December 2016 to February 2017. Ms. Akana sat on OHA’s Board of Directors for much of the time she served an OHA Trustee. Ms. Akana’s tenure ended in November 2018.
3. The Office of Hawaiian Affairs (“OHA”), which is not a party hereto, was founded in 1978 and describes itself as a Hawai‘i “public agency with a high degree of autonomy... responsible for improving the well- being of Native Hawaiians”, as governed by its Board of Trustees.
4. During her tenure as an OHA Trustee, Ms. Akana was responsible for numerous OHA programs intended to benefit the people of Hawai‘i, such as: Quality Homes for the Pacific; The Hawaiian Registry Program; the Annual Commitment to Scholarships; the Native Hawaiian Revolving Loan Fund (for local start-ups); the Aha Opio Program (for high school leadership); Aha Kupuna (educational program for Native Hawaiian senior citizens); and numerous others. In addition, she served on a number of boards of national organizations that work with persons and groups in Hawai‘i to benefit Native Hawaiians and the citizens of Hawai‘i, such as serving on: the Governors’ Interstate Indian Council Board of Directors; and as the Pacific Representative for the American Indian Alaska Native Tourism Association, to name but two.

5. Throughout her tenure with OHA, Ms. Akana was also known as an activist for transparency and the provision of information to OHA beneficiaries – whose interests she is obligated to put first – and for public access to OHA’s decision-making process, decisions and records. She never hesitated to publicly criticize OHA and/or certain of its Trustees and Board Members for decisions that she believed in good faith were not in the best interests of OHA beneficiaries.

6. In doing so, she accumulated a fair number of political supporters, as well as opponents and critics.

7. Appellee the Hawai‘i State Ethics Commission (the “Commission”) is a legislative agency of the State of Hawai‘i created under and governed by Hawai‘i Administrative Rules (“HAR”), Title 21, put in effect to carry out the provisions of Hawai‘i Revised Statutes (“HRS”), Chapter 84 and holding the powers, duties and authority as set forth in Revised Ordinances of Honolulu (“ROH”), Chapter 3, Article 6, Section 3-6.3.

8. Appellee Daniel M. Gluck is the Executive Director of the Hawai‘i State Ethics Commission, per his appointment effective August 1, 2016, and is included herein in his official capacity.

JURISDICTION

9. This Court has jurisdiction over this appeal and possesses the power to affirm the final ruling or preliminary order or decision of the Commission or remand the case with instructions for further proceedings, or reverse or modify the decision and order, if the substantial rights of Appellant may have been prejudiced because of the administrative findings, conclusions, decisions, or orders, pursuant to HRS § 91-14 (Judicial Review of Contested Cases).

VENUE

10. Venue is proper in the First Circuit Court pursuant to HRS § 603-36(5), because Appellant is located in the First Circuit, Appellees are located in the First Circuit, all or most events underlying this dispute arose or occurred in the First Circuit, and most if not all relevant evidence and relevant witnesses are located in the First Circuit.

BACKGROUND FACTS

11. In May 2008, Executive Director Gluck and the Commission brought charges against Ms. Akana in a Commission complaint entitled *Hawaii State Ethics Commission vs. Rowena Akana*, bearing the matter number COMPL-C-15-00236 (hereinafter, the “Expenditures and Gifts Proceeding” or the “Proceeding”).

12. Ms. Akana answered the charges in the Expenditures and Gifts Proceeding and demanded a hearing on them on May 23, 2018.

13. On July 18, 2018, after answering the charges in the Expenditures and Gifts Proceeding, the Commission served on Ms. Akana a “Further Statements of Alleged Violations.”

14. The charges in the Expenditures and Gifts Proceeding, as stated in the Further Statements of Alleged Violations, pertain to (a) various expenditures made by Appellant from her OHA Trust Account going back a number of years, (b) receipt of legal services that were paid for by a third-party (Princess Abigail Kawananakoa) in a lawsuit vis-à-vis her fellow OHA Trustees on transparency issues and regarding the disclosure of information to OHA trust beneficiaries, and (c) late reporting to the Commission of her receipt of such legal services.

15. Ms. Akana answered the Further Statements of Charges in the Expenditures and Gifts Proceeding on August 2, 2018.

16. In the midst of the Expenditures of Gifts Proceeding, Ms. Akana brought a related civil action in Circuit Court against the Hawai'i State Ethics Commission and Executive Director Gluck, bearing Civil No. 18-1-1019-06 (hereinafter, the "2018 Civil Action"), filed June 27, 2018. A First Amended Complaint was thereafter filed on August 2, 2018.

17. A true and correct copy of the Complaint filed June 27, 2018, is attached hereto as **Exhibit 1**.

18. A true and correct copy of the First Amended Complaint filed August 2, 2018, is attached hereto as **Exhibit 2**.

19. The 2018 Civil Action is an equitable action arising out of the Hawai'i State Ethics Commission's investigation and pursuit of charges against Ms. Akana in the underlying Expenditures and Gifts Proceeding, claiming various actions of the Commission in bringing that action and in its prosecution of same are unconstitutional and without jurisdiction or authority, i.e., *ultra vires*.

20. More specifically, in the 2018 Civil Action, Ms. Akana asserted that the Commission lacked the authority and jurisdiction to bring its charges and make investigations against Ms. Akana in part because: (1) pursuant to HRS § 91-7, HAR § 21-5-2 must be struck down by the Court as having been promulgated in excess of the Commission's statutory authority set forth at HRS § 84-31 (and the Expenditures and Gifts Proceeding must therefore be set aside as well); (2) the Commission lacks the authority to regulate an OHA Trustee's discretionary exercise of power via (post-OHA review and approval) application of the Ethics Code in a manner that (a) conflicts with well-established rules of statutory construction, and (b) creates violations out of statutorily-mandated conduct set forth in HRS § 10-1, *et seq.*; (3) the Commission's proceeding singles out Ms. Akana and is an exercise of selective enforcement

based on improper motive, also in violation of the Hawai‘i Constitution; and (4) the threatened punishment violates the Excessive Fines clause of the Hawai‘i Constitution.

21. To date, the Circuit Court in the 2018 Civil Action bearing Civil No. 18-1-1019-06 has made no ruling on the jurisdictional and constitutional issues raised by Ms. Akana.

22. Pursuant to an *Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss First Amended Complaint or, in the Alternative, to Stay Proceedings Pending Resolution of Administrative Process, Filed August 10, 2018*, filed January 17, 2019, some of the claims in the 2018 Civil Action were dismissed on grounds of ripeness, pending the Ethics Commission’s issuance of its Findings of Fact and Conclusions of Law after the hearings in the Expenditures and Gifts Proceeding, and the remaining claims have been stayed.

23. The same jurisdictional and constitutional arguments made in the 2018 Civil Action were also made before the Commission in the Expenditures and Gifts Proceeding.

24. Thereafter, in response to Ms. Akana’s jurisdictional concerns, the Commission made a request through its Prehearing Conference Order, issued September 25, 2018, for legal briefing on Ms. Akana’s argument that (1) the Commission lacks jurisdiction to review and oversee the actions of OHA Trustees, (2) the Commission’s Expenditures and Gifts Proceeding violates Ms. Akana’s constitutional rights, and (3) whether the Commission has the authority to make such rulings.

25. Legal briefing ensued, and on October 16, 2018, the Commission issued its *Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent* (hereinafter, the “Preliminary Ruling”), which Appellant hereby appeals. A true and correct copy of the Preliminary Ruling is attached hereto as **Exhibit 3**.

26. In its Preliminary Ruling, the Commission first concluded that it could answer these questions itself, and then determined that it had jurisdiction to review Ms. Akana's actions as an OHA Trustee, including her actions relating to her Trustee Annual Allowance Fund, so long as its review is labeled as an ethics matter.

27. Following the Commission's issuance of the Preliminary Ruling, Ms. Akana instituted a separate action in the Circuit Court pursuant to HRS § 91-14 by filing a Notice of Appeal on October 17, 2018, in Civ. No. 18-1-1665 ("First Agency Appeal"). A true and correct copy of that Notice of Appeal is attached hereto as **Exhibit 4** (without its exhibits due to size).

28. For the sake of conservation of parties' and judicial resources, the First Agency Appeal was withdrawn via stipulation signed by the parties and the Court and filed on December 4, 2018. Pursuant to that stipulation, Ms. Akana was given leave to refile and appeal the Commission's Preliminary Ruling following the issuance of the Commission's Findings of Fact and Conclusions of Law. A true and correct copy of that stipulation is attached hereto as **Exhibit 5**.

29. Per the Notice of Hearing filed September 10, 2018, and the Preliminary Ruling, the Commission went forward on a contested formal hearing of its charges against Ms. Akana, which began on October 22, 2018.

30. Following a week-long hearing on the merits of the underlying charges, the Commission made a request for post-hearing submissions of proposed findings of facts and conclusions of law from the parties.

31. Pursuant to that request, Ms. Akana submitted *Respondent Rowena Akana's Post-Hearing Proposed Findings of Facts and Conclusions of Law* ("Respondent-Appellant's Proposed FOFCOL"), entered on the record below on December 14, 2018, and Daniel M. Gluck,

as Charge Counsel for the Hawai'i State Ethics Commission, submitted Complainant's Proposed Findings of Fact and Conclusions of Law ("Complainant-Appellee's Proposed FOFCOL"), entered on the record below on December 14, 2018. True and correct copies of Respondent-Appellant's Proposed FOFCOL and Complainant-Appellee's Proposed FOFCOL are attached hereto as **Exhibits 6** and **7** respectively.

32. Thereafter, the Commission issued its *Findings of Fact, Conclusions of Law, and Decision and Order* ("Final Ruling" or "Commission's FOFCOL") on February 5, 2019, which Appellant hereby appeals per this Action. A true and correct copy of the Commission's Final Ruling is attached hereto as **Exhibit 8**. The Final Ruling fully and finally resolved all issues before the Commission below.

33. In its Final Ruling, the Commission found that Ms. Akana committed four (4) violations of HRS § 84-11.5, Gifts Reporting law (Counts 1-4); two (2) violations of HRS § 84-11, Gifts law (Counts 5-6); and forty-one violations of HRS § 84-13, Fair Treatment law (Counts 8, 10, 12-36, 38-48, 49-51), for a total of forty-seven (47) violations of HRS chapter 84.

34. The Commission further determined that an administrative fine for said violations, with the exception of Count 48, would be appropriate, and issued an Order imposing an administrative fine in the total amount of \$23,106.53 against Ms. Akana.

35. The Commission further determined that sufficient cause exists for the issuance of a complaint by the Commission pursuant to HRS § 84-32(c) and a referral of the matter to the Attorney General. Accordingly, the Commission issued a *Complaint* on February 5, 2019, referring the underlying matter to the Attorney General. A true and correct copy of said Complaint is attached hereto as **Exhibit 9**.

POINTS OF ERROR

FIRST POINT OF ERROR – EXCESS OF JURISDICTION

36. The Commission lacks the authority to apply the Ethics Code in a manner that would in effect limit, regulate, or nullify an OHA Trustee's statutorily-mandated duties under HRS § 10-1, *et seq.*

37. The Office of Hawaiian Affairs was established in 1978 under article 12, section 5, of the Hawai'i State Constitution.

38. The OHA board of trustees has the duty and authority to manage and administer public trust funds for native Hawaiians. Const. Art. 12, § 6.

39. In accordance with the constitutional mandate, the Legislature enacted HRS § 10-1 *et seq.* setting forth the purpose, duties, and powers of the board and its members.

40. It is uncontested that the purpose and objective of OHA is the betterment of native Hawaiians. HRS §§ 10-1, 10-3. "A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the Legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians." HRS § 10-3(1).

41. The law provides, and the Legislature intended, that OHA Trustees have a special fiduciary duty to fairly and equitably administer the Native Hawaiian Trust Fund for its beneficiaries, the Hawaiian people. *See* HRS § 10-1, *et seq.*

42. In examining this fiduciary duty, the Supreme Court has stated, "because chapter 10 does not mandate how the OHA trustees should expend trust funds to better the conditions of native Hawaiians, **the trustees have broad discretion in making that determination... the OHA trustees' expenditures are to be reviewed for abuse of discretion.**" *Kealoha v.*

Machado, 131 Hawaii 62, 77–78, 315 P.3d 213, 228–29 (2013) (citations omitted) (emphasis added).

43. The Hawai‘i Supreme Court has already looked at this issue and has stated unequivocally that the Commission lacks jurisdiction to determine whether or not, in making any particular expenditure, an OHA Trustee breached this unique fiduciary duty. *See Kealoha*, 131 Hawaii at 77, 315 P.3d at 228 (“When a trustee has discretion with respect to the exercise of a power, **its exercise is subject to supervision by a court only to prevent abuse of discretion.**”) (emphasis added).

44. The Commission’s investigation and prosecution here, characterized as violations of the Ethics Code, is nothing more, however, than an (improper) action alleging multiple breaches by Ms. Akana of her fiduciary duties as a former OHA Trustee.

45. In further support, well-established rules of statutory construction under Hawai‘i law provide that (1) all statutes, including HRS § 10-1 *et seq.*, should be interpreted in a manner so as to give them effect; (2) when the application of two or more statutes pertains to the same subject matter, the statutes should be read in reference to one another insofar as possible; and (3) specific statutes are favored over general statutes.

First, legislative enactments are presumptively valid and “should be interpreted [in such a manner as] to give them effect.” *State v. Spencer*, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986) (citation omitted). Second, “[l]aws 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 in aid to explain what is doubtful in another.” HRS § 1–16 (1985); *Kam v. Noh*, 70 Haw. 321, 325, 770 P.2d 414, 417 (1989). Third, “where there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” *Mahiai v. Suwa*, 69 Haw. 349, 356–57, 742 P.2d 359, 366 (1987) (citations omitted).

Richardson v. City & Cty. of Honolulu, 76 Hawai‘i 46, 54–55, 868 P.2d 1193, 1201–02 (1994).

46. A cursory analysis of the conflict created by the Commission's sought-after application of the Ethics Code to Ms. Akana's constitutionally- and statutorily-mandated responsibilities reveals that: (1) the Legislature intended for HRS § 10-1 *et seq.* to have full force and effect, and the Legislature intended that the parameters of OHA Trustees' duties and responsibilities would be set by their fiduciary duties; (2) not even the Fair Treatment law, HRS § 84-13, or the Gifts law, HRS § 84-11, should be read to restrict, nullify, regulate, limit, or repeal the statutory framework of HRS § 10-1 *et seq.*; and (3) the statutory authority conferred on OHA and OHA Trustees via HRS § 10-1 *et seq.*, which prescribes specifically the duties, authorities, and restrictions related to OHA disbursements, must be favored over and as to the general and broad powers given the Commission on ethics matters in HRS § 84-13 or § 84-11.

47. It is illogical, inconsistent and a contradiction of age-old legal principles regarding how statutes are to be read and interpreted to permit the Commission to create violations out of conduct that was statutorily-mandated by the Legislature.

48. Subjecting Ms. Akana to multiple varying and conflicting standards violated Ms. Akana's constitutional and statutory rights.

SECOND POINT OF ERROR – FAILURE TO FOLLOW EXCLUSIVE REMEDY

49. "In matters of misapplication of funds and resources in breach of fiduciary duty, [OHA] board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private counsel." HRS § 10-16 (underlining added) (bracketing added for clarity).

50. Five years ago, in *Kealoha v. Machado*, the Hawai'i Supreme Court looked specifically at the question of whether and how an OHA trustee could be held liable for abuse or misuse of OHA trust funds:

First, a breach of the OHA trustees' duty to administer the public land trust solely in the interest of the beneficiaries occurs when the trustees' decision conflicts with the purpose of bettering the conditions of native Hawaiians or is made for the purpose of benefiting a non-beneficiary rather than the trust. Restatement (Third) of Trusts § 78 cmt. F (stating that a trustee may not enter into transactions "either for the purpose of benefiting a third person ... rather than the trust estate or for the purpose of advancing an objective other than the purposes of the trust"); Bogert § 543 ("[T]he trustee may not enter into a transaction ... in which his personal interest or the interest of a third party is or becomes adverse to the interest of the beneficiary."). Under this view, an expenditure that better the conditions of native Hawaiians may also simultaneously benefit the conditions of others.

Second, because chapter 10 does not mandate how the OHA trustees should expend trust funds to better the conditions of native Hawaiians, the trustees have broad discretion in making that determination. Restatement (Third) of Trusts § 87 cmt. A (stating that a trustee's "power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties"). **Thus, the OHA trustees' expenditures are to be reviewed for abuse of discretion, which occurs when a trustee "has acted unreasonably—that is, beyond the bounds of a reasonable judgment."** *Id.* § 87 cmt. C.

Kealoha v. Machado, 131 Hawaii 62, 77–78, 315 P.3d 213, 228–29 (2013) (emphasis added) (footnote omitted).

51. A breach of fiduciary duty claim brought in a Hawai'i court of law is the appropriate action for alleged misapplication of trust funds – this should not be by-passed by Executive Director Gluck and the Commission.

52. The Commission via its *ultra vires* investigation and prosecution of Ms. Akana, nevertheless, is attempting to short-circuit the constitutional and statutory mandates and the jurisdiction of the courts on issues of alleged misapplication of trust funds and breaches of her fiduciary duty.

THIRD POINT OF ERROR – FINDINGS IN EXCESS OF STATUTORY AUTHORITY AND MADE UPON AN UNLAWFUL PROCEDURE

53. The Expenditures and Gifts Proceeding was brought pursuant to HAR § 21-5-2, which permits the Commission to engage in preliminary investigation *prior to* initiating charges,

in excess of the authority granted the Commission by the Hawai'i Legislature via HRS § 84-31, which permits the Commission to engage in investigations *only after* bringing charges.

54. It is well established in Hawai'i that "an administrative agency can only wield powers expressly granted to it by statute." *Asato v. Procurement Policy Bd.*, 132 Hawaii 333, 346, 322 P.3d 228, 241 (2014) (quoting *Morgan v. Planning Dep't, Cty. of Kauai*, 104 Hawaii 173, 184, 86 P.3d 982, 993 (2004)).

55. If an agency acts beyond the scope of its authority, courts have the power to enjoin that action. *See Asato*, 132 Hawaii at 347, 322 P.3d at 242.

56. HRS §§ 84-31(a)(6) and 84-31(b) state, in relevant parts, "[The Commission] shall have jurisdiction for purposes of investigation... in all proceedings commenced... A proceeding shall be deemed commenced by the filing of a charge..." and "The commission may investigate, after compliance with this section [referring to the initiation of a proceeding via formal issuance of a charge], such charges...."

57. However, in stark excess of authority, the Commission decided to promulgate its own rules giving itself the power to conduct investigations before issuing charges:

(a) Upon the receipt of anonymous information or other information not under oath, or information obtained at the initiative of the commission, the executive director or delegate shall verify such facts as may be verified through public documents or the assistance of department heads, legislators, or other appointed or elected officials or employees, including the respondent. Investigation may not extend to interviews of other persons unless the commission, in its discretion, initiates an investigation to determine whether a charge should be issued.

(b) If after preliminary investigation at least three commissioners decide that a charge should be initiated, the charge will be issued in writing and signed by at least three commissioners.

HAR § 21-5-2.

58. The express statutory language limits the jurisdiction of the Commission for purposes of investigation to commenced proceedings.

59. Therefore, HAR § 21-5-2 must be struck down under HRS § 91-7(b) and the underlying proceedings brought by the Commission against Ms. Akana must be set aside.

FOURTH POINT OF ERROR – CONSTITUTIONAL VIOLATIONS AND ARBITRARY OR CAPRICIOUS ABUSE OF DISCRETION

60. The Expenditures and Gifts Proceeding violates Ms. Akana's equal protection rights because it singles her out, without any rational basis, for the alleged violations of the Ethics Code related to discretionary expenditures, in violation of article 1, section 5 of the Hawai'i Constitution. Const. Art. 1, § 5.

61. Use of Trustee allowance expenditures for social gatherings involving OHA members and staff is, and many of the other charges leveled by the Commission against Ms. Akana, were, at the relevant time of the expenditures, standard policy, practice, and procedure among all OHA Trustees, (with numerous witnesses having testified to the absence of express written guidelines and policies for such), and yet the Commission has singled out Ms. Akana, and only Ms. Akana to our knowledge, for alleged violations of the Ethics Code in this regard.

62. Appellees' charges in the Expenditures and Gifts Proceeding also violate Appellant's Due Process rights under the Hawai'i State Constitution subjecting Ms. Akana to contradictory dual system and an arbitrary, capricious and discriminatory exercise of Appellees' power and dissimilar treatment under the law, where such conditions have not previously been applied to other OHA Trustees and since there is no rational basis for singling out Ms. Akana and the selective enforcement that has occurred.

63. It is alleged that the Expenditures and Gifts Proceeding arose out and in connection with a prior complaint that was motivated by a group of OHA trustees and members

of the OHA Board of trustees who are politically opposed to Ms. Akana and who were able to persuade and influence the Commission to bring a retaliatory action against Ms. Akana.

64. Furthermore, the Commission's imposition of an administrative fine in the amount of \$23,106.53 against Ms. Akana violates the excessive fines clause of Article 1, Section 12 of the Hawai'i Constitution, given the underlying alleged violations.

FIFTH POINT OF ERROR – CLEARLY ERRONEOUS DECISION MAKING

65. The Final Ruling of February 5, 2019, is clearly erroneous in view of the reliable, probative, and substantial evidence, upon review of the whole record.

66. No evidence was introduced at the agency hearing to show that the payments for legal fees that Ms. Akana had accepted while involved in prior litigation in her individual and official OHA Trustee capacity were in any manner made under circumstances in which it could reasonably be inferred that the payments were intended to influence Ms. Akana in her official duties or that the payments were made as a reward for some official action taken or promised. Therefore, the Complainant-Appellee failed to carry its burden below on the charges relating to acceptance of gifts and gifts disclosure.

67. No evidence was introduced at the agency hearing to show that any expenditures made by Ms. Akana were not in line with her OHA mandate and/or standard OHA policy and procedure, and therefore no evidence was presented to show that Ms. Akana ever made any "unwarranted" expenditures. In fact, all evidence showed that every single discretionary expenditure made by Ms. Akana from the OHA Trustees' account was vetted and either approved or not disapproved, or was reimbursed by Ms. Akana following disapproval by OHA.

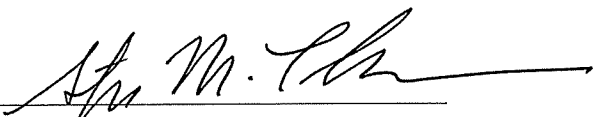
68. Regarding any so-called “intent” violations of OHA Trustee spending, no evidence was presented by any witness at OHA hearings to show that Ms. Akana had intent to violate either OHA mandates or Ethics regulations with regards to any expenditure made.

69. Furthermore, in its Hawaii Ethics Commission Advisory Opinion No. 2018-2 dated June 21, 2018, the Commission addressed the question of when the acceptance of legal services from another without payment (1) needed to be reported and (2) did or did not constitute an improper benefit or gift. On the second point, the Commission enumerated several factors for consideration, explaining how and when each would or would not constitute a violation. The uncontested evidence at the Hearings in the Expenditures and Gifts Proceedings went through each of these factors, and if applied as stated in Opinion No. 2018-2, weighed against a finding of improper acceptance. Nonetheless, the Commission ignored its own prior ruling, and, in MS. Akana’s case, reached a conclusion that was entirely inconsistent with Opinion No. 2018-2.

70. Accordingly, Appellees Final Ruling on the merits is clearly contrary to the reliable, probative, and substantial evidence on the record below as a whole. The Final Ruling must therefore be reversed by this Court, which is the only venue in which questions and issues pertaining to an OHA Trustee’s discretionary spending may be addressed.

WHEREFORE, Appellant ROWENA AKANA hereby respectfully prays for relief from this Court in the form of a reversal of the Commission’s Preliminary Ruling issued October 16, 2018, and the Final Ruling issued on February 5, 2019.

DATED: Honolulu, Hawai'i, March 7, 2019.



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FIRST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ROWENA AKANA,

Appellant,

vs.

THE HAWAII STATE ETHICS
COMMISSION and DANIEL M. GLUCK,
EXECUTIVE DIRECTOR, in his Official
Capacity,

Appellees.

Civil No. 19-1-0379-03 JHA

Agency Case No. COMPL-C-15-00236

**APPELLANT'S MOTION TO STAY
ENFORCEMENT OF AGENCY ORDER;
MEMORANDUM OF LAW;
DECLARATION OF JEREMY K.
O'STEEN; EXHIBITS "1" - "3";
DECLARATION OF ROWENA AKANA;
NOTICE OF HEARING; CERTIFICATE
OF SERVICE**

Judge: Hon. James H. Ashford

Hearing Date: **APR - 2 2019**

Hearing Time: **10:00 am**

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STATE OF HAWAII
STATE ETHICS COMMISSION


APPELLANT'S MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER

Appellant ROWENA AKANA ("Appellant" or "Ms. Akana"), by and through her undersigned counsel, BICKERTON LAW GROUP LLLP, hereby respectfully moves this Honorable Court pursuant to section 91-14(c), Hawai'i Revised Statutes, to issue an Order staying enforcement of the appealed agency decisions. The requested Motion is intended to preserve the *status quo* until oral arguments may be heard in this matter.

This Motion is made pursuant to Rule 7 of the Hawai'i Rules of Civil Procedure, Rule 7.2(f) of the Rules of the Circuit Courts of the State of Hawai'i, and section 91-14(c) of Hawai'i Revised Statutes.

An *ex parte motion* to shorten time on hearing of this matter is being submitted contemporaneously with this Motion.

DATED: Honolulu, Hawai'i, March 11, 2019.


JAMES J. BICKERTON
STEPHEN M. TANNENBAUM
BRIDGET G. MORGAN
JEREMY K. O'STEEN

Attorneys for Appellant
ROWENA AKANA

TABLE OF CONTENTS

I.	FACTUAL AND PROCEDURAL HISTORY	1
II.	RELEVANT RULE.....	5
A.	Appellant is Likely to Prevail on the Merits of her Appeal.....	6
a.	The Commission Lacks the Authority to Use the Ethics Code to Regulate an OHA Trustee’s Discretionary Exercise of Power Afforded to Him or Her by the Legislature	6
i.	The interpretation and application of the Ethics Code by the Commission conflict with the objectives of OHAs statutory mandate.....	6
ii.	The Commission’s improper attempt to proscribe OHA conduct via ultra vires rule-making is a violation of due process	8
iii.	HRS § 10-16 provides an exclusive remedy for misapplication of OHA trust funds.....	9
iv.	Ms. Akana’s acceptance of legal fees is a valid exercise of sanctioned discretionary power.....	10
v.	HRS § 84-13 does not provid authority for the commission to regulate discretrinary use of OHA trust funds	11
vi.	The Commission’s proceeding should be reversed and barred by the doctrine of standing and the statute of limitations for breach of fiduciary duty.....	12
b.	Charges Brought Pursuant to HAR § 21-5-2 Exceed the Express Statutory Authority Granted the Commission by HRS § 84-31 and Must be Struck Down	13
c.	Additional Constitutional Concerns.....	15
i.	The Commission’s proceeding violates equal protection and other Constitutional rights of Ms. Akana.....	15
ii.	The Commission’s Final Ruling violates the prohibition against the Hawaii Constitution’s excessive fines.....	15
d.	The Commission’s Final Ruling is Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole Record.....	16
B.	Irreparable Damage Will Result to Ms. Akana.....	19

C. No Irreparable Damage Will Result to the Public; Rather, the Public Interest Will be Served by a Stay Order.....	20
--	----

III. CONCLUSION.....	20
----------------------	----

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Asato v. Procurement Policy Bd.</i> , 132 Hawaii 333, 322 P.3d 228 (2014)	13
<i>Austin v. United States</i> , 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)	15
<i>Doe v. State Ethics Comm'n</i> , 53 Haw. 373, 494 P.2d 559 (Haw. 1972)	14
<i>Kealoha v. Dep't of Pub. Safety of State of HI</i> , No. CIV.05 00009 ACK KSC, 2007 WL 1303021 (D. Haw. May 2, 2007)	15
<i>Kealoha v. Machado</i> , 131 Hawaii 62, 315 P.3d 213 (2013)	<i>passim</i>
<i>Richardson v. City & Cty. of Honolulu</i> , 76 Hawai'i 46, 868 P.2d 1193 (1994)	7
<i>State v. Solomon</i> , 107 Hawaii 117, 111 P.3d 12 (2005)	16
<i>United States v. Bajakajian</i> , 84 F.3d 334 (9th Cir. 1996), <i>aff'd</i> , 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)	15, 16
Statutes and Rules	
HRCP Rule 7	1
RCCH Rule 7.2(f)	1
HRS § 10-1, <i>et seq.</i>	<i>passim</i>
HRS § 10-3	2, 12
HRS § 10-3(1)	6
HRS § 10-16	9, 13
HAR § 21-5-2	3, 13, 14
HRS § 657-7	13
HRS Ch. 84	5

HRS § 84-1, <i>et seq.</i>	6, 10
HRS § 84-11	4, 8
HRS § 84-11.5	4
HRS § 84-13	<i>passim</i>
HRS § 84-31	3, 13, 14
HRS § 84-32	5
HRS Ch. 91	8
HRS § 91-1	8
HRS § 91-3	8
HRS § 91-7	3, 13, 14
HRS § 91-14(c)	<i>passim</i>

Secondary Sources

Restatement (Third) of Trusts § 2 (June 2018 Update)	12
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

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Capacity,

Appellees.

Civil No. Civil No. 19-1-0379-03 JHA

Agency Case No. COMPL-C-15-00236

MEMORANDUM OF LAW

MEMORANDUM OF LAW

Appellant ROWENA AKANA (“Appellant” or “Ms. Akana”), by and through her undersigned counsel, BICKERTON LAW GROUP LLLP, hereby respectfully moves this Honorable Court pursuant to Section 91-14(c) of the Hawai‘i Revised Statutes (“HRS”), to issue an Order staying enforcement of the appealed agency decisions. The requested Motion is intended to preserve the status quo until oral arguments may be heard in this matter.

This Motion is made pursuant to Rule 7 of the Hawai‘i Rules of Civil Procedure (“HRCPP”), Rule 7.2(f) of the Rules of the Circuit Courts of the State of Hawai‘i (“RCCH”), and HRS § 91-14(c).

I. FACTUAL AND PROCEDURAL HISTORY

Ms. Akana was an Office of Hawaiian Affairs (“OHA”) Trustee-at-Large for twenty-eight (28) years, and was previously its Chairwoman from 1998 to 2000 and again from December 2016 to February 2017. Ms. Akana sat on OHA’s Board of Directors for much of the time she has served as OHA Trustee. The purposes of OHA includes, and an OHA Trustee’s responsibility lies with, “[t]he betterment of conditions of native Hawaiians,” and “[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services.”

Hawai'i Revised Statutes ("HRS") § 10-3. Ms. Akana's tenure as an OHA Trustee ended in November 2018.

In April 2018, Executive Director Gluck and the Commission brought charges against Ms. Akana arising out of her tenure and activities as an OHA Trustee. A Commission complaint entitled *Hawaii State Ethics Commission vs. Rowena Akana*, bearing the matter number COMPL-C-15-00236 (hereinafter "Expenditures and Gifts Proceeding"), was issued on April 19, 2018. *See Exhibit 1* to the accompanying Declaration of Jeremy K. O'Steen ("O'Steen Decl."). Ms. Akana answered the charges in the Expenditures and Gifts Proceeding and demanded a contested case hearing on them on May 23, 2018.

On July 18, 2018, after answering the charges in the Expenditures and Gifts Proceeding, the Commission served on Ms. Akana a "Further Statements of Alleged Violations." *See Exhibit 2* to the O'Steen Decl. The charges in the Expenditures and Gift Proceeding pertain to various expenditures made by Appellant during her tenure as an OHA Trustee from her OHA Trust Account going back a number of years and to the payment of legal fees to Ms. Akana's lawyers to pay for the fees and costs incurred in a lawsuit vis-à-vis her fellow OHA Trustees on transparency issues and access to information for OHA beneficiaries. Ms. Akana answered the Further Statements of Charges in the Expenditures and Gifts Proceeding on August 2, 2018.

In the midst of the Expenditures of Gifts Proceeding, Ms. Akana brought a related civil action in Circuit Court against the Hawai'i State Ethics Commission and its Executive Director, Daniel Gluck, bearing Civil No. 18-1-1019-06 (hereinafter "2018 Civil Action"), on June 27, 2018. *See Exhibit 1* to Appellant's Statement of the Case.¹ A First Amended Complaint was thereafter filed on August 2, 2018. *See Exhibit 2* to Appellant's Statement of the Case. The 2018 Civil Action

¹ For the sake of efficiency, Appellant hereby incorporates the exhibits from Appellant's Notice of Appeal and Statement of the Case as if fully incorporated herein. Appellant will supplement this Motion with these exhibits separately should the Court require.

is an ongoing equitable action arising out of the unconstitutional and *ultra vires* actions of the Hawai'i State Ethics Commission in investigating and pursuing charges against Ms. Akana in the underlying Expenditures and Gifts Proceeding. In the 2018 Civil Action, Ms. Akana asserts that the Commission lacks the authority and jurisdiction to bring its charges and make investigation against Ms. Akana in part because: (1) pursuant to HRS § 91-7, HAR § 21-5-2 must be struck down by the Court as having been promulgated in excess of the Commission's statutory authority set forth at HRS § 84-31 (and the Expenditures and Gifts Proceeding must therefore be set aside as well); (2) the Commission lacks the authority to regulate Ms. Akana's discretionary exercise of power via applying the Ethics Code in a manner that (a) conflicts with well-established rules of statutory construction and (b) creates violations out of the statutorily-mandated conduct set forth at HRS § 10-1, *et seq.*; (3) the Commission's proceeding singles out Ms. Akana based on improper motive in violation of the Hawai'i Constitution; and (4) the then-threatened punishment violates the Excessive Fines clause of the Hawai'i Constitution. To date, the Circuit Court in the 2018 Civil Action bearing Civil No. 18-1-1019-06 has made no ruling on the jurisdictional issues raised by Ms. Akana. However, pursuant to an *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss First Amended Complaint or, in the Alternative, to Stay Proceedings Pending Resolution of Administrative Process, Filed August 10, 2018*, filed January 17, 2019, some of the claims in the 2018 Civil Action were dismissed on grounds of ripeness and the remaining claims have been stayed.

The same jurisdiction arguments made in the 2018 Civil Action were also made before the Commission in the Expenditures and Gifts Proceeding. In response to Ms. Akana's jurisdiction concerns, the Commission made a request via its Prehearing Conference Order, issued September 25, 2018, for legal briefing on Ms. Akana's arguments that (1) the Commission lacks jurisdiction to review the actions of OHA Trustees and (2) the Commission's Expenditures and Gifts Proceeding violates Ms. Akana's constitutional rights. Legal briefing ensued, and on October 16, 2018, the

Commission issued its *Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent* (hereinafter “Preliminary Ruling”), which Ms. Akana is presently appealing. See Exhibit A to Appellant’s Notice of Appeal and Exhibit 3 to Appellant’s Statement of the Case.

In its Preliminary Ruling, the Commission concluded that it had jurisdiction to review Ms. Akana’s actions as an OHA Trustee, including her actions relating to her Trustee Annual Allowance Fund, so long as its review is labeled as an ethics matter. Per the Notice of Hearing filed September 10, 2018, see **Exhibit 3** to the O’Steen Decl., and the Preliminary Ruling, see Exhibit 3 to Appellant’s Statement of the Case, the Commission decided to move forward on a contested formal hearing of its charges against Ms. Akana, which began on October 22, 2018.

Following a week-long hearing on the merits of the underlying charges, the Commission made a request for post-hearing submissions of proposed findings of facts and conclusions of law. Pursuant to that request, Ms. Akana submitted *Respondent Rowena Akana’s Post-Hearing Proposed Findings of Facts and Conclusions of Law* (“Respondent-Appellant’s Proposed FOFCOL”), entered on the record below on December 14, 2018, and Daniel M. Gluck, as Charge Counsel for the Hawai’i State Ethics Commission, submitted Complainant’s Proposed Findings of Fact and Conclusions of Law (“Complainant-Appellee’s Proposed FOFCOL”), entered on the record below on December 14, 2018. True and correct copies of Respondent-Appellant’s Proposed FOFCOL and Complainant-Appellee’s Proposed FOFCOL are attached to Appellant’s Statement of the Case as Exhibits 6 and 7 respectively.

Thereafter, the Commission issued its *Findings of Fact, Conclusions of Law, and Decision and Order* (“Final Ruling” or “Commission’s FOFCOL”) on February 5, 2019, which Appellant is presently appealing. See Exhibit B to Appellant’s Notice of Appeal and Exhibit 8 to Appellant’s Statement of the Case. The Final Ruling fully and finally resolved all issues before the Commission below. In its Final Ruling, the Commission found that Ms. Akana committed four (4) violations of HRS § 84-

11.5, Gifts Reporting law (Counts 1-4); two (2) violations of HRS § 84-11, Gifts law (Counts 5-6); and forty-one violations of HRS § 84-13, Fair Treatment law (Counts 8, 10, 12-36, 38-48, 49-51), for a total of forty-seven (47) violations of HRS chapter 84. The Commission further determined that an administrative fine for said violations, with the exception of Count 48, would be appropriate, and issued an Order imposing an administrative fine in the total amount of \$23,106.53 against Ms. Akana. The Commission further determined that sufficient cause exists for the issuance of a complaint by the Commission pursuant to HRS § 84-32(c) and a referral of the matter to the Attorney General. Accordingly, the Commission issued a *Complaint* on February 5, 2019, referring the underlying matter to the Attorney General. A true and correct copy of said Complaint is attached to Appellant's Statement of the Case as Exhibit 9.

II. RELEVANT RULE

Pursuant to Section 91-14(c) of Hawai'i Revised Statutes, Appellant respectfully requests this Honorable Court issue an Order staying enforcement the Commission's final decisions pending this case. Specifically, Appellant requests the Court stay enforcement of (1) the administrative fine in the total amount of \$23,106.53 imposed by the Commission against Ms. Akana, which was directed by the Commission to be paid to the State of Hawai'i within sixty (60) days from the date of the Final Ruling, *see* Exhibit 8 to Appellant's Statement of the Case at 84, and (2) the Complaint filed by the Commission on February 5, 2019, referring the underlying matter further to the Attorney general for recovery of \$21,513.15 in legal fees that had been paid in connection with prior litigation involving Ms. Akana, *see* Exhibit 9 to Appellant's Statement of the Case.

A stay of enforcement of the agency decision is appropriate where the following criteria have been met:

1. There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
2. Irreparable damage to the subject person will result if a stay is not ordered;

3. No irreparable damage to the public will result from the stay order; and
4. Public interest will be served by the stay order.

HRS § 91-14(c). For the following reasons, the Court should issue a stay.

A. Appellant is Likely to Prevail on the Merits of her Appeal.

- a. The Commission Lacks the Authority to Use the Ethics Code to Regulate an OHA Trustee's Discretionary Exercise of Power Afforded to Him or Her by the Legislature .*
 - i. The interpretation and application of the Ethics Code by the Commission conflict with the objectives of OHA's statutory mandate.*

The Commission has exceeded its authority and jurisdiction by proceeding against Ms. Akana in the underlying Expenditures and Gifts Proceeding and applying the Hawai'i Ethics Code, HRS § 84-1, *et seq.* (the "Ethics Code"), in a manner that in conflicts with, limits, regulates, and nullifies an OHA Trustee's statutorily-mandated duties under HRS § 10-1, *et seq.*

The Office of Hawaiian Affairs was established in 1978 under article 12, section 5, of the Hawai'i State Constitution. The OHA board of trustees has the duty and authority to manage and administer public trust funds for native Hawaiians. Const. Art. 12, § 6. In accordance with the constitutional mandate, the Legislature enacted HRS § 10-1 *et seq.* setting forth the purpose, duties, and powers of the board and its members. It is uncontested that OHA Trustees have a constitutional and statutory mandate to administer and spend trust fund monies for the betterment of native Hawaiians: "A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the Legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians." HRS § 10-3(1). Therefore, the law provides, and the Legislature intended, that during Ms. Akana's tenure as an OHA Trustee, she had a special fiduciary duty to fairly and equitably administer the Native Hawaiian Trust Fund for its beneficiaries, the Hawaiian people. *See* HRS § 10-1, *et seq.*

In examining this fiduciary duty, the Supreme Court has stated, “because chapter 10 does not mandate how the OHA trustees should expend trust funds to better the conditions of native Hawaiians, **the trustees have broad discretion in making that determination... the OHA trustees' expenditures are to be reviewed for abuse of discretion.**” *Kealoha v. Machado*, 131 Hawaii 62, 77–78, 315 P.3d 213, 228–29 (2013) (citations omitted) (emphasis added). The Hawai‘i Supreme Court has stated unequivocally that the Commission lacks jurisdiction to determine whether or not, in making any specific expenditure, an OHA Trustee breached this unique fiduciary duty. *See Kealoha*, 131 Hawaii at 77, 315 P.3d at 228 (“When a trustee has discretion with respect to the exercise of a power, **its exercise is subject to supervision by a court only to prevent abuse of discretion.**”) (emphasis added). The Commission’s investigation and prosecution in the underlying matter, characterized as violations of the Ethics Code, is nothing more, however, than an improper action alleging multiple breaches by Ms. Akana of her fiduciary duties.

Absurdly conflicting and prejudicial consequences would result if the Commission were allowed to proscribe an OHA Trustee’s duly-authorized conduct. Well-established rules of statutory construction under Hawai‘i law provide that (1) all statutes, including HRS § 10-1 *et seq.*, should be interpreted in a manner so as to give them effect; (2) when the application of two or more statutes pertains to the same subject matter, the statutes should be read in reference to one another insofar as possible; and (3) specific statutes are favored over general statutes.

First, legislative enactments are presumptively valid and “should be interpreted [in such a manner as] to give them effect.” *State v. Spencer*, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986) (citation omitted). Second, “[l]aws 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 in aid to explain what is doubtful in another.” HRS § 1–16 (1985); *Kam v. Nob*, 70 Haw. 321, 325, 770 P.2d 414, 417 (1989). Third, “where there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” *Mahiai v. Suwa*, 69 Haw. 349, 356–57, 742 P.2d 359, 366 (1987) (citations omitted).

Richardson v. City & Cty. of Honolulu, 76 Hawai'i 46, 54–55, 868 P.2d 1193, 1201–02 (1994). A cursory analysis of the conflict created by the Commission's application of the Ethics Code to Ms. Akana's constitutionally- and statutorily-mandated responsibilities reveals that: (1) the Legislature intended for HRS § 10-1 *et seq.* to have full force and effect, and the Legislature intended that the parameters of OHA Trustees' duties and responsibilities would be set by their fiduciary duties; (2) not even the Fair Treatment law, HRS § 84-13, or the Gifts law, HRS § 84-11, should be read to restrict, nullify, regulate, limit, or repeal the statutory framework of HRS § 10-1 *et seq.*; and (3) the statutory authority conferred on OHA and OHA Trustees via HRS § 10-1 *et seq.*, which prescribes specifically the duties, authorities, and restrictions related to OHA disbursements, must be favored over and as to the general and broad powers given the Commission on ethics matters in HRS § 84-13 or § 84-11.

Appellees have conceded that they lack the jurisdiction and authority to determine breach of fiduciary duty, but unless there is a breach of such a duty there can be no violation of the Ethics Code – and that is because the Legislature did not intend to create violations out of statutorily-mandated conduct.

ii. *The Commission's improper attempt to proscribe OHA conduct via ultra vires rule-making is a violation of due process.*

Insofar as the Commission is attempting to proscribe or limit certain types of OHA Trustee expenditures, or set parameters on the discretionary spending of the OHA Board and its Trustees, the Commission is also in violation of the Hawai'i Administrative Procedure Act ("HAPA"), as enacted in HRS Chapter 91, and its conduct should be enjoined. HRS § 91-1 defines "Rule" for purposes of rule-making to mean a "statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." (emphasis added). Any such rule is subject to strict due process requirements prior to adoption and effect, which have not occurred here. *See* HRS § 91-3. Given (1) that the statutory framework of HRS § 10-1 *et seq.* already provides an exclusive and

comprehensive standard for reviewing OHA Trustees' discretionary expenditures, and (2) in light of the courts' exclusive jurisdiction for reviewing a trustees' expenditures, see *Kealoha*, 131 Hawaii at 77, 315 P.3d at 228 ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."), any attempt by the Commission to interfere with the mandates of the OHA constitutes *ultra vires* rule-making.

iii. HRS § 10-16 provides an exclusive remedy for misapplication of OHA trust funds.

Five years ago, in *Kealoha v. Machado*, the Hawai'i Supreme Court looked specifically at the question of whether and how an OHA trustee could be held liable for abuse or misuse of OHA trust funds:

First, a breach of the OHA trustees' duty to administer the public land trust solely in the interest of the beneficiaries occurs when the trustees' decision conflicts with the purpose of bettering the conditions of native Hawaiians or is made for the purpose of benefiting a non-beneficiary rather than the trust. Restatement (Third) of Trusts § 78 cmt. f (stating that a trustee may not enter into transactions "either for the purpose of benefiting a third person ... rather than the trust estate or for the purpose of advancing an objective other than the purposes of the trust"); Bogert § 543 ("[T]he trustee may not enter into a transaction ... in which his personal interest or the interest of a third party is or becomes adverse to the interest of the beneficiary."). Under this view, an expenditure that better the conditions of native Hawaiians may also simultaneously benefit the conditions of others.

Second, because chapter 10 does not mandate how the OHA trustees should expend trust funds to better the conditions of native Hawaiians, the trustees have broad discretion in making that determination. Restatement (Third) of Trusts § 87 cmt. a (stating that a trustee's "power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties"). **Thus, the OHA trustees' expenditures are to be reviewed for abuse of discretion, which occurs when a trustee "has acted unreasonably—that is, beyond the bounds of a reasonable judgment."** *Id.* § 87 cmt. c.

Kealoha v. Machado, 131 Hawaii 62, 77–78, 315 P.3d 213, 228–29 (2013) (emphasis added) (footnote omitted). Therefore, a breach of fiduciary duty claim brought in a Hawai'i court of law is the only appropriate action for alleged misapplication of trust funds – this cannot be bypassed by Executive

Director Gluck and the Commission.² The Commission via its *ultra vires* investigation and prosecution of Ms. Akana, nevertheless, is a blatant attempt to short-circuit the constitutional and statutory mandates and the jurisdiction of the courts on issues of alleged misapplication of trust funds and breaches of her fiduciary duty.

The Hawai'i courts alone have the authority to intervene and supervise the discretionary expenditures of OHA trust funds.

“When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.” Restatement (Third) of Trusts § 87. **Where discretionary power is given to the trustee, “the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.”** *Dowsett v. Hawaiian Trust Co.*, 47 Haw. 577, 581, 393 P.2d 89, 93 (1964) (quoting Restatement (Second) of Trusts § 187 cmt. e (1959)); Restatement (Third) of Trusts § 87 cmt. b (“A court will not interfere with a trustee’s exercise of a discretionary power (or decision not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee’s fiduciary duties[.]”).

Kealoha, 131 Hawaii at 77, 315 P.3d at 228 (emphasis added). If the courts have been mandated as the forum for the review of these issues and are not permitted to interfere with OHA trust fund expenditures absent a clear finding of a breach of fiduciary duty due to dishonesty, an improper motive, or an altogether absence of reasonable judgment, then certainly the Commission may not (i) proceed with its investigation and charges of alleged improper trustee expenditures in violation of Supreme Court law on the proper forum for such challenges and (ii) therein, attempt to apply a level of scienter less for the charges than that which is required in the courts.

iv. Ms. Akana’s acceptance of legal fees is a valid exercise of sanctioned discretionary power.

² For the sake of argument, even if one were to assume that the potential discipline by the Commission via enforcement of the Ethics Code provides a type of relief and remedy that is both necessary and above and beyond what has been afforded via the exclusive statutory remedy found in HRS § 10-16, the only appropriate resolution would be to enjoin the Commission’s proceedings until after a breach of fiduciary duty has been established in the courts.

Nothing within the HRS § 84-1 *et seq.* statutory authority authorizes the Commission to make a determination regarding whether the legal fees provided to Ms. Akana for representation of her in her official capacity constituted a benefit primarily to Ms. Akana or, on the other hand, if they were in the first instance a benefit to the OHA beneficiaries. The legal fees (paid directly to Ms. Akana's legal counsel) were for a legal action in which Ms. Akana was seeking to enable the beneficiaries of the trust (the Hawaiian people) to have greater amounts of and access to information and transparency vis-à-vis actions and decisions that the OHA Board was taking and making. Even assuming for argument's sake that the Commission had the authority to make factual determinations regarding to whom the benefits of those legal fees accrued, which it does not, there is nothing in the Commission's statutory authority or administrative rules that would provide a proper standard for its doing so, and therefore the court is in the best position to make that determination. Reasonable minds could readily construe that benefits of the legal fees to Ms. Akana for legal representation in her official capacity in fact inured to the State and/or advanced the betterment of native Hawaiians by fighting for their rights to have better information regarding precisely what their trust funds were being used for.

To the extent the Commission seeks to regulate how Ms. Akana and OHA may carry out sanctioned duties in accordance with the constitutional and statutory mandates given to OHA, the underlying proceedings are illegal. As with the Commission's attempt to regulate an OHA Trustee's discretionary spending, the attempt to regulate how Ms. Akana conducts herself for the betterment of OHA beneficiaries is (1) in the first instance, a matter of supervision by the OHA board, and (2) in the second instance, a matter of supervision by the courts. *Kealoha v. Machado*, 131 Hawaii 62, 77, 315 P.3d 213, 228 (2013) ("When a trustee has discretion with respect to the exercise of a power, **its exercise is subject to supervision by a court** only to prevent abuse of discretion.") (emphasis added).

v. HRS § 84-13 does not provide authority for the commission to regulate discretionary use of OHA trust funds.

As set forth above, it is this tribunal, not the Commission, which has authority to review the use of discretionary OHA trust funds. In further support of this proposition, the Court need look no further than the special status of the trust funds. First, the funds originate via a unique history entwined with the federal government:

[T]he public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as “available lands” by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

HRS § 10-3. Unlike the normal budget set aside to an agency using state-sanctioned tax dollars, the Native Hawaiian Trust Fund is comprised of monies derived from public land in connection with Admissions Act of March 18, 1959. Pub.L. No. 86-3, § 5, 73 Stat. 4.

Second, under traditional principles of trust law, the setting aside of trust funds creates a “fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons.” Restatement (Third) of Trusts § 2 (June 2018 Update). As a trustee, Ms. Akana owed a duty and authority to manage and administer public trust funds for certain beneficiaries, i.e., native Hawaiians – not the State, not the Commission, not the public at large. The Fair Treatment Law, at HRS § 84-13, prohibits state employees from using state resources for private business purposes; but there is nothing in § 84-13 which prohibits an OHA Trustee from operating at the direction of her constitutional and statutory mandates to use Native Hawaiian Trust Fund resources for OHA beneficiaries. The Commission’s attempt to set

boundaries to an OHA trustee's discretionary and mandate is an *ultra vires* action, and the Final Ruling must be reversed.

vi. The Commission's proceeding should be reversed and barred by the doctrine of standing and the statute of limitations for breach of fiduciary duty.

To the extent that any of the Commission's breach of fiduciary duty claims masked as Ethics Code charges should have been barred by the doctrine of standing or statute of limitations, the Court should reverse the Final Ruling with respect to those charges. With regards to standing, to show injury-in-fact and to comport with the requirements of HRS § 10-16, either a trust beneficiary or the attorney general would be proper parties to challenge misapplication of funds – not Executive Director Gluck or the Commission.

With regards to the statute of limitations, which is two years as set forth under HRS § 657-7, the litigation of many if not most of charges, brought April 19, 2018, would be rightly barred. For example, Count 49 asserts a \$50.00 donation to the Hawaiian Humane Society in February 2014, and Counts 46 and 47 assert donations made to the Hawaii County Democrats and Democratic National Committee in February 2014. Rather than employ the exclusive remedy expressly set forth under HRS § 10-16 for breach of fiduciary duty, the Commission is attempting to bypass issues of standing and statute of limitations by contesting misapplication of trust funds as Ethics Code violations. The Commission's charges are nothing more than an improper attempt to substitute its own judgment for that of the Court, and the Final Ruling must therefore be reversed.

b. Charges Brought Pursuant to HAR § 21-5-2 Exceed the Express Statutory Authority Granted the Commission by HRS § 84-31 and Must be Struck Down.

The underlying Expenditures and Gifts Proceeding was brought pursuant to HAR § 21-5-2, which permits the Commission to engage in preliminary investigation *prior to* initiating charges, in excess of the authority granted the Commission by the Hawai'i Legislature via HRS § 84-31, which permits the Commission to engage in investigations *only after* bringing charges. Under Hawai'i law,

“the court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency.” HRS § 91-7(b). It is well established in Hawai‘i that “an administrative agency can only wield powers expressly granted to it by statute.” *Asato v. Procurement Policy Bd.*, 132 Hawaii 333, 346, 322 P.3d 228, 241 (2014) (quoting *Morgan v. Planning Dep’t, Cty. of Kauai*, 104 Hawaii 173, 184, 86 P.3d 982, 993 (2004)). If an agency acts beyond the scope of its authority, courts have the power to enjoin that action. *See Asato*, 132 Hawaii at 347, 322 P.3d at 242. Moreover, an action under HRS § 91-7 “may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.” HRS § 91-7(a).

The express statutory authority given to the Commission provides that the Commission may only investigate a matter *after* the issuance of written charges:

Charges concerning the violation of this chapter shall be in writing, signed by the person making the charge under oath, except that any charge initiated by the commission shall be signed by three or more members of the commission. The commission shall notify in writing every person against whom a charge is received and afford the person an opportunity to explain the conduct alleged to be in violation of the chapter. **The commission may investigate, after compliance with this section, such charges** and render an informal advisory opinion to the alleged violator. **The commission shall investigate all charges** on a confidential basis, having available all the powers herein provided, and proceedings at this stage shall not be public.

HRS § 84-31(b) (emphasis added). However, in stark excess of authority, the Commission decided to promulgate its own rules giving itself the power to conduct investigations before issuing charges:

(a) Upon the receipt of anonymous information or other information not under oath, or information obtained at the initiative of the commission, **the executive director or delegate shall verify such facts** as may be verified through public documents or the assistance of department heads, legislators, or other appointed or elected officials or employees, including the respondent. **Investigation may not extend to interviews of other persons unless the commission, in its discretion, initiates an investigation to determine whether a charge should be issued.**

(b) If **after preliminary investigation** at least three commissioners decide that a charge should be initiated, the charge will be issued in writing and signed by at least three commissioners.

HAR § 21-5-2. Under the Commission's *ultra vires* rules, the Commission is making unlimited use of discretionary investigatory powers without ever having to first file charges. This is precisely the type of "[t]he commission's almost unlimited power to accuse, prosecute, and judge" that the Hawai'i Supreme Court was concerned about in *Doe. Doe v. State Ethics Comm'n*, 53 Haw. 373, 374, 494 P.2d 559, 560 (Haw. 1972). The Final Ruling must therefore be reversed.

c. Additional Constitutional Concerns

i. The Commission's proceeding violates equal protection and other Constitutional rights of Ms. Akana.

The underlying Expenditures and Gifts Proceeding is illegal and must be reversed because it singles out Ms. Akana, without any rational basis, for the alleged violations of the Ethics Code related to discretionary expenditures, in violation of article 1, section 5 of the Hawai'i Constitution. Const. Art. 1, § 5. Use of Trustee allowance expenditures for social gatherings involving OHA members and staff is and was at the relevant time of the expenditures standard policy, practice, and procedure among all OHA Trustees, and yet the Commission has singled out Ms. Akana, and only Ms. Akana to our knowledge, for alleged violations of the Ethics Code in this regard. It is alleged that the underlying proceeding arose out and in connection with a prior complaint that was motivated by a group of OHA trustees and members of the OHA Board of trustees who are politically opposed to Ms. Akana and who were able to persuade and influence the Commission to bring a retaliatory action against Ms. Akana.

ii. The Commission's Final Ruling violates the prohibition against the Hawaii Constitution's excessive fines.

The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609, 113 S. Ct. 2801, 2805, 125 L. Ed. 2d 488 (1993) (citing *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 2915, 106 L. Ed. 2d 219 (1989)). Article 1, Section 12 of

the Hawai'i Constitution contains a nearly identical "cruel and unusual punishments" provision that was modeled after the Eighth Amendment provision. Hawai'i courts have held that when a plaintiff asserts both a federal and state constitutional claim and the two clauses are virtually identical, federal law will be followed. *Kealoha v. Dep't of Pub. Safety of State of HI*, No. CIV.05 00009 ACK KSC, 2007 WL 1303021, at *6 (D. Haw. May 2, 2007) (citing *Wilder v. Tanouye*, 7 Haw.App. 247, 254, 753 P.2d 816, 822 (Haw.App.1988)). The central issue in an excessiveness inquiry is proportionality, of which the nature of the offense and the danger the offender poses to society are the key factors. See *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998); *State v. Solomon*, 107 Hawaii 117, 132, 111 P.3d 12, 27 (2005).

Here, the administrative fine in the total amount of \$23,106.53 imposed by the Commission against Ms. Akana is excessive considering that the violations found by the Commission involved expenditures for menial food expenses paid by Ms. Akana for work-related functions that Ms. Akana either received approval on via the OHA Board or reimbursed following a denial from the OHA Board.

Regarding the belated reporting of "gifts" of legal fees, the offense if at all is purely a technical violation. In at least once case, the Ninth Circuit Court of Appeals reasoned that any amount of forfeiture of currency would be an unconstitutionally excessive fine where the offense consisted of a simple failure to report the transportation of lawfully possessed currency, because the crime is withholding information, not possession or transportation of the money. *United States v. Bajakajian*, 84 F.3d 334, 337 (9th Cir. 1996), *aff'd*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Although forfeiture of legal fees is not at issue here, the belated reporting of information based on good faith reliance on legal advice presents the weakest level of offense if any at all. Moreover, here, it is argued that the information that was "withheld" was not one that was required to be reported in the first place, because the legal fees in issue actually inured to the benefit of the

State and OHA beneficiaries. Accordingly, the referral of this matter to the Attorney General for an administrative fine of \$21,513.15 is clearly excessive.

d. The Commission's Final Ruling is Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole Record.

No evidence was introduced at the agency hearing to show that the payments for legal fees that Ms. Akana had accepted while involved in prior litigation in her individual and official OHA Trustee capacity were in any manner made under circumstances in which it could reasonably be inferred that the payments were intended to influence Ms. Akana in her official duties or that the payments were made as a reward for some official action taken or promised. Therefore, the Complainant-Appellee failed to carry its burden below on the charges relating to acceptance of gifts and gifts disclosure. No evidence was introduced at the agency hearing to show that any expenditures made by Ms. Akana were not in line with her OHA mandate and/or standard OHA policy and procedure, and therefore no evidence was presented to show that Ms. Akana ever made any "unwarranted" expenditures. In fact, all evidence showed that every single discretionary expenditure made by Ms. Akana from the OHA Trustees' account was vetted and either approved or not disapproved, or was reimbursed by Ms. Akana following disapproval by OHA. Regarding any so-called "intent" violations of OHA Trustee spending, no evidence was presented by any witness at OHA hearings to show that Ms. Akana had intent to violate either OHA mandates or Ethics regulations with regards to any expenditure made.

Furthermore, in its Hawaii Ethics Commission Advisory Opinion No. 2018-2 dated June 21, 2018, the Commission addressed the question of when the acceptance of legal services from another without payment (1) needed to be reported and (2) did or did not constitute an improper benefit or gift. On the second point, the Commission enumerated several factors for consideration, explaining how and when each would weigh towards or against the finding of a violation. The uncontested evidence at the Hearings in the Expenditures and Gifts Proceedings went through each of these

factors, and if applied as stated in Opinion No. 2018-2, weighed *against* a finding of improper acceptance of legal services. Nonetheless, the Commission ignored its own prior ruling, and, in Ms. Akana's case, reached a conclusion that was entirely inconsistent with Opinion No. 2018-2. Accordingly, Appellees' Final Ruling on the merits is clearly contrary to the reliable, probative, and substantial evidence on the record below as a whole, and, therefore, was arbitrary and capricious. The Final Ruling must therefore be reversed by this Court.

B. Irreparable Damage Will Result to Ms. Akana.

Immediate and irreparable injury has already resulted and will continue to result should a stay not be granted. The Final Order requires that Ms. Akana make payment for the \$23,106.53 in administrative fines within 60 days. As a result of the underlying proceedings, Ms. Akana's reputation was irreparably harmed; her recent campaign suffered and she was not re-elected as an OHA Trustee-at-Large. Not only is Ms. Akana recently out of a job because of the underlying unlawful proceedings, but now Ms. Akana is being forced to pay a substantial fine. Throughout these proceedings, Ms. Akana has diligently worked to have her day in Court and has been denied over and over, forced to suffer through illegal, time-consuming, resource-sucking proceedings that have stripped her of her ability to work for the OHA beneficiaries, which she has spent the majority of her career doing. Ms. Akana's request is that the status quo simply be preserved until after oral arguments and a decision on this matter.

C. No Irreparable Damage Will Result to the Public; Rather, the Public Interest Will be Served by a Stay Order.

There is no possibility that staying the enforcement of the Commission's administrative fine will irreparably damage the Public, as in the event this Court determines to uphold the Commission's ruling, Ms. Akana would then be forced to pay the fine as originally ordered by the Commission. Particularly given the streamlined procedures involved in an agency appeal, the passage of minimal time considering a \$23,106.53 administrative fine will have no effect whatsoever

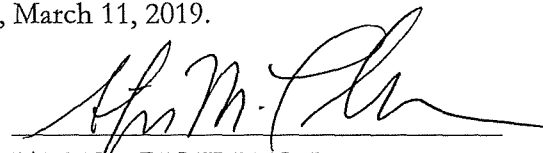
on the Public. Similarly, staying the Commission's referral of the matter to the Attorney General will, at most, cause a minimal delay of further litigation which could potentially result in a further fine.

More importantly, public interest will be served by an Order staying enforcement of the Final Ruling. It is important that due process safeguards be maintained given that an agency such as the Hawai'i State Ethics Commission, which has no claim to specialization in highly legal jurisdiction and constitutional issues, made the subject Final Ruling and issued a substantial administrative fine. The public interest will be served by safeguarding Ms. Akana's due process interests and allowing the Court to act as a check on the Commission's ruling.

III. CONCLUSION

Based on the forgoing, and weighing the considerations set forth under HRS § 91-14(c), with particular emphasis on the Appellant's likelihood of success on her appeal, Appellant respectfully requests that the Court GRANT the *Appellant's Motion to Stay Enforcement of Agency Order* and stay enforcement of the Commission's Final Ruling pending full review of this agency appeal by the Court.

DATED: Honolulu, Hawai'i, March 11, 2019.



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ROWENA AKANA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ROWENA AKANA,

Appellant,

vs.

THE HAWAII STATE ETHICS
COMMISSION and DANIEL M. GLUCK,
EXECUTIVE DIRECTOR, in his Official
Capacity,

Appellees.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

**DECLARATION OF JEREMY K.
O'STEEN; EXHIBITS "1" - "3"**

DECLARATION OF JEREMY K. O'STEEN

I, Jeremy K. O'Steen, hereby declare as follows:

1. I am an attorney with Bickerton Law Group, LLP, and legal counsel for Appellant in the above-entitled action. I make this declaration in support of *Appellant's Motion to Stay Enforcement of Agency Order*. Except as otherwise stated, I have personal knowledge of the matters set forth herein and can and will testify thereto if called upon to do so.

2. The Hawai'i State Ethics Commission initiated a proceeding entitled *Hawaii State Ethics Commission vs. Rowena Akana* ("2018 Ethics Proceeding"), pursuant to Hawai'i Revised Statutes ("HRS") §§ 84-31(a) and 84-31(b), and Hawai'i Administrative Rules ("HAR") § 21-5-2, via Charge No. COMPL-C-15-00236, dated April 19, 2018. A true and correct copy of the Charge document is attached hereto as **Exhibit 1**.

3. The Hawai'i State Ethics Commission issued its Further Statement of Alleged Violation, dated July 19, 2018, following issuance of Charge No. COMPL-C-15-00236. A true and correct copy of the Further Statement of Alleged Violation is attached hereto as **Exhibit 2**.

4. On September 10, 2018, the Commission issued its Notice of Hearing, which sets forth that a formal contested case hearing on the Further Statement of Alleged Violation will be held before the Commission on October 22, 2018, beginning at 9:00 a.m., and continuing, if necessary, through Friday, October 26, 2018, and/or on subsequent days as ordered or directed by the Commission. A true and correct copy of the Notice of Hearing is attached hereto as **Exhibit 3**.

5. Ms. Akana brought a related civil action in Circuit Court against the Hawai'i State Ethics Commission and Executive Director Gluck, bearing Civil No. 18-1-1019-06 (hereinafter "2018 Civil Action"), filed June 27, 2018. A true and correct copy of the Complaint is attached the Appellant's Statement of the Case as Exhibit 1.

6. A First Amended Complaint was thereafter filed in the 2018 Civil Action on August 2, 2018. A true and correct copy of the Amended Complaint is attached to Appellant's Statement of the Case as Exhibit 2.

7. On October 16, 2018, the Commission issued its Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent (hereinafter, the "Preliminary Ruling"), which Ms. Akana presently appeals. A true and correct copy of this Order is attached to Appellant's Notice of Appeal as Exhibit A and to Appellant's Statement of the Case as Exhibit 3.

8. Following a week-long hearing on the merits of the underlying charges, the Commission made a request for post-hearing submissions of proposed findings of facts and conclusions of law. Pursuant to that request, Ms. Akana submitted *Respondent Rowena Akana's Post-Hearing Proposed Findings of Facts and Conclusions of Law* ("Respondent-Appellant's Proposed FOFCOL"), entered on the record below on December 14, 2018. A true and correct copy of Respondent-Appellant's Proposed FOFCOL is attached to Appellant's Statement of the Case as Exhibit 6.

9. Daniel M. Gluck, as Charge Counsel for the Hawai'i State Ethics Commission, submitted Complainant's Proposed Findings of Fact and Conclusions of Law ("Complainant-Appellee's Proposed FOFCOL"), entered on the record below on December 14, 2018. A true and correct copy of Complainant-Appellee's Proposed FOFCOL is attached to Appellant's Statement of the Case as Exhibit 7.

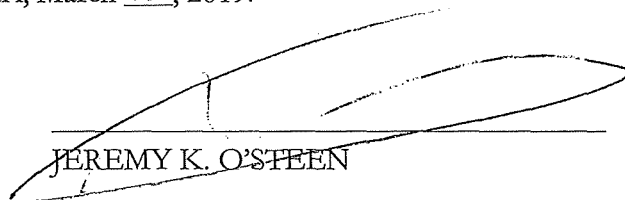
10. The Commission issued its *Findings of Fact, Conclusions of Law, and Decision and Order* ("Final Ruling" or "Commission's FOFCOL") on February 5, 2019, which Appellant presently appeals. A true and correct copy of the Commission's FOFCOL is attached as Exhibit B to Appellant's Notice of Appeal and as Exhibit 8 to Appellant's Statement of the Case.

11. The Commission determined that sufficient cause exists for the issuance of a complaint by the Commission pursuant to HRS § 84-32(c) and a referral of the matter to the Attorney General. Accordingly, the Commission issued a *Complaint* on February 5, 2019, referring the underlying matter to the Attorney General. A true and correct copy of said Complaint is attached to Appellant's Statement of the Case as Exhibit 9.

12. All exhibits included in Appellant's Notice of Appeal and Statement of the Case are hereby incorporated as if fully set forth herein by reference. Appellant will supplement her Motion with all exhibits separately should the Court require.

I, Jeremy K. O'Steen, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, March 11, 2019.


JEREMY K. O'STEEN

SUNSHINE LAW MEETING
AGENDA ITEM VI

ADMINISTRATIVE RULES

Review of proposed edits made after consultation with the Department of the Attorney
General

Attachment 1: Revised proposed amendments to *Hawaii Administrative Rules*,
Title, 21, Chapters 1-10

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

AMENDMENT AND COMPILATION OF CHAPTER 21-1
HAWAII ADMINISTRATIVE RULES

MONTH, DAY, 201~~9~~⁸

SUMMARY

1. §§21-1-1 to 21-1-6, Hawaii Administrative Rules, are amended
2. §21-1-7, Hawaii Administrative Rules, is repealed.
3. §§21-1-8 to 21-1-12, Hawaii Administrative Rules, are amended.
4. A new §21-1-13, Hawaii Administrative Rules, is added.
5. Chapter 1 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 1

GENERAL PROVISIONS

Chapter 21-1, Hawaii Administrative Rules, entitled “General Provisions”, is amended and compiled to read as follows:

21-1-1	Purpose
21-1-2	Definitions
21-1-3	Authentication of commission action
21-1-4	Disqualification of commissioners; bias or prejudice
21-1-5	Consolidations
21-1-6	Right to appear
21-1-7	Repealed
21-1-8	Confidential records
21-1-9	Adjudicatory functions
21-1-10	Chairperson and vice-chairperson
21-1-11	Staff
21-1-12	Operations
21-1-13	Guidance and information

Historical Note: This chapter is based substantially upon rules 1, 2, 6, and 9 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-1-1 Purpose. ~~[This chapter is]~~ (a) Chapters 1 through 10 are intended to ~~[carry out]~~ **implement** and administer the provisions of chapter 84, HRS, relating to standards of conduct for state legislators and employees, and chapter 97, HRS, relating to lobbyists ~~[and to provide for the efficient administration thereof]~~.

(b) General principles. The following general principles apply to every legislator and employee and may form the basis for the standards contained in these rules. The prohibitions set forth in these chapters are not intended to create a comprehensive list of unlawful conduct. Where a situation is not covered by the standards set forth in chapters 84 or 97, HRS, or these rules, legislators and employees shall apply the principles set forth in this section in determining whether their conduct is proper.

- (1) Public service is a public trust, requiring legislators and employees to place loyalty to the Constitution, laws, and ethical principles above private gain.
- (2) To preserve the public's confidence in the integrity of state government, legislators and employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.
- (3) Legislators and employees shall not advance their financial interests at the expense of the conscientious performance of duty and shall not use public office for private gain.

(c) Any agency may adopt or implement stricter ethical standards of conduct than those set forth in chapters 84 or 97, HRS, or these rules. [Eff. July 13, 1981; am and comp] (Auth: Haw. Const. art. XIV; HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: Haw. Const. art. XIV; HRS §§84-1, 84-31, 84-37, 97-6)

§21-1-2 Definitions. As used in title 21, chapters 1 through 10[6], unless the context clearly requires otherwise:

“Administrative action” has the same meaning as in section 97-1, HRS;

“Advisory opinion” means formal written guidance ~~[an opinion]~~ rendered by the commission pursuant to a request by any individual ~~[by a legislator, employee, or former legislator or employee]~~ as to whether the facts and circumstances of ~~[a]~~ that individual's particular case violate or will violate any provision of chapter 84, chapter 97, section 11-8, or section 11-316, HRS ~~[the standards of conduct]~~;

“Agency” has the same meaning as “state agency” in section 84-3, HRS;

“Answer” means the written response by a respondent to a charge [filed with the commission by a person disputing the charge];

“Charge” means a document signed under oath before a notary, [notarized letter] or a document signed by three or more commissioners, alleging basic facts constituting a violation of one or more provisions of chapters 84 or 97, HRS;

“Commission” means the state ethics commission of the State of Hawaii;

“Complainant” means a person who has ~~lodged a complaint~~ provided unsworn information of an alleged violation of chapter 84 or 97, HRS, or filed a charge alleging a violation of chapter 84 or 97, HRS [charge alleging that an employee or legislator has violated chapter 84, HRS]. ~~If a complainant files a charge, the [The] complainant shall be [is]~~ a party of record];

[“Complaint” means the statement of facts of a violation issued to the legislature or to the governor by the commission after due hearing and determination;]

“Contested case” or “contested hearing” means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for a hearing consistent with chapter 91, HRS;

[“Decision” means the written conclusions of the commission, rendered after a contested hearing on the charge;]

“Declaratory order” means a written decision issued after a petition by any interested person as to the applicability of any statutory provision over which the commission has jurisdiction or of any rule or order of the commission;

[“Deleted opinion or decision” means a summary of a decision, advisory opinion, or informal advisory opinion from which facts disclosing the identity of persons have been omitted;]

[“Disclosure period” means the period from January 1 of the preceding calendar year to the time of filing the disclosure by the person required to file;]

“Dependent child” means any person who is or could be claimed as a dependent for federal or state income tax purposes, or any child under 19 years old related to the filer for whom the filer is or could be legally obligated to provide financial support;

“Employee” has the same meaning as in section 84-3, HRS;

“Executive director” means the chief staff member or delegate of the commission;

“Fiscal officer” means, for the purposes of section 84-17(c)(2), HRS, an employee who exercises significant authority over purchasing or fiscal matters or both, including any person with delegated authority to enter into and administer contracts and make written determinations with respect thereto. An employee who takes ministerial action will not be considered a fiscal officer and will not be required to file a disclosure of financial interests pursuant to section 84-17, HRS;

“Legislative action” has the same meaning as in section 97-1, HRS;

“Lobbying” has the same meaning as in section 97-1, HRS, and includes direct lobbying and grassroots lobbying as defined in section 21-10-1, but excludes purely administrative tasks such as making copies and scheduling meetings;

“Lobbyist” means any individual as defined by section 97-1, HRS, and includes all agents acting on behalf of the lobbyist;

“Participate” means, for the purpose of sections 84-14, 84-15, and 84-18, HRS, to take any action, other than an action that is purely ministerial, in one’s official capacity as an employee or legislator;

“Presiding officer” means the chairperson of the commission, or another commissioner or hearing officer as selected by the commission to conduct a contested case hearing.

["Formal advisory opinion" means the same as advisory opinion;]

“Purchasing agent” [and “fiscal officer”] means the same as fiscal officer[; for the purposes of §84-17(c)(2), HRS, an employee who exercises significant authority over purchasing or fiscal matters or both. An employee who takes ministerial action will not be considered a purchasing agent or fiscal officer and will not be required to file a disclosure of financial interests pursuant to §84-17, HRS];

“Redacted” or “redaction” means the omission or deletion of facts to prevent disclosing the identity of persons; and

“Respondent” means the person who is a subject of a charge, [allegedly violating chapter 84, HRS;]

["Ruling" means a summary advisory opinion which may be followed by a full advisory opinion within the original thirty-day period, rendered due to the requestor's need for an immediate advisory opinion; and]

["Solely advisory" means a board or commission that can take no significant action to influence the administration of state programs or the exercise of state powers. The description of a board or commission as being advisory does not mean that the board or commission will be considered to be solely advisory.]

[Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-3, 84-14, 84-15, 84-17, 84-18, 84-31, 84-32, 84-35, 91-1, 97-6)

§21-1-3 Authentication of commission action. All decisions^[7] rendered after a contested case, declaratory orders, informal advisory opinions, and ~~[formal]~~ advisory opinions of the commission shall be signed by three or more members of the commission. Commissioners may authorize commission staff to affix their signatures electronically. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 92-15, 97-6)

§21-1-4 Disqualification of commissioners; bias or prejudice. Any party to a matter before the commission ~~[hearing]~~ may make and file an affidavit or declaration that one or more of the commissioners before whom the matter is pending ~~[hearing is being held]~~ has a personal bias or prejudice. The commissioner against whom the affidavit or declaration is filed may answer the affidavit or declaration or may recuse from the matter ~~[file a disqualifying certificate with the commission]~~. If the commissioner chooses to answer the affidavit or declaration, the remaining commissioners shall decide whether ~~[or not]~~ that commissioner should be disqualified from proceeding therein. Every affidavit or declaration shall state the facts and reasons for the belief that bias or prejudice exists and shall be filed as soon as practicable, but no later than ~~[at least]~~ ten days before any contested case ~~[the]~~ hearing, or good cause shall be shown for the failure to do so. At any time, [C] commissioners may disqualify themselves by ~~[filing with the executive director a certificate]~~, or by informing the other commissioners and/or the executive director, that they deem themselves unable for any reason to participate with absolute impartiality in the pending matter ~~[hearing]~~. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-1-5 Consolidations. The commission, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties^[7] or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-1-6 Right to appear. (a) Any person, or the person's authorized representative, having business with the commission may appear before it.

(b) Any person who acts in a manner that prevents the orderly and peaceful conduct of business may be removed upon ~~unless the commission determines by~~ a vote of three or more members of the commission ~~[that the person or the person's representative is acting in a manner which prevents the orderly and peaceful conduct of business]~~. The right to appear before the commission may be reinstated upon the commission's acceptance of a written statement that the person will abide by the commission's rules and will not disrupt the orderly and peaceful conduct of its proceedings.

~~[(b)](c)~~ To ensure the reasonable and orderly administration of oral testimony during a commission meeting, the commission may place reasonable time limits for members of the public to present oral testimony. ~~[Charges initiated by the commission shall be prosecuted by the executive director or delegate. When serving as the prosecutor, the associate director shall prosecute without the supervision of the executive director. When the complainant is not the commission, the complainant may request that the executive director or delegate represent the complainant in the matter if the commission joins as co-complainant. This request shall be made in writing within twenty days following personal service of the charge and further statement of alleged violation to the respondent.]~~ [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-1-7 Repealed. ~~[Rules of evidence. The commission shall not be bound by the strict rules of evidence. Any oral or documentary evidence which is relevant and material to the charge may be admitted. Effect shall be given to the rules of privilege recognized by law.]~~ [Eff. July 13, 1981; R] (Auth: HRS §§84-31, 91-10) (Imp: HRS §§84-31, 91-10)

§21-1-8 Confidential records. ~~[Disclosures of financial interests which are made confidential by §84-17, HRS, and other matters]~~ Records deemed confidential by law [statute] shall not be ~~[released or inspected]~~ made public except with the written authorization of the person involved or as otherwise provided by law. ~~[Disclosures of financial interests made available for public inspection by §84-17, HRS, are available pursuant to §21-3-2.]~~ [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31, 97-6(a)(5)) (Imp: HRS §§84-17, 84-31, 97-6)

§21-1-9 Adjudicatory functions. Pursuant to section 92-6, HRS, the exercise by the commission of its adjudicatory functions is not a meeting within the meaning of section 92-2, HRS, and these rules. ~~[Availability of commission documents.~~

~~(a) The public may obtain information on matters relating to chapter 84, HRS, by inquiring during regular business hours at the offices of the commission or by submitting a written request to the commission. A member of the public wishing to obtain information about the contents of a disclosure of financial interests filed with the commission shall follow the procedure outlined in §21-3-2.~~

~~(b) The rules of the commission are available for public inspection during regular business hours at the commission offices or the office of the lieutenant governor, state capitol, Honolulu, Hawaii.~~

~~(c) The minutes of commission meetings shall be deleted to prevent disclosure of the identity of persons involved in confidential matters under chapter 84, HRS, and shall be available for public inspection at the commission offices during regular business hours.~~

~~(d) Deleted advisory opinions and decisions of the commission shall be available for public inspection at the commission offices during regular business hours.~~

~~(e) Copies of public records will be furnished to any person upon request and upon payment of a fee set in accordance with chapter 92, HRS.] [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 92-6) (Imp: HRS §§92-2, 92-6)~~

§21-1-10 Chairperson and vice-chairperson. (a) A chairperson shall be elected ~~[by secret ballot vote]~~ by a majority of all the members to which the commission is entitled, who shall serve for a term of one year or until a successor is elected, with such term to commence on January 1 of each year.

(b) A vice-chairperson, who shall call and chair meetings in the incapacity or absence of the chairperson, shall be elected ~~[by secret ballot vote]~~ by a majority of all the members to which the commission is entitled, and shall serve for a term of one year or until a successor is elected, with such term to commence on January 1 of each year. [Eff. July 13, 1981; am and comp] (Auth: HRS §84-31(a)(5)) (Imp: HRS §84-21)

§21-1-11 Staff. (a) The executive director shall have charge of the commission's official records and shall be responsible for the maintenance and custody of the files and records of the commission, including the papers, transcripts of testimony and exhibits filed in proceedings, the minutes of all actions taken by the commission, and all its rulings, advisory opinions, decisions, rules, and approved forms. The executive director ~~[or delegate]~~ shall receive all documents required to be filed with the commission and shall promptly stamp the time and date upon documents [papers] filed with the commission, provided that the time and date may be recorded electronically for documents submitted via any electronic filing system. The executive director is responsible for the administration of the office.

(b) The associate director assists the executive director in administrative matters. The associate director shall conduct investigations and prosecute cases as delegated by the executive director. In cases where the executive director serves as counsel to the commission or is recused, then the associate director or the associate director's delegate shall conduct or prosecute the case without supervision by the executive director.

(c) The commission may delegate to the executive director any duties as appropriate to conduct its operations. The executive director may delegate to commission staff any duties set forth herein. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-1-12 Operations. (a) The offices of the commission are at 1001 Bishop Street, Suite 970,~~[in the Kamamalu Building, 250 South King Street],~~ Honolulu, Hawaii, or such other address where the commission may be located from time to time. All communications shall be addressed to the ~~[state ethics]~~ commission at its offices, via electronic mail or other electronic means designated by the commission or its staff, or otherwise as directed ~~[unless otherwise specifically directed].~~

(b) The offices of the commission shall be open from 7:45 a.m. to 4:30 p.m. Monday through Friday, except for state holidays, unless otherwise directed by the commission or the executive director.

(c) The commission meets and exercises its powers in any part of the State of Hawaii. Meetings may be called by the chairperson or by two or more commissioners upon notice to the staff and other commissioners, consistent with chapter 92, HRS. ~~[Except when considering matters made confidential by chapter 84, HRS, or matters considered in executive session, meetings are open to the public.]~~ Meetings are open to the public except when matters under consideration are considered in executive session, are made confidential by chapters 84 or 97,

HRS, or these rules, ~~or~~ otherwise made confidential by law, ~~are~~ considered in executive session. [Eff. July 13, 1981; am and comp]
(Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-1-13 Guidance and information. The commission may develop and publish general guidance and information about chapters 84 and 97, HRS, for the purpose of educating the public, legislators, employees, lobbyists and organizations that employ lobbyists regarding ethics and lobbying laws. General guidance issued for educational purposes shall not have the force and effect of law and shall not be dispositive in any particular matter. [Eff.] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: Preamble, HRS chapter 84; HRS §§84-31(a)(7), 84-42, 84-43)

END OF CHAPTER 1

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

AMENDMENT AND COMPILATION OF CHAPTER 21-2
HAWAII ADMINISTRATIVE RULES

MONTH, DAY, 201~~9~~⁸

SUMMARY

1. §21-2-1, Hawaii Administrative Rules, is amended.
2. §§21-2-3 to 21-2-6, Hawaii Administrative Rules, are amended.
3. Chapter 2 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 2

~~[STATE ETHICS COMMISSION]~~ FILING OF DOCUMENTS, SERVICE, WITNESSES, AND SUBPOENAS

Chapter 21-2, Hawaii Administrative Rules, renamed “Filing of Documents, Service, Witnesses, and Subpoenas”, is amended and compiled to read as follows:

- | | |
|--------|--|
| 21-2-1 | Filing of documents |
| 21-2-2 | Computation of time |
| 21-2-3 | Continuances or extensions of time |
| 21-2-4 | Service of process |
| 21-2-5 | Subpoenas |
| 21-2-6 | Witnesses and fees |
| 21-2-7 | Retention of documents by the commission |

Historical Note: This chapter is based substantially upon rule 2 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-2-1 Filing of Documents. (a) All disclosures, charges, requests for opinions, pleadings, submittals, reports, petitions, briefs, memoranda, and other ~~[papers required to be]~~ documents [filed with] for the commission’s consideration [in any proceeding] shall be filed with the executive director. ~~[Such papers]~~ Documents may be ~~[sent by mail to the post office box of the commission or mailed or]~~ delivered via electronic mail or in [paper-hard](#) copy ~~[or hand-carried]~~ to

the commission offices in Honolulu within the time limit, if any, for such filing unless the commission requires that documents be submitted electronically. The date on which the documents [papers] are actually received by the commission shall be deemed to be the date of filing, except as otherwise provided by law.

(b) All documents [papers] filed or lodged with the commission shall be plainly legible.

(c) All documents [papers] shall be signed [~~in ink~~] by the person submitting [signing] the same or the person's duly authorized agent or attorney. The commission may establish an electronic filing system that allows for digital signature of documents. The signature of the person signing the document constitutes a certification that the person has read the document[;], and that, to the best of the person's knowledge, information, and belief, every statement contained in the instrument is true, not [~~and no such statements are~~] misleading[;], and [~~that it is~~] not interposed for delay.

(d) [~~Only an original of all papers shall be filed with the commission, except that an original and six copies of all~~] The commission may require that ~~paper-hard~~ copies of pleadings and memoranda submitted for hearing purposes [~~shall~~] be filed with the commission.

(e) The initial document filed by any person in any proceeding shall state on the first page thereof the name, mailing address, electronic mail address, and telephone number of the person or persons who may be served with any documents filed in the proceeding. [Eff. July 13, 1981; am and comp

] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-2-2 Computation of time. In computing any period of time prescribed or allowed either by these rules or by order of the commission, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday or legal holiday in the State of Hawaii, in which event the period runs until the next day which is neither a Saturday, Sunday nor a holiday. [Eff. July 13, 1981; comp

] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6(a))

§21-2-3 Continuances or extensions of time. [~~With the exception of the requirements of §84-17, HRS, and Chapter 3, whenever~~] Whenever a person or agency has a right or is required to take action within the period prescribed or allowed by these rules, or by order of the commission, the person or agency may

apply to the executive director or [a member of] the commission for an extension not to exceed fifteen days. Additional extensions or extensions exceeding fifteen days will be allowed [ordered] only upon written request and may be granted by the commission chair or delegate [motion and notice] for good cause shown. ~~The commission will not accept late documents, nor will it recognize action not performed within the prescribed time without good cause shown.~~ [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§1-29, 84-31, 97-6)

§21-2-4 Service of process. (a) The commission shall cause to be served all orders, notices, and other papers issued by it, together with any other papers which it is required by law to serve. Pleadings and memoranda relating to charges or hearings shall be served by the party filing them.

(b) All documents [papers] served by either the commission or any party shall be served upon all counsel[s] of record at the time of such filing and upon parties not represented by counsel or upon their agents designated by them or by law. Any counsel entering an appearance subsequent to the initiation of the proceedings shall notify all parties of that fact in writing.

(c) The final opinion, decision, or any other document [paper] required to be served by the commission upon a party shall be served upon the party's counsel of record, if any, or the party or an agent designated by the party or by law to receive service of such papers.

(d) ~~[The s]~~Service of a charge, [and] further statement of [e charge of] alleged violation, and notice of a contested hearing shall be made:

- (1) personally upon the respondent;
~~[or, in case the respondent cannot be found, by leaving copies thereof at the respondent's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or]~~
- (2) by delivering a copy to an agent designated by the respondent [that person] or by law to receive service of such papers[-];
- (3) by registered or certified mail, return receipt requested; or
- (4) by any method agreed to by the parties.

If service by one of the above means is not made because of the refusal to accept service or the commission and its agents have been unable to ascertain the address of the respondent after reasonable and diligent inquiry, service may be effected as ordered by the circuit court pursuant to section 84-31(b) or 97-6(b), HRS, or as otherwise provided by statute.

(e) Service of a notice of the failure to file a disclosure of financial interests as required by section 84-17, HRS, shall be made in accordance with section 21-3-9.

(f) Service of all other papers required to be served shall be made by delivering a copy to counsel of record, if any, or to the person or an agent designated by the person or by law to receive service of such papers, ~~[or]~~ by mailing a copy to the person's last known address, or by other means agreed to by the parties. Delivery of a copy within this subsection means handing it to the person's attorney or to the person directly or leaving it at the person's office, with the person's secretary, clerk, or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by personal delivery or mailing shall be indicated by a certification of time and place of delivery or mailing, filed with the commission. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-17, 84-31, 97-6)

§21-2-5 Subpoenas. (a) Subpoenas requiring the attendance of witnesses or the production of documentary evidence from any place within the State ~~[of Hawaii]~~ at any designated place of hearing, or at any designated place of an investigatory interview by the executive director, may be issued by any member of the commission.

(b) ~~Application~~ Requests for subpoenas shall be made in writing to the commission. ~~[The application]~~ Requests for subpoenas for the production of documentary evidence shall be reasonable in scope and specify as clearly as possible documents or data desired, and show their general relevancy.

(c) Requests for subpoenas for the production of documentary evidence, or for the appearance of witnesses at a hearing or at an investigatory interview, ~~[For production of documentary evidence or appearance of witnesses at a hearing, application for subpoenas]~~ shall be made at least fourteen ~~three~~ days prior to the hearing or interview. If application for a subpoena for a hearing is made at a later time, the commission may, in its discretion, continue the hearing or any part thereof.

(d) Enforcement of obedience to subpoenas issued by the commission and served pursuant to this chapter will be effected by written application of any commissioner to any circuit judge. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 92-16, 97-6(a)(5)) (Imp: HRS §§84-31, 92-16, 97-6)

§21-2-6 Witness fees. Witnesses summoned for contested cases shall be paid the same fees and mileage as are paid to witnesses in courts of the State of Hawaii and shall be paid by the party at whose instance the witnesses appear. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-2-7 Retention of documents by the commission. All documents filed with or presented to the commission may be retained by the commission. However, the commission may permit the withdrawal of original documents upon submission of properly authenticated copies to replace such documents. [Eff. July 13, 1981; comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-17, 84-31, 97-6)

END OF CHAPTER 2

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

AMENDMENT AND COMPILATION OF CHAPTER 21-3
HAWAII ADMINISTRATIVE RULES

MONTH, DAY, 201~~9~~⁸

SUMMARY

1. §21-3-1, Hawaii Administrative Rules, is re-numbered to §21-3-2 and is amended. A new §21-3-1 is added.
2. §21-3-2, Hawaii Administrative Rules, is re-numbered to §21-3-4 and is amended.
3. A new §21-3-3 is added.
4. New §§ 21-3-5 through 21-3-11, Hawaii Administrative Rules, are added.
5. Chapter 3 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 3

FINANCIAL DISCLOSURE REQUIREMENTS

Chapter 21-3, Hawaii Administrative Rules, renamed “Financial Disclosure Requirements”, is amended and compiled to read as follows:

21-3-1	Definitions
21-3-2	Financial disclosure filing procedures
21-3-3	Financial interests
21-3-4	Public access to disclosure statements
21-3-5	Disclosure period
21-3-6	Amended disclosures
21-3-7	Newly elected or appointed officials; interim or acting officials.
21-3-8	Changes in position; exit disclosure
21-3-9	Administrative fine for failure to file
21-3-10	Payment of fine or request for waiver; good cause
21-3-11	Disposition of financial disclosures

Historical Note: This chapter is based substantially upon rule 3 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-3-1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

“Deputy director” means any individual who is subordinate only to the head of an agency and who exercises supervisory authority over subordinate employees;

“Disclosure” means, for purposes of this chapter, a disclosure of financial interests that is required to be filed pursuant to section 84-17, HRS;

“Division chief” means, for those agencies that have divisions, the head of a division who exercises supervisory authority over subordinates;

“Executive director” and “executive secretary” means the highest-ranking staff member of an agency, and includes wardens of correctional centers;

“Filer” or “filers” means all persons who are required to file a disclosure pursuant to section 84-17(c), HRS;

“Financial interests” means information that is required to be reported pursuant to section 84-17(f), HRS, and these rules;

“Solely advisory” means a board or commission that can take no significant action to influence the administration of state programs or the exercise of state powers. In determining whether a board or commission is solely advisory, the ethics commission may consider whether the board or commission exercises adjudicatory powers; adopts and implements state programs; develops and monitors program standards; and has authority to hire and fire employees, enter into contracts, issue permits or licenses, promulgate rules, receive gifts, or spend state funds. The agency’s description of a board or commission as being advisory is not dispositive as to whether the board or commission will be considered solely advisory;

“State position” means one of the positions enumerated in section 84-17(c), HRS, for which a disclosure is required to be filed with the commission.

In determining whether an individual is a deputy director, division chief, executive director, or executive secretary, the commission may consider the individual’s responsibility to hire, fire, and supervise personnel; the individual’s responsibility for fiscal and budgetary matters; and the individual’s responsibility for programmatic matters. The agency’s title for an individual is not dispositive as to whether the individual will be required to submit a disclosure. [Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31)

§21-3-1 §21-3-2 Financial disclosure filing ~~[Filing]~~ procedures.

(a) ~~[The]~~ All persons holding those positions enumerated in section 84-17(c), HRS, shall file annually with the commission a disclosure ~~[of financial interests]~~ within the applicable time periods prescribed in section 84-17(b), HRS, and this chapter.

(b) Disclosures shall be filed electronically using the commission's electronic filing system or by any other method established by the commission.

(c) Disclosures shall be deemed filed as of the time and date when the documents are received by the commission.

(d) In addition to those financial interests required to be reported by section 84-17(f), HRS, the disclosure ~~[statement filed with the commission]~~ shall contain ~~[the full name of the person filing the disclosure, the state agency which the person serves and the person's position with the agency, the names of the person's spouse and dependent children, and the date of the person's disclosure]:~~

- (1) the filer's full name and personal contact information, including the filer's residential address, work address, personal telephone number, work telephone number, personal electronic mail address, and work electronic mail address;
- (2) the filer's state position and the name of the agency, board, or commission the filer serves; and
- (3) the names of the filer's spouse, civil union partner, and dependent children.

(e) The disclosure shall be signed, digitally or otherwise, by the filer ~~[person required to file the disclosure]~~. The filer's [This] signature constitutes a certification that the filer [person] has read the document and that to the best of the filer's [person's] knowledge, information, and belief every statement contained in the instrument is true and no such statements are misleading. [For commission records only, the commission requires that the person filing the disclosure provide the person's business and residence addresses and business and home telephone numbers.

~~The commission shall provide a form for full financial disclosure and a short form of disclosure for subsequent annual filing in those instances where the financial interests of the person disclosing are substantially the same as those reported for the preceding disclosure period.~~

~~(c) The disclosure of financial interests required by §84-17, HRS, shall be filed between January 1 and April 30 of each year or within thirty days of the election or appointment of a person to a position enumerated in §84-17(c), HRS.~~

~~(d) A person who is required by §84-17, HRS, to file a financial disclosure shall file such disclosure with the commission pursuant to §21-2-1.~~

~~(e) A person who is required to file a disclosure of financial interests may be granted an extension of fifteen days by the commission for good cause shown.~~

The request for an extension shall be directed to a commissioner and shall be received at the commission's offices before the filing deadline for the person's disclosure.]

(f) ~~[Upon receipt of a disclosure, the executive director shall indicate thereon the date and time of receipt. The disclosure will be reviewed by the commission for conflicts of interest. If no conflict exists, the commission will acknowledge receipt of the disclosure and file it without further action. If a conflict is found, the commission will acknowledge the receipt of this disclosure and] advise the person of the conflict and the person's obligations and responsibilities to avoid violation of the state ethics law. Where the situation has precedential value, the commission will proceed as though the disclosure were a request for an advisory opinion.]~~ Filers shall promptly notify the commission regarding any changes in their contact information provided pursuant to section 21-3-2(d)(1). [Eff. July 13, 1981; §21-3-1; am, ren §21-3-2, and comp] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-31)

§ 21-3-3 Financial interests. (a) As provided by section 84-17(f), HRS, financial interests to be disclosed include, but are not limited to:

- (1) rental income;
- (2) stocks, exchange traded funds, and other similar financial instruments, which shall be individually disclosed as ownership interests in a business, provided that filers need not disclose the contents of mutual funds if the fund itself has been disclosed;
- (3) trust assets that would be reportable by the filer if held outside a trust, provided that specific trust assets need not be reported if they are held within a blind trust or similarly outside the filer's control or knowledge.
- (b) Filers need not disclose ownership of or income from the following:
 - (1) money market funds, savings and checking accounts, and certificates of deposit;
 - (2) tax deferred retirement accounts such as the State's deferred compensation plan, Individual Retirement Accounts, and 401k plans;
 - (3) tax deferred qualified tuition plans such as 529 college savings plans;
 - (4) tax deferred health savings accounts;
 - (5) Social Security or other government benefits.

(c) Filers need not disclose consumer credit card debt or automobile lease agreements. [Eff. _____] (Auth: HRS §84-31(a)(5))
(Imp: HRS §§84-14, 84-17, 84-31)

[§21-3-2] §21-3-4 Public access to disclosure statements. Disclosures that are designated as confidential pursuant to section 84-17(e), HRS, shall not be made available for public inspection or duplication, except with written authorization of the filer. Disclosures that are designated as public pursuant to section 84-17(d), HRS, shall be posted on the commission's website, provided that the filer's business or residential address, telephone number, or electronic mail address shall not be publicly disclosed, nor shall the names of the filer's spouse, civil union partner, or dependent children be publicly disclosed. —(a) An exact copy of the financial disclosure statements of the persons holding those positions designated in §84-17(b), HRS, shall be available for public inspection at the commission offices during regular business hours within two working days following the receipt and review of the disclosure by the commission. For purposes of public inspection, a financial disclosure statement shall not include the business and home addresses and telephone numbers of the person disclosing, although they will appear on the original form. The disclosures of those persons who are required by §84-17, HRS, to file but who do not hold positions designated in §84-17(d), HRS, are confidential, and the commission shall not release the contents of the disclosures except as permitted by chapter 84, HRS, and §21-1-8.

(b) Any person wishing to inspect a disclosure statement which is available for public inspection pursuant to §84-17, HRS, shall complete and file a form listing:

(1) The name of the person requesting the inspection and the person's business or residence address;

(2) The name and address of any person or organization for whom the person requesting the inspection is acting;

(3) The name of the person whose statement is to be inspected;

(4) The date of the inspection.

A copy of the form shall be kept in the file of the person whose disclosure was inspected. The form shall be available for inspection by the person whose disclosure statement was inspected, the commission, and the commission staff. A statement indicating this procedure shall appear plainly on all request forms provided by the commission. [Eff. July 13, 1981; §21-3-2; am, ren §21-3-4, and comp _____] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-31)

§21-3-5 Disclosure period. Filers shall disclose all financial interests held during the applicable disclosure period. For initial disclosures and disclosures submitted by candidates for state elective offices, including candidates for election to the constitutional convention, the disclosure period includes January 1 of the preceding calendar year to the date of filing. All disclosures filed thereafter include the date of the previous filing to the date of filing, excluding amended filings, except that income reported shall be for the previous calendar year. [Eff. July 13, 1981; am and comp] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-31)

§21-3-6 Amended disclosures. If a filer files a disclosure that contains inaccurate information or omits information regarding the filer's financial interests, the filer shall promptly file an amended disclosure with the commission. [Eff.] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-31)

§21-3-7 Newly elected or appointed officials; interim or acting officials. Newly elected or appointed officials required to submit a disclosure pursuant to section 84-17(b), HRS, and persons serving in an interim or acting capacity in positions that require filing a disclosure, shall file a disclosure within thirty days of the first day in office, whether on an interim, acting, or permanent basis. [Eff.] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31, 84-31.5)

§21-3-8 Changes in position; exit disclosure. (a) Filers transferring from a position requiring the filing of a confidential disclosure to a position requiring the filing of a public disclosure shall file a new, public disclosure within thirty days of the first day in office, whether on an interim, acting, or permanent basis. Other filers who transfer positions need not file a new disclosure statement until the next filing deadline.

(b) Filers shall file a disclosure within thirty days of any filer's final date in state office or employment, unless the filer filed a disclosure within 180 days of the final date of state office or employment. [Eff.] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31, 84-31.5)

§21-3-9 Administrative fine for failure to file. (a) The commission shall notify filers of the failure to timely file a disclosure and the applicable administrative fine. The commission may notify such individuals by electronic mail to the person's state electronic mail address, first-class mail, or personal service.

(b) If notice is sent via electronic mail, the ten-day period described in section 84-17(i), HRS, shall run from the date the electronic mail is sent. If notice is sent via first-class mail, the ten-day period shall begin two business days after mailing, unless the notice is mailed to an address outside the State, in which case the ten-day period shall begin four business days after mailing. [Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31, 84-31.5)

§21-3-10 Payment of fine or request for waiver; good cause. (a) An individual who receives a notice of administrative fine and subsequently files a disclosure shall, within ten days of filing the disclosure, pay the assessed administrative fine or request a waiver from the commission.

(b) Any individual requesting a waiver of administrative fine shall submit a written request to the commission. The request shall contain the filer's name, address, electronic mail address, telephone number, and state position; a clear and concise statement regarding the factual basis for the filer's request for a waiver, including the reasons or circumstances why the filer was unable to meet the applicable due date; and any documents or evidence in support of the filer's request for a waiver.

(c) The commission may waive any administrative fine for good cause shown. The filer has the burden to establish good cause. Good cause may be found if the filer faced an unexpected crisis such as a serious medical issue, a death in the family, or a theft or destruction of financial documents that prevented the filer from meeting the relevant deadline. Good cause generally may not be found by inadvertence or oversight.

(d) Payment of the administrative fine is deemed made when received by the commission.

(e) The commission may issue a charge against any filer who fails to file a disclosure by the relevant deadline. [Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31, 84-31.5)

§21-3-11 Disposal of financial disclosures. (a) Disclosures shall be destroyed six years after the filer leaves state office or employment, regardless of whether the filer later returns to state office or employment, unless otherwise provided by statute.

(b) A disclosure filed by a candidate for state elective office shall be destroyed upon the expiration of six years after an election for which the candidate filed the disclosure, unless otherwise provided by law.

(c) In destroying disclosures, all paper copies shall be shredded, all electronic copies shall be deleted from the commission's record-keeping system, and all public disclosures shall be removed from the commission's website. [Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-17, 84-17.5, 84-31, 84-31.5)

END OF CHAPTER 3

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Amendment and Compilation of Chapter 21-4
Hawaii Administrative Rules

Month, Day, 201~~9~~⁸

SUMMARY

1. §21-4-1 Hawaii Administrative Rules, is renamed and amended.
2. §21-4-2, Hawaii Administrative Rules, is amended.
3. §§21-4-3 through 21-4-5, Hawaii Administrative Rules, are repealed.
4. Chapter 4 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 4

ADVISORY OPINIONS

Chapter 21-4, Hawaii Administrative Rules, entitled “Advisory Opinions”, is amended and compiled to read as follows:

21-4-1	Request for guidance; request for advisory opinion
21-4-2	Rendering of advisory opinions
21-4-3	Repealed
21-4-4	Repealed
21-4-5	Repealed

Historical Note: This chapter is based substantially upon rule 4 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-4-1 Request for guidance; request for advisory opinion. (a) The executive director may provide confidential guidance to any individual as to whether the facts and circumstances of a particular case constitute or would constitute a violation of chapter 84, chapter 97, section 11-8, or section 11-316, HRS, provided that nothing herein shall establish an attorney-client relationship between the person seeking advice and the executive director. Any written guidance rendered by the executive director advising that certain conduct is or was permissible shall, until amended or revoked, be binding upon the commission in any subsequent enforcement proceeding concerning the individual who sought the guidance and acted in reliance on it in good faith, unless material facts were omitted or misstated by the person requesting guidance. Nothing in this subsection shall prevent the executive director or the commission from investigating alleged violations of chapters 84 or 97, HRS.

(b) Any individual seeking formal written guidance from the commission itself may request an advisory opinion. All requests for advisory opinions made to the commission shall be in writing and shall contain:

- (1) The name of the person requesting the opinion;
- (2) The state agency for which the person works, if applicable;
- (3) That person's position in the state agency, if applicable;
- (4) The nature and duties of that person's state employment, if applicable;
- (5) The date of the request;
- (6) That person's mailing address and electronic mail address ~~[business and home address]~~;
- (7) That person's ~~[business and home]~~ telephone number[s];
- (8) A complete statement of the facts and circumstances upon which the commission can make a determination; and
- (9) The signature, digital or otherwise, of the person requesting the opinion.

~~[(b)]~~(c) A request for an advisory opinion is considered filed when the commission has received ~~[in writing or the executive director has obtained through an interview process]~~ all ~~[the]~~ information deemed necessary by the commission. When the opinion is requested ~~[by an employee or legislator]~~ regarding a situation involving another person ~~[employee or legislator]~~ as set forth in subsection (d), the filing shall not be deemed completed until that ☐ person ~~[employee or legislator who will be the subject of the opinion]~~ has had a reasonable opportunity to review the facts submitted and to present that person's ~~[employee's or legislator's]~~ view of the factual circumstances.

(d) Except as provided by sections 11-8 and 11-316, HRS, or otherwise provided by law, a person may only request an advisory opinion regarding the person's own conduct, provided that:

- (1) a supervisor may request an advisory opinion as to whether the supervisor should act to prevent a subordinate from violating the code of ethics;
- (2) an agency may request an advisory opinion as to whether it is permitted to enter into a contract pursuant to sections 84-15 or 84-18, HRS; and
- (3) a person may request an advisory opinion as to whether anyone acting on behalf of or in connection with that person is in compliance with chapter 97, HRS.

(e) The person who is the subject of a request for an advisory opinion may appear before the commission pursuant to section 21-1-6 of these rules.

(f) Consideration of the request for an advisory opinion is an adjudicatory function of the commission. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 92-3, 92-6, 97-6)

§21-4-2 Rendering of advisory opinion. (a) An advisory opinion shall ~~[will]~~ be in writing and signed by all commissioners subscribing to the opinion. It shall ~~[will]~~ be considered rendered when it is signed and placed in the mail[], postage prepaid and addressed to the person requesting the opinion at the address furnished by the person, ~~[or]~~ upon personal delivery, or upon delivery via electronic mail.

(b) Any commissioner who agrees with the commission's opinion but for different reasons than as stated may file a written concurring opinion; any member of the commission who disagrees with the commission's opinion may file a written dissenting opinion, which shall ~~[will]~~ be placed at the end of the majority opinion or at the end of the concurring opinion, if any.

(c) An unredacted advisory opinion ~~[will]~~ shall be issued to the person requesting the opinion within thirty days of the request being filed with the commission pursuant to section 21-4-1(c) ~~[except that when the request for an advisory opinion involves a legislator or employee other than the person requesting the opinion, then a copy of the advisory opinion, without the name of the person requesting the opinion or facts identifying such person, if any, will be sent to the legislator or employee concerned].~~ The person requesting the opinion may authorize the commission to publish the unredacted advisory opinion; however, provided that the commission may retain the discretion to redact the opinion prior to publication.

(d) The commission shall provide the person requesting the opinion with a draft redacted opinion via electronic mail or first-class mail within forty-five days of rendering the unredacted opinion. The person requesting the opinion shall have fifteen days from receipt of the redacted opinion in which to provide comments to the commission. The commission shall have thirty days from the expiration of the fifteen-day period or receipt of comments, whichever comes first, in which to publish the redacted opinion. The commission may extend these deadlines by request or on its own motion for good cause shown.

~~[Requests for copies of the opinion will be referred by the commission to the person to whom the opinion was issued, unless the person has indicated in writing that the commission may release copies of the opinion upon request.~~

~~(e) Within forty five days after an opinion has been rendered, the commission shall submit a deleted opinion to the person affected by the opinion who shall have ten days to submit comments or request for recommendations for amendment. The commission may in its discretion consider the comments of the~~

~~person prior to filing of the deleted opinion, which shall be completed no later than ninety days after the opinion has been rendered. The deleted opinion shall be a matter of public record. The executive director shall provide copies of deleted opinions upon request without charge. At the end of each calendar year, the opinions issued during the calendar year shall be printed, along with an index, and copies shall be available upon request.] [Eff. July 13, 1981; am and comp~~
] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-4-3 Repealed. [Interim rulings. ~~(a) In a case where a person requesting an opinion indicates that due to circumstances, that person must make an immediate decision, the commission may, in its discretion, issue a ruling signed by three or more commissioners, which ruling briefly states the commission's opinion and which may be followed within the original thirty day period by a full advisory opinion.] [Eff. July 13, 1981; R~~
] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-4-4 Repealed. [An opinion rendered by lapse of thirty days. ~~Upon the receipt of a request for an advisory opinion, the executive director [or delegate] may determine whether or not the situation is in violation of the ethics law or lobbyists law based upon a prior opinion of the commission. Such a determination, if approved in writing by a commissioner, will become the opinion of the commission by lapse of thirty days from the date of the receipt of the request. The executive director shall notify person requesting the opinion of the determination and approval. An opinion issued in this manner will not be published.] [Eff. July 13, 1981; R~~
] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-4-5 Repealed. [Hearings. ~~Generally, an opinion will be rendered only upon facts submitted in writing. The employee or legislator subject to an opinion, however, may request a hearing in writing, stating the reason for making the request, and may request that other persons attend. The commission may limit the time allowed for the hearing and the number of persons attending the hearing. The commission, at any time, with notice to the person requesting the opinion, may interview persons who may have information desired by the commission in the consideration of a request for an advisory opinion.] [Eff. July 13, 1981; R~~
] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

END OF CHAPTER 4

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Amendment and Compilation of Chapter 21-5
Hawaii Administrative Rules

Month, Day, 201~~9~~8

SUMMARY

1. §21-5-1, Hawaii Administrative Rules, is renumbered to §21-5-2, renamed, and amended.
2. §21-5-2, Hawaii Administrative Rules, is renumbered to §21-5-1, renamed, and amended.
3. New §§21-5-2.1, 21-5-2.2, 21-5-2.3, 21-5-2.4, 21-5-2.5, and 21-5-2.6, Hawaii Administrative Rules, are added.
4. §21-5-3, Hawaii Administrative Rules, is renamed and amended.
5. §21-5-4, Hawaii Administrative Rules, is repealed.
6. §21-5-5, Hawaii Administrative Rules, is renamed and amended.
7. §21-5-6, Hawaii Administrative Rules, is renamed and amended.
8. A new §21-5-6.1, Hawaii Administrative Rules, is added.
9. §21-5-7, Hawaii Administrative Rules, is renamed and amended.
10. §21-1-7, Hawaii Administrative Rules, is re-numbered to §21-5-7.1 and amended.
11. §§21-5-8 to 21-5-9, Hawaii Administrative Rules, are amended.
12. A new §21-5-9.1, Hawaii Administrative Rules, is added

13. §§21-5-10 to 21-5-11, Hawaii Administrative Rules, are renamed and amended.
14. A new §21-5-12, Hawaii Administrative Rules, is added.
15. Chapter 5 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 5

~~COMPLAINTS~~INVESTIGATIONS, CHARGES, CONTESTED CASES, AND SETTLEMENT AGREEMENTS

Chapter 21-5, Hawaii Administrative Rules, renamed “~~Complaints~~Investigations, Charges, Contested Cases, and Settlement Agreements,” is amended and compiled to read as follows:

- 21-5-1 ~~Complaints~~Investigations; charges initiated by the commission
- 21-5-2 Charges initiated by a member of the public
- 21-5-2.1 Confidentiality in investigations
- 21-5-2.2 Cooperation with commission investigations
- 21-5-2.3 Investigatory interviews
- 21-5-2.4 Legal counsel
- 21-5-2.5 Individual representing party
- 21-5-2.6 Procedure upon issuance of charge; further statement of alleged violation
- 21-5-3 Status conference
- 21-5-4 Repealed
- 21-5-5 Contested hearings; notice of hearing
- 21-5-6 Motions
- 21-5-7 Contested hearings; procedure
- 21-5-7.1 Rules of evidence
- 21-5-8 Pre-hearing conference
- 21-5-9 Post-hearing procedures for hearing conducted by the commission
- 21-5-9.1 Post-hearing procedures for hearing conducted by hearing officer
- 21-5-10 Record of hearing
- 21-5-11 Post-hearing complaint
- 21-5-12 Settlement

Historical Note: This chapter is based substantially upon rules 5 and 9 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-5-1 ~~§21-5-2~~ **Complaints; investigations; charges** ~~[Charges]~~
initiated by the commission. (a) ~~[Upon the receipt of anonymous information or other information not under oath, or information obtained at the initiative of the commission, the executive director or delegate shall verify such facts as may be verified through public documents or the assistance of department heads, legislators, or other appointed or elected officials, including the respondent. Investigation may not extend to interviews of other persons unless the commission, in its discretion, initiates an investigation to determine whether a charge should be issued. This investigation will be carried out confidentially by the executive director or delegate. The nature and scope of the investigation shall be defined by a resolution supported by a vote of three or more members of the commission.]~~ Any individual may submit information to the executive director alleging a violation of chapters 84 or 97, HRS. Such information complaints may be made-offered anonymously and need not be made-provided under oath.

(b) The executive director may investigate any matter upon the receipt of such a complaint information indicating a possible violation of chapter 84 or 97, HRS. The executive director may also investigate any matter, at the request of the commission, or on the executive director's own initiative.

(c) The commission-executive director may refer any complainant to another agency as appropriate.

(bd) The executive director shall determine whether and how to investigate a matter and whether to request from the commission a resolution to investigate the matter pursuant to section 21-5-1(ee). At any time prior to requesting a resolution to investigate, the executive director may close any investigation.

(ee) In investigating any matter prior to obtaining a resolution to investigate from the commission, the executive director may review publicly available documents or documents maintained by the State; the executive director may also interview legislators, employees, other appointed or elected officials, or the putative respondent-alleged violator. Investigations shall not extend to interviews of other persons unless the commission, in its discretion, issues a resolution to investigate.

(df) A resolution to investigate issued by the commission shall define the nature and scope of the investigation and be supported by a vote of three or more members of the commission.

~~[(b)]~~(eg) If after ~~[preliminary]~~ investigation at least three commissioners decide that a charge should be initiated, the charge shall ~~[will]~~ be issued in writing and signed by at least three commissioners.

~~[(c) Upon filing of a charge by a member of the public or the commission, the commission shall notify the respondent of the charges in writing and afford the respondent an opportunity to explain the conduct alleged to be in violation of the chapter.]~~ [Eff. July 13, 1981; §21-5-2; am, ren. §21-5-1, and comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 97-6)

§21-5-1 §21-5-2 Charges initiated [instituted] by a member of the public. (a) Any individual may file a charge with the commission. All charges shall contain a short and simple statement of the facts constituting the alleged violation, the name [and public position] of the respondent [alleged violator], and the name and contact information of the individual filing the charge. The charge [and] shall be signed by the person making the charge under oath, declaring under penalty of perjury that the allegations are true and correct to the best of the person's knowledge. [The oath may be administered by a notary public of the State [] or any other person authorized by law in the State [] to administer oaths. Oaths administered in a foreign jurisdiction will be administered in accordance with the laws of that jurisdiction.] The executive director may investigate such charges pursuant to section 21-5-1.

(b) Where it appears that a document submitted to the commission is intended to be a charge, but the document [Upon receipt of a document which] does not comply with [the requirement of §21-5-1(a)] section 21-5-2(a) [or which does not in form or substance constitute a charge], the commission shall notify the filer [person signing the document] of the insufficiency. The executive director shall may investigate the matter in accordance with section 21-5-1 but shall not treat the document as a chargetreat the document as a complaint submitted pursuant to section 21-5-1 until the insufficiency is corrected. [Eff. July 13, 1981; §21-5-1; am, ren §21-5-2, and comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 97-6)

§21-5-2.1 Confidentiality in investigations. (a) The executive director shall investigate ~~complaints all matters and charges~~ confidentially and shall not disclose non-public details of an investigation except as necessary to conduct the investigation, provided that the executive director may, on a confidential basis and at any time, disclose information or refer any matter to any governmental law

enforcement agency ~~as warranted. The executive director and~~ may likewise ~~disclose information or refer any administrative matters~~ to the relevant agency administrator for further action as warranted.

(b) The commission's records relating to a ~~complaint~~, charge, or ~~any~~ investigation are ~~otherwise~~ confidential and are not open to inspection by any person except as specifically required by chapters 84 or 97, HRS, or these rules.

(c) The executive director may, during the pendency of an investigation, ~~direct request~~ legislators and employees to refrain from disclosing information regarding that investigation ~~that the legislator or employee learns from the commission or its staff~~ if the executive director determines that such ~~directiverequest~~ is necessary to maintain the integrity of the investigation or for another compelling reason. Such ~~directive request~~ shall be as limited in time and scope as is ~~necessary and~~ practicable under the circumstances. ~~Failure to comply with such a directive shall be a violation of section 84-12, HRS.~~ Nothing herein shall prevent any legislator or employee from discussing a matter with the legislator's or employee's attorney, ~~or from~~ lodging a complaint with any governmental entity as allowed by law, ~~or exercising the constitutional right to free speech.~~

(d) At the conclusion of an investigation, the executive director may notify the complainant and the respondent that the investigation has been closed. The executive director may reveal additional information regarding the resolution of an investigation if necessary to prevent retaliation against the complainant or witnesses, to prevent other violations of chapters 84 or 97, HRS, or for other good cause.

(e) Nothing in these rules shall require the commission to reveal the source of a complaint. [Eff. _____] (Auth: HRS §§84-31(a)(5), 91-2, 91-8.5, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-8.5, 97-6)

§21-5-2.2 Cooperation with commission investigations. (a) Every department, division, board, bureau, commission, or other agency of the state shall ~~provide~~ cooperation and assistance to the commission in the performance of the commission's duties.

(b) In response to a request for documents by the commission, every department, division, board, bureau, commission, or other agency of the state shall provide such documents within ten business days unless extenuating circumstances exist. Extenuating circumstances exist when:

(1) The request requires extensive efforts to search, review, or segregate the records, or otherwise prepare the records for copying and transmittal to the commission;

- (2) The agency requires additional time to respond to the request to avoid an unreasonable interference with its other statutory duties or functions; or
 - (3) A natural disaster or other situation beyond the agency's control prevents the agency from responding to the request within ten business days.
 - (c) When extenuating circumstances are present or the requested records ~~of~~are voluminous, the responding agency may, in good faith, elect to make the records available in increments and shall disclose each increment within ten business days of the prior incremental disclosure.
 - (d) The head of each department, division, board, bureau, commission, or other agency of the state shall be responsible for ensuring such cooperation and assistance.
 - (e) If the commission requests cooperation with an investigation or seeks to conduct an investigatory interview, and such cooperation is not forthcoming from any agency or individual, the commission may, but need not:
 - (1) draw a negative inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
 - (2) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
 - (3) exclude other evidence offered by the party failing to produce the requested information or witness; or
 - (4) take such other action as it deems appropriate.
- [Eff. _____] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)) (Imp: HRS §§84-31, 84-36, 91-2, 97-6)

§21-5-2.3 Investigatory interviews. (a) The commission, by subpoena, may compel the attendance of witnesses or respondents at investigative interviews with the executive director.

(b) The interviewee may be accompanied by the interviewee's counsel or union representative and may record the interview.

(c) Any interview conducted by the commission or the executive director may, at the commission's or executive director's discretion, be conducted under oath, recorded, and/or transcribed by a court reporter. [Eff.

] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 97-6)

§21-5-2.4 Legal counsel. (a) A party, at the party's own expense, may be represented by legal counsel at any stage of the proceeding before the commission or hearing officer.

(b) Substitution of legal counsel shall be effective upon filing of a notice of the substitution by the party represented.

(c) Withdrawal of legal counsel in the absence of a concurrent substitution shall be effective only upon the approval of the commission or hearing officer and shall be subject to the guidelines of the Hawaii rules of professional conduct and other applicable law.

(d) No party shall substitute or withdraw legal counsel for the purpose of delaying a proceeding. Substitution or withdrawal of counsel less than thirty days before the hearing shall not be considered sufficient reason to continue the hearing, unless good cause is shown. [Eff. _____] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 97-6)

§21-5-2.5 Individual representing party. When an individual attorney or union representative, acting in a representative capacity on behalf of a party, appears in a proceeding or signs a document submitted to the commission or hearing officer, that personal appearance or signature shall constitute a representation that the individual is lawfully authorized and qualified to so act. The individual at any time, however, may be required by the commission or hearing officer to furnish proof of authorization and qualification to act in that capacity. [Eff. _____]

] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 97-6)

§21-5-2.6 Procedure upon issuance of charge; further statement of alleged violation. (a) Upon issuance of a charge by the commission or a member of the public, the commission shall notify the respondent of the charge in writing in accordance with section 21-2-4(d).

(b) The respondent shall have twenty days after service thereof to answer the charge in writing. The executive director may extend the time to answer for good cause shown.

(c) The answer shall specifically admit, deny, or explain the charges filed against the respondent and shall set forth any other matter constituting an avoidance or affirmative defense.

(d) After reviewing the answer and conducting any further investigation as warranted, the commission may close the matter, settle the matter on any terms it deems fair and in the public interest, issue an informal advisory opinion, or issue a further statement of alleged violation.

(e) Upon issuance of a further statement of alleged violation, the commission shall enter an order erecting a firewall between the commission and its counsel, on one side, and the executive director or delegate, as charge counsel, on the other. Neither charge counsel nor the respondent shall have ex parte communications with the commission or its counsel by discussing or sharing information about substantive matters pertaining to the case. The executive director or delegate shall independently supervise and direct how the case against the respondent will be presented, argued, and otherwise conducted. Legal staff designated as commission counsel shall not be subject to supervision or direction by the executive director or other charge counsel on matters relating to the case.

(f) The executive director or delegate shall prosecute each case, provided that when the party filing the charge is not the commission, that party may move to prosecute the case. Such motion shall be filed no later than five days following publication of the notice of hearing as set forth in section 21-5-5. In considering the motion, the commission shall consider whether the movant has the ability to prosecute the case, whether the further statement of alleged violation includes allegations beyond those included in the charge, and whether granting the motion is in the public interest.

(g) The respondent shall have twenty days after service of the further statement of alleged violation to answer in writing. The answer shall specifically admit, deny, or explain the charges filed against the respondent and shall set forth any other matter constituting an avoidance or affirmative defense. [Eff.

](Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 91-9.5, 97-6)

§21-5-3 Status conference ~~[Informal hearing notice]~~. At any time, the commission may request the respondent's attendance at a status conference to obtain further information from the respondent, discuss settlement with the respondent, or otherwise seek a fair and efficient resolution of any matter. [The commission shall notify the respondent in writing and afford the respondent an opportunity to explain the conduct alleged to be in violation of chapter 84, HRS. The commission may request the respondent's attendance at an informal hearing conducted for the purpose of obtaining further information from the respondent. The notice of informal hearing shall state the date, time, and place of hearing and shall be given to the respondent five days prior to the hearing. The hearing may be

continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing by the commission.] [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 97-6)

§21-5-4 Repealed. [Procedures for an informal hearing.] (a) The chairperson or designate of the commission shall convene the hearing and shall read the charge. The chairperson or designate shall preside at the hearing and will recognize those who wish to speak. The hearing will be informal and conducted in an orderly manner so that all commissioners may have an opportunity to direct questions to the respondent and so that the respondent may be afforded an opportunity to explain the conduct alleged to be in violation of chapter 84, HRS. The respondent may attend the informal hearing with a counsel or agent.

(b) Within a reasonable time after the informal hearing, the commission may render an informal advisory opinion to the respondent. If a probable violation is indicated, the respondent shall either request a formal opinion or shall, within a reasonable time, comply with the informal advisory opinion.

(c) If the respondent fails to comply with the informal advisory opinion, if any is rendered, or if a majority of the commissioners determine that there is probable cause for belief that a violation of chapter 84, HRS, may have occurred, the commission shall personally serve the respondent with a copy of the charge and a further statement of alleged violation. The respondent shall have twenty days after service thereof to answer the charge and statement in writing. The answer shall specifically admit, deny, or explain the charges filed against the respondent and shall set forth any other matter constituting an avoidance or affirmative defense.

(d) Failure to file an answer will constitute default, whereupon the commission shall notify the authority having power to discipline of the decision in default.] [Eff. July 13, 1981; R] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 97-6)

§21-5-5 [Formal and contested] Contested hearings; notice of hearing.

(a) The commission shall give at least fifteen [five] days' notice to the respondent prior to [the] a contested hearing, unless such notice is waived in writing by the respondent. The notice shall state the date, time, place, and nature of the hearing; the legal authority under which the hearing is held; the particular sections of the statutes or rules involved; and the fact that the respondent may retain counsel if desired.

(b) The hearing may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at a hearing by the commission. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 91-9.5, 97-6)

§21-5-6 Motions. (a) All motions other than those made during a hearing shall be made in writing, shall state the relief sought, and shall be accompanied by an affidavit, or declaration, or memorandum setting forth the grounds upon which the motions are based. The presiding officer shall set the time for filing all motions and opposing memoranda, if any.

(b) Copies of all motions, affidavits, declarations, and memoranda shall be served on all other parties to the hearing within the time set by the presiding officer. The original shall be filed with the commission with a certificate of service.

(c) Failure to serve or file an affidavit, declaration, or memorandum in opposition to a motion or failure to appear at the hearing on the motion, if held, shall be deemed a waiver of objection to the granting or denial of the motion unless otherwise ordered by the commission. ~~[Formal and contested hearings; request for an open hearing. Any respondent who wants an open hearing shall file a written request at least two days prior to the hearing. If a request is made for an open hearing at a later time, the commission shall hold an open hearing, but it may, in its discretion, change the date, time, and place of the hearing.]~~ [Eff. July 13, 1981; am and comp] (Auth: HRS §84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-7, 97-6)

§21-5-7 [Formal and contested] Contested hearings; procedures. (a) The commission may conduct the hearing or, in its discretion, may delegate the conduct of the contested hearing to a hearing officer, in which case the commission shall select such hearing officer.

(b) The presiding officer [chairperson] shall convene and conduct the hearing [and shall read the charge].

(c) ~~[(b)]~~ Before presentation of the case, the parties shall have the opportunity to make opening statements, provided that the presiding officer may order that opening statements be made in writing rather than orally at the hearing. The usual order of making opening statements shall be as follows:

(1) Opening statement by the executive director or [complainant]; and

- (2) Opening statement by the respondent. The respondent may reserve the opportunity to make the opening statement until after the executive director or {complainant} executive director has presented its the [the complainant's] case. Opening statements may be waived by a party.
- (d) ~~{e}~~ Witnesses shall be examined as follows:
 - (1) Direct examination by the party calling the witness;
 - (2) Cross examination by the other party, limited to the issues raised on direct examination;
 - (3) Redirect examination by the party calling the witness, limited to the issues raised on cross examination;
 - (4) Recross examination by the other party, limited to the issues raised on redirect examination; and
 - (5) Examination of the witness by the commission or hearing officer at any time.
- (e) ~~{d}~~ After all the evidence has been presented, the presiding officer [commission] shall give the parties the opportunity to summarize. The usual order of final arguments shall be as follows:
 - (1) Final argument by the executive director or {complainant};
 - (2) Final argument by the respondent; and
 - (3) Rebuttal argument by the executive director or {complainant}. Rebuttal arguments shall be limited to countering whatever may be said by the other party during that party's final argument.
 - (4) Reasonable time limits may be imposed by the presiding officer [commission] for the final arguments. Final arguments may be waived by either party. The presiding officer may order that final arguments be made in writing rather than orally at the hearing.
- (f) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents and briefs, ensure the orderly conduct of any proceeding, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.
- (g) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct examination, cross examination, redirect examination, or recross examination, or the time for testimony upon a particular issue.

(h) Any procedure in a contested case may be modified or waived by stipulation of the parties.

(i) Within a reasonable time after final arguments have been completed and all requested memoranda submitted, including the report and recommended order of the hearing officer, if applicable, the commission shall render an order, decision, or ruling.

~~[(f)]~~ (j) Within ten days after entry of an order, decision, or ruling, the commission may entertain a written petition to reconsider or rehear its final order, decision, or ruling. The petition shall be granted or denied with reasonable expedition. Denial of such petition shall be in writing. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 91-9, 91-10, 92-16, 97-6)

§21-5-7.1 Rules of evidence. Any oral or documentary evidence that is relevant and material to the charge may be admitted, provided that the commission's findings must be based upon competent and substantial evidence in accordance with section 84-31(c), HRS. Effect shall be given to the rules of privilege recognized by law. The presiding officer may take notice of judicially recognizable facts. [Eff. July 13, 1981; §21-1-7; am, ren §21-5-7.1, and comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-9, 91-10, 97-6)

§21-5-8 Pre-hearing conference. (a) When a prehearing conference is held by the presiding officer, except as and to the extent otherwise ordered ~~[by the commission]~~:

- (1) Each party shall file a prehearing conference brief in which it discloses the theory of that party's case, including the basic facts each party intends to prove and the names and addresses of all witnesses which each party intends to call;
- (2) Each party shall disclose to all others and permit examination of all exhibits which are in that party's possession or under that party's control and which that party intends to offer in evidence at the hearing. ~~[(3) Unless so disclosed, no]~~ Undisclosed exhibits ~~[required to be disclosed by §21-5-8(a)(2)]~~ shall not be received in evidence at the hearing over objection unless the presiding officer ~~[commission]~~ finds that there was reasonable ground for failing to disclose such exhibits prior to hearing;

(3) ~~(4)~~ All exhibits required to be disclosed by section ~~[~~21-5-8(a)(2), and any other exhibits as may be requested by counsel presenting the same, shall be marked for identification at least five days ~~[one day]~~ prior to the hearing ~~[and shall be listed in any pre-hearing order]~~.

(b) The presiding officer may issue a prehearing order setting forth any requirements or deadlines regarding the hearing, or may otherwise set a schedule for filing briefs, exhibits, or other pleadings. The presiding officer may strike any documents not timely filed. [pre-hearing order shall supersede the pleadings where there is any conflict and shall supplement the pleadings in all other respects.] [Eff. July 13, 1981; am and comp]
(Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 91-10, 97-6)

§21-5-9 [Decisions] Post-hearing procedures for hearing conducted by the commission. (a) The commission may direct one or both parties to submit proposed findings of fact and conclusions of law. The commission shall determine the findings of fact and conclusions of law to be entered.

(b) Every decision of the commission rendered after hearing shall be in writing and shall be accompanied by separate findings of fact and conclusions of law. ~~[Within forty-five days after a decision has been rendered, the commission shall file a deleted decision which shall be a matter of public record. The executive director shall provide copies upon request without charge. At the end of each calendar year, the decisions issued during that calendar year shall be printed, along with an index, and copies shall be available upon request.]~~

~~[(b)—The commission may direct the prevailing party to submit proposed findings of fact and conclusions of law. The party required to prepare the proposed findings of fact and conclusions of law shall do so within the time set by the commission, shall secure the approval as to form thereon of the opposing counsel or party, and shall deliver the original and copies to the commission; or, if not so approved, serve a copy upon each party who has appeared in the action and deliver the original and six copies to the commission. If the form of the proposed findings of fact and conclusions of law has not been approved, a party served with the proposed findings and conclusions may within five days thereafter serve and deliver to the commission objections and a copy of that party's proposed findings and conclusions. The commission shall determine the findings of fact and conclusions of law to be entered.]~~

(c) Any commissioner ~~[who agrees with the decision but for different reasons]~~ may file a written concurring or dissenting statement. ~~[decision. Any commissioner may file a written dissenting decision.]~~ [Eff. June 13, 1981; am and

comp] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 91-11, 91-12, 97-6)

§21-5-9.1 Post-hearing procedures for hearing conducted by hearing officer. (a) Upon completion of the taking of evidence, the hearing officer may ask the parties to submit proposed findings of fact and conclusions of law. The hearing officer shall thereafter prepare a report containing proposed findings of fact, proposed conclusions of law, and a recommended order.

(b) The hearing officer shall cause a copy of the report proposed findings of fact, proposed conclusions of law, and recommended order to be served upon all parties to the proceedings.

(c) Except as otherwise ordered by the commission, within fourteen calendar days after service of the report proposed findings of fact, proposed conclusions of law, and recommended order by the hearing officer, a party may file with the commission exceptions to the report proposed findings of fact, proposed conclusions of law, and recommended order together with a brief in support of such exceptions. Such party shall serve copies of exceptions and briefs upon each party to the proceeding.

(d) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken;

(2) Identify that part of the hearing officer's report the proposed findings of fact, proposed conclusions of law, and/or portions of the recommended order to which objections are made; and

(3) State all the grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

(e) Except as otherwise ordered by the chairperson, within ten days after service of the exceptions to the hearing officer's report, any party may file with the commission a brief in response to the exceptions. Such party shall serve copies of the brief upon each party to the proceeding.

(f) The brief shall:

(1) Answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and

(2) State the facts and reasons why the report proposed findings of fact, conclusions of law, and recommended order should be accepted.

(g) The commission may direct oral argument on its own motion.

(h) Upon the filing of the exceptions and briefs together with the briefs in support, the commission may:

- (1) Render its decision upon the record, which shall include the charge, further statement of alleged violation, answers, notice of hearing, motions, rulings, orders, the transcript or other record of the hearing, stipulations, documentary evidence, proposed findings, exhibits and other documents submitted by the parties, objections to the conduct of the hearing, the report of the hearing officer, and all other matters placed in evidence;
- (2) Render its decision after any oral argument ordered;
- (3) Reopen the docket and take further evidence; or
- (4) Make such other disposition of the case that is necessary under the circumstances.

(i) In the event no statement of exceptions is filed, the commission may proceed to reverse, modify, or adopt the report of the hearing officer. [Eff.

] (Auth: HRS §§84-31(a)(5), 91-2, 97-

6(a)(5)) (Imp: HRS §§84-31, 91-2, 91-9, 91-11, 91-12, 97-6)

§21-5-10 Record of hearing[s]. The record of the hearing shall be compiled in conformance with section [§] 91-9[~~(e)~~], HRS. The commission shall [will] make provisions for an audio, ~~or~~ video, and/or ~~stenographic~~ ~~[recorde]~~ recording of the testimony, but it [shall] need not be transcribed unless requested for purposes of rehearing or court review. The parties to the hearing [The complainant and the alleged violator] shall be entitled to a copy of the recording [record] of the hearing or any part thereof upon application to the commission and upon payment of the costs thereof. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-31, 91-9, 97-6)

§21-5-11 Post-hearing complaint [Complaint]. After the commission has issued a written [~~made a~~] decision, it [~~the commission~~] shall determine whether sufficient cause exists to issue a post-hearing complaint and, if so, shall issue such complaint pursuant to section 84-32, HRS within thirty days of issuance of such written decision [~~issue the complaint and refer its decision to the appropriate legislative body or to the governor, as the case may be~~]. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§84-32, 84-38, 97-6)

§21-5-12 Settlement. (a) The commission may resolve a matter at any time pursuant to a settlement agreement deemed to be fair and in the public interest.

(b) Settlement procedure:

- (1) The executive director may negotiate a tentative settlement agreement with any alleged violator, subject to the commission's approval. At any time, the executive director may, with the consent of the alleged violator, present the matter to the commission to obtain its inclination regarding proposed terms of an agreement;
- (2) Upon request, the alleged violator shall be provided an opportunity to address the commission as to the proposed terms of an agreement.
- (3) Upon approval of the settlement agreement, the alleged violator and the chairperson, ~~or another commissioner so authorized by a majority of the commission or delegate of the commission,~~ shall sign the agreement.
- (4) The commission may issue a resolution that serves as a final disposition of the matter.

(c) Force and effect of agreement:

- (1) The agreement resolves only those matters directly raised in the settlement agreement itself. The commission reserves the right to investigate and charge the alleged violator regarding matters not raised in the settlement agreement unless the agreement expressly provides otherwise;
- (2) The settlement agreement does not resolve any matter against any alleged violator not a party to the agreement; and
- (3) By entering into a settlement agreement, the alleged violator waives any right to appeal any action taken by the commission in connection with the matter.

(d) Settlement agreements and resolutions are presumptively public, but the commission may enter a confidential settlement agreement after considering the following factors:

- (1) the nature of the violation;
- (2) the alleged violator's position and duties;
- (3) whether the alleged violator has been involved with prior commission proceedings;
- (4) the manner in which the matter was brought to the commission's attention;
- (5) the alleged violator's level of cooperation with the commission's investigation;

- (6) the alleged violator's acknowledgement of wrongdoing and commitment to avoid future violations; and
 - (7) any other mitigating or aggravating factors.
- [Eff. _____] (Auth: HRS §§84-31(a)(5), 91-2, 97-6(a)(5))
(Imp: HRS §§84-32, 91-2, 91-8.5, 91-9, 97-6)

END OF CHAPTER 5

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Amendment and Compilation of Chapter 21-6
Hawaii Administrative Rules

Month, Day, 2018

SUMMARY

1. §§21-6-1 to 21-6-2, Hawaii Administrative Rules, are renamed and amended
2. §21-6-3, Hawaii Administrative Rules, is renamed.
3. §21-6-4, Hawaii Administrative Rules, is renamed and amended.
4. §§21-6-5 and 21-6-6, Hawaii Administrative Rules, are renamed and amended.
5. New §§21-6-6.1 and 21-6-6.2, Hawaii Administrative Rules, are added.
6. §§21-6-7 to 21-6-8, Hawaii Administrative Rules, are renamed and amended.
7. Chapter 6 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 6

STATE ETHICS COMMISSION

PETITIONS FOR ADOPTION, AMENDMENT OR REPEAL OF RULES
AND FOR DECLARATORY ORDERS

21-6-1	Who may petition for rulemaking
21-6-2	Form and content of petition for rulemaking
21-6-3	Conformance of petition for rulemaking
21-6-4	Processing of petition for rulemaking
21-6-5	Consideration and disposition of petition for rulemaking
21-6-6	Who may petition for declaratory order
21-6-6.1	Form and content of petition for declaratory order
21-6-6.2	Conformance of petition for declaratory order
21-6-7	Processing of petition for declaratory order
21-6-8	Consideration and disposition of petition for declaratory order

Historical Note: This chapter is based substantially upon rules 7 and 8 of the State of Hawaii Ethics Commission Rules and Regulations. [Eff. 1/7/74 and 11/11/78; R July 13, 1981; am and comp]

§21-6-1 Who may petition for rulemaking. Any interested person may petition the commission for the adoption, amendment, or repeal of any rule of the commission. ~~[The petition shall be submitted in duplicate to the commission.]~~
[Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5)), 91-6, 97-6(a)(5)) (Imp: HRS §§84-31, 91-6, 97-6)

§21-6-2 Form and content of petition for rulemaking. The petition need not be in any special form, but it shall contain:

- (1) The petitioner's name, address, electronic mail address, and telephone number, if any;
- (2) A statement of the nature of the petitioner's interest;
- (3) A draft or statement of the substance of the proposed rule or amendment or a designation of the provisions sought to be repealed, or both;
- (4) A statement of the reasons in support of the proposed rule, amendment, or repeal;
- (5) Any other information relevant to the petition;
- (6) The petitioner's signature. [Eff. July 13, 1981; am and comp
] (Auth: HRS §§84-31(a)(5), 91-6, 97-6(a)(5)) (Imp:

HRS §§84-31, 91-6, 97-6)

§21-6-3 Conformance of petition for rulemaking. The commission may reject any petition which does not conform to the requirements of this chapter. [Eff. July 13, 1981; am and comp
] (Auth: HRS §§84-31(a)(5), 91-6, 97-6(a)(5)) (Imp: HRS §§84-31, 91-6, 97-6)

§21-6-4 Processing of petition for rulemaking. The petition shall be dated upon receipt. The commission shall notify the petitioner of the date, time, and place where the commission shall consider the petition, the petitioner's privilege of personal appearance with or without counsel, and the privilege of presenting evidence and argument in support of the petition. [Eff. July 13, 1981; am and comp
] (Auth: HRS §§84-31(a)(5), 91-6, 97-6(a)(5)) (Imp: HRS §§84-31, 91-6, 97-6)

§21-6-5 Consideration and disposition of petition for rulemaking. Within ninety [~~thirty~~] days after the receipt thereof, the commission shall either deny the petition in writing, stating its reasons for denial, or initiate proceedings in accordance with law for adoption, amendment, or repeal of the rule, as the case may be. [Eff. July 13, 1981; am and comp
] (Auth: HRS §§84-31(a)(5), 91-6, 97-6(a)(5)) (Imp: HRS §§84-31, 91-6, 97-6)

§21-6-6 Who may petition [Form and content of the petition for] for declaratory order. Any interested person may petition the commission for a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission. ~~[The petition shall be submitted in duplicate and delivered to the office of the commission. The petition shall state the controversy or question, shall cite the statutory provision, rule, or order involved, and shall include a complete statement of the facts and the reasons or grounds prompting the petition, together with full disclosure of the petitioner's interest, and shall be signed by the petitioner. The commission may reject any petition which does not conform to the requirements set forth above.]~~ [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 91-8, 97-6) (Imp: HRS §§84-31, 91-8, 97-6)

§21-6-6.1 Form and content of petition for declaratory order. The petition shall be submitted in writing to the commission. The petition shall state the controversy or question, shall cite the statutory provision, rule, or order involved, and shall include a complete statement of the facts and the reasons or grounds prompting the petition, together with full disclosure of the petitioner's interest, and shall be signed by the petitioner. [Eff.]
(Auth: HRS §§84-31(a)(5), 91-8, 97-6) (Imp: HRS §§84-31, 91-8, 97-6)

§21-6-6.2 Conformance of petition for declaratory order. The commission may reject any petition that does not conform to the requirements set forth herein. [Eff.] (Auth: HRS §§84-31(a)(5), 91-8, 97-6) (Imp: HRS §§84-31, 91-8, 97-6)

§21-6-7 Processing of [the] petition for declaratory order[; consideration and disposition]. ~~The petition shall be dated upon receipt.~~ The commission shall notify the petitioner of the date, time, and place where the commission shall consider the petition, the petitioner's privilege of personal appearance with or without counsel, and the privilege of presenting evidence and argument in support of the petition. Within a reasonable time after the receipt of the petition, the commission shall render its order in writing. [Eff. July 13, 1981; am and comp] (Auth: HRS §§84-31(a)(5), 91-8, 97-6)
(Imp: HRS §§84-31, 91-8, 97-6)

§21-6-8 [Declaratory order on commission's own motion.

~~Notwithstanding the other provisions of this rule, the commission on its own motion or upon receipt but without notice or hearing may issue a declaratory order to resolve a controversy or answer a question.]~~ **Consideration and disposition of petition for declaratory order.** (a) The commission may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the commission may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future;
- (2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief;
- ~~(3)~~(2) The issuance of the declaratory order may adversely affect the interests of the commission or any of its officers or employees in litigation which is pending or may reasonably be expected to arise;
- ~~(4)~~(3) The matter is not within the jurisdiction of the commission; or
- ~~(5)~~(4) Any other good cause exists.

(b) The commission may, in its discretion, hold a hearing on the petition. [Eff. July 13, 1981; am and comp _____] (Auth: HRS §§84-31(a)(5), 91-8, 97-6(a)(5)) (Imp: HRS §§84-31, 91-8, 97-6)

END OF CHAPTER 6

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Adoption of Chapter 21-7
Hawaii Administrative Rules

Month, Day, 201~~9~~8

SUMMARY

Chapter 21-7, Hawaii Administrative Rules, entitled “Gifts and Fair Treatment”, is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 7

STATE ETHICS COMMISSION

GIFTS AND FAIR TREATMENT

21-7-1	Definitions
21-7-2	Prohibited gifts
21-7-3	Acceptable items
21-7-4	Offers of travel
21-7-5	Valuation of gifts
21-7-6	Imputing gifts to others
21-7-7	Submission of gifts disclosure statement
21-7-8	Public information
21-7-9	Fair Treatment

§21-7-1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

“Charitable organization” means an entity organized under section 501(c)(3) of the Internal Revenue Code;

“Gift” means anything of value and includes, but is not limited to, money, gift cards, food, services, loans, travel, lodging, training, entertainment, hospitality, things, gratuities, favors, or discounts;

“State purpose” means reasonably related to conducting one’s official state duties;

“State resources” means state time, equipment, facilities, money, electronic mail, letterhead, and other assets and resources, including state personnel. [Eff. _____] (Auth: HRS §84-31(a)(5))
(Imp: HRS §§84-11, 84-11.5, 84-13)

§21-7-2 Prohibited gifts. (a) ~~An~~ ~~state~~ employee or legislator shall not solicit, accept, or receive any gift, directly or indirectly, if a reasonable person may conclude that the gift is being given to influence or reward the recipient for the performance or nonperformance of the recipient’s state duties.

(b) In determining whether a gift is prohibited, the commission shall examine the circumstances surrounding the offer of the gift and consider:

- (1) the donor’s relationship to the recipient. ~~Except as specifically provided in this chapter, Generally,~~ a gift is ~~generally~~ prohibited where the recipient is in a position to take official action specifically affecting the donor, such as where the donor is a party to a contested case hearing before the recipient, regulated by the recipient, involved in procurement with the recipient, or a lobbyist seeking legislative or administrative action ~~from the recipient~~;
- (2) the value of the gift. Generally, the higher the value of the gift, the more likely the gift is prohibited; and
- (3) whether the gift supports a state purpose. Generally, cash, gift cards, and complimentary admission to events or venues that are primarily intended as entertainment, such as concerts, movies, sporting events, or golf tournaments, do not serve any state purpose and are more likely to be prohibited.

[Eff. _____] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-11.5, 84-13)

§21-7-3 Acceptable items. (a) The following items generally may be accepted and need not be reported on a gifts disclosure statement:

- (1) A lei, other than a money lei, offered in connection with a celebration, commemoration, or event;
- (2) Discounts, services, or other benefits offered to the public at large. This may include discounts, services, or other benefits offered to government employees as a group, provided that the same discounts, services, or other benefits are offered on similar terms to other large groups of employees;
- (3) Bona fide competitively awarded grants or scholarships;
- (4) Promotional items having no resale value, such as branded pens, calendars, hats, or tote bags;
- (5) Rewards or prizes given to competitors in contests or events, including random drawings, offered to the public or a segment thereof, where the legislator or employee receiving the reward or prize does not attend the contest or event in an official capacity, unless a reasonable person would conclude that the reward or prize was offered to the legislator or employee because of the legislator's or employee's state position;
- (6) A gift provided by any other state, a political subdivision of any other state, or the United States, provided that the gift serves a bona fide state purpose and that tangible and durable items of more than nominal value, such as artwork or jewelry, shall belong to the State rather than the individual recipient;
- (7) Modestly priced awards, plaques, and other ceremonial items of the type customarily bestowed in connection with bona fide ceremonies and otherwise reasonable under the circumstances;
- (8) Gifts received by a spouse or dependent child of the legislator or employee solely because of the spouse's or child's own employment, volunteer activities, or personal relationships, where a reasonable person would not believe that the gift was intended to influence or reward the legislator or employee;
- (9) An unsolicited gift of nominal value given as a token of appreciation to a teacher, medical professional, or similar kind of service provider, such as a holiday gift given to a teacher by a student or guardian, where the gift is offered by an individual in the individual's personal capacity, and the gift is given under circumstances in which no reasonable person would conclude that

the gift was given to influence the recipient's state duties with respect to the offeror; and

- (10) Gifts given under circumstances in which no reasonable person would conclude that the gift was being given to influence or reward the recipient for the performance or nonperformance of the recipient's state duties.

(b) An individual who represents the State for protocol purposes, such as the governor, lieutenant governor, legislator, president of the University of Hawaii, department director, or deputy director, may generally accept an unsolicited offer of complimentary attendance to attend an event organized with the principal objective of raising money for or awareness of a charitable organization, provided that:

- (1) the recipient's attendance at the event is paid for by the charitable organization itself;
- (2) the non-tax-deductible value of attendance is less than \$75, unless the commission finds that the recipient has demonstrated a special need to exceed this limit;
- (3) the recipient does not accept more than \$300 in cumulative non-tax-deductible value in any calendar year, unless the commission finds that the recipient has demonstrated a special need to exceed this limit; and

(4) the recipient's attendance at the event serves a state purpose; provided that the commission shall revise the dollar amounts in this subpart in January of each even-numbered year to reflect changes in the Consumer Price Index and shall publicize these values on its website.

(c) For purposes of subsection (b), if the value of the gift meets the reporting requirements of section 84-11.5, HRS, the gift shall be reported and the recipient shall separately report both the non-tax-deductible value of attendance and the tax-deductible portion of the attendance fee on the recipient's annual gifts disclosure statement. [Eff. _____] (Auth: HRS §84-

31(a)(5)) (Imp: HRS §§84-11, 84-11.5, 84-13)

Comments:

- *Gifts received by spouses or dependent children: If the spouse of a legislator or employee receives two tickets to an event, solely because of the spouse's employment or community work, the legislator or employee may attend the event with the spouse unless it appears as though the gift was offered with the intention of influencing the legislator or employee.*

The same is true for gifts received by dependent children of legislators or employees.

- *Gifts from family members or personal friends: Gifts generally may be accepted where the gift is based upon a familial or personal relationship and no reasonable person would conclude that a gift is being given to influence or reward the recipient for the performance or nonperformance of the recipient's state duties. However, where such a relationship exists, the recipient may consider voluntarily recusing her- or himself from taking official action involving (directly or indirectly) the individual offering the gift to avoid any appearance of impropriety.*
- *Reporting events: Where a legislator accepts the offer of a ticket to an annual dinner held by a charitable organization in the legislator's district, and the ticket costs \$250 with a tax-deductible amount of \$200, the legislator must report having received a \$250 gift, with a meal valued at \$50 and the tax-deductible portion of the ticket of \$200.*
- *The items listed in §21-7-3(a) need not be reported on a gifts disclosure statement either because (1) they are not gifts for which there could be a reasonable inference of influence on the legislator or employee, or (2) they would never approach the gifts reporting threshold of more than \$200. Items that exceed \$200 generally would not fit the criteria for acceptance under subsections (a)(1), (a)(4), (a)(7), or (a)(9).*

§21-7-4 Offers of travel. (a) The following economy-class travel expenses, including modest meals and lodging, generally may be accepted and need not be reported on a gifts disclosure statement:

- (1) Travel expenses paid for by the United States, any of its states or territories, or any political subdivision thereof;
- (2) Travel expenses provided pursuant to a grant to or a contractual agreement with the State, provided the benefit supports a bona fide state purpose;
- (3) Travel expenses provided to individuals to serve as chaperones to groups of public school students on student educational tours, where the tours are paid for by students or their guardians and are approved by the Hawaii Department of Education, and where the

travel expenses are paid for by the organizing tour company or with a portion of fees collected from other travelers.

(b) An offer of economy-class travel expenses, modest food and non-alcoholic beverages, and educational programming in connection with a bona fide professional development program, conference, or business meeting, generally may be accepted if receipt thereof is consistent with section 21-7-2, provided that the recipient shall report the travel pursuant to section 84-11.5, HRS. In determining whether an offer of travel is acceptable, the commission shall consider:

- (1) the donor's relationship to the recipient. Generally, an offer of travel may not be accepted where the donor lobbies, seeks business with, or is regulated by the recipient's agency;
- (2) the value of the trip, including all travel costs sponsored by the donor; and
- (3) whether the travel supports a state purpose. Generally, offers of travel to events that lack significant educational content may not be accepted. Likewise, offers to attend entertainment events, such as golf, cruises, sporting events, or luxury meals, generally may not be accepted, even if they occur as part of an otherwise acceptable event.

[Eff. _____] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-11.5, 84-13)

Comments:

- *Gifts of travel are often acceptable because of their benefit to the State. For example, if the National Association of Attorneys General wishes to pay for two Deputy Attorneys General to attend a training on effective litigation techniques, and the recipients will travel in economy class and stay at a modestly priced hotel, the gift of travel may be accepted. If, however, an organization wishes to pay for a Deputy Attorney General to fly first-class to a ski resort and stay at a five-star hotel, the trip generally may not be accepted. Recipients are advised to contact the Commission for guidance prior to acceptance.*

§21-7-5 Valuation of gifts. (a) The value of a gift is its fair market value, which is the cost that a member of the public would reasonably expect to incur to purchase the gift, including any tax-deductible portion.

(b) If the gift is a seat at a table for an event, the value of the gift is the cost of the table sponsorship divided by the number of seats at the table. [Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-11.5)

Comments:

- *If the face value of a ticket to an event is \$100, but at the time the ticket is offered as a gift the event is sold out and tickets on the secondary market are \$500, the value of the ticket is \$500.*

§21-7-6 Imputing gifts to others. (a) Where an offeror of a gift does not specify a recipient within an office, and the legislator or supervisor of the receiving office knows or reasonably should know of the gift, the gift is presumed to be a gift to the legislator or supervisor.

(b) A gift to a family member of a legislator or employee is presumed to be a gift to a legislator or employee where:

- (1) the gift is offered because of the family member's relationship to the legislator or employee; and
- (2) the legislator or employee knows or reasonably should know of the gift.

[Eff.

] (Auth: HRS §84-31(a)(5)) (Imp: HRS §84-11)

Example:

- *When a donor provides a gift of food to a legislative office, the legislator is presumed to be the recipient of the gift.*

§21-7-7 Submission of gifts disclosure statement. Gifts disclosure statements shall be filed using forms and methods prescribed by the commission. The commission may require that gifts disclosure statements be filed using an electronic filing system. [Eff.] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-11.5)

§21-7-8 Public information. Gifts disclosure statements are public records and the contents of a gifts disclosure statement are public information, except as otherwise provided by law. [Eff. _____] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-11.5)

§21-7-9 Fair treatment. (a) Subject to article III, section 7 of the Constitution and section 84-13, HRS, legislators and employees shall not use or attempt to use their official positions to solicit, request, accept, receive, or grant unwarranted privileges, exemptions, advantages, contracts, treatment, or benefits, for themselves or others, or to subject others to unwarranted treatment, whether favorable or unfavorable. Among other things, legislators and employees shall not:

- (1) Take unwarranted action or withhold warranted action against an individual, or threaten to do so, for lodging a complaint with the commission, where a reasonable person would conclude that the action or lack of action, or threat thereof, was intended as retaliation for lodging a complaint or cooperating with a commission investigation;
- (2) Use or attempt to use their official position to seek or secure private employment or contracts for services for themselves or others, provided that legislators and employees may offer professional references for their current and former employees;
- (3) Accept, receive, or solicit compensation, honoraria, other consideration, or gifts for the performance of their official duties or responsibilities except as provided by law;
- (4) Use state resources for private business purposes, including, but not limited to, the use of state resources for:
 - (A) political campaign activities;
 - (B) advertising or publicizing the sale of goods or services;
 - (C) taking or responding to sales orders or inquiries;
 - (D) preparing or sending invoices;
 - (E) collecting payments;
 - (F) producing or delivering goods or services;
 - (G) arranging or conducting private business meetings;
 - (H) requesting or directing other state personnel to assist with private business activities; or
 - (I) otherwise furthering a private business interest, except where the State has made a state facility or resource

available for rent, purchase, or use by private organizations or individuals on generally equal terms and such use serves a state purpose;

- (5) Use state resources for fundraising, except:
 - (A) as approved by the Governor, the Speaker of the House and President of the Senate, the Chief Justice, or the President of the University of Hawaii, or
 - (B) in conjunction with a nonprofit organization that exists for the sole purpose of assisting and supporting a state facility or program, including but not limited to a state charter school;
- (6) Solicit or engage in a substantial financial transaction with a subordinate or a person or business the legislator or employee inspects or supervises in an official capacity; or
- (7) Abuse their position within state government to sexually harass another individual.

(b) In all but the most extraordinary circumstances, acceptance of a gift in compliance with section 84-11, HRS, and sections 21-7-1 to 21-7-6 will comport with the fair treatment law; however, solicitation or acceptance of a substantial number of individual gifts may raise fair treatment concerns even if each individual gift is acceptable. [Eff. _____] (Auth: HRS §84-31(a)(5)) (Imp: HRS §§84-11, 84-13)

Comments

- *Door prizes: One who attends an event in his or her official capacity is prohibited from accepting a door prize or complimentary item of more than nominal value that is won or offered at the event. Acceptance may be permissible, however, if the item is accepted on behalf of the State and becomes property of the State. For example, an employee who wins a laptop computer at a conference the employee attends in the employee's official capacity may turn the item over to the employee's state agency to become part of the agency's inventory.*
- *Honoraria: One who gives a speech as part of his or her official duties may not accept an honorarium from a non-state source for giving the speech, because he or she is already compensated by the State to perform such a duty.*

- *Political campaign activities: The use of state resources for political campaign activities is prohibited. These include, but are not limited to, soliciting support for political candidates for office, organizing or publicizing political fundraisers, and organizing activities such as sign-waving to support political candidates for office.*
- *Fundraising: State resources may be used for fundraising activities in limited situations, including:*
 1. *Non-coercive fundraising to support a charity or purpose officially sponsored and endorsed by the State.*
 2. *Non-coercive fundraising for humanitarian causes officially endorsed by the State, e.g., to support victims of a natural disaster.*
- *Volunteer activities: A state employee may serve as an uncompensated officer, director, or volunteer of a nonprofit organization affiliated with the employee's state agency and whose sole purpose is to assist and support the state agency. So long as the employee receives no compensation from the nonprofit organization, and the employee is authorized by the director of the employee's agency or other relevant authority, the employee may use state resources, including state time, to benefit the organization.*
- *Travel: Except in very limited circumstances, state officials may travel only in economy class. If possible, mileage credit accrued on state travel shall be used for state travel. If such credit cannot be used for state travel, it may be applied to personal travel subject to approval by the Comptroller or other relevant authority. Similarly, travel upgrades or other benefits earned while on state travel that cannot be applied to state travel may be applied to personal travel subject to approval by the Comptroller or other relevant authority.*
- *Use of state resources for private business purposes: the State may rent public facilities (such as school cafeterias), sell advertising space at public facilities, and/or otherwise engage in transactions with private entities, so long as state facilities are generally offered on equal terms to all would-be purchasers.*

END OF CHAPTER 7

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Adoption of Chapter 21-8
Hawaii Administrative Rules

Month, Day, 2018

SUMMARY

Chapter 21-8, Hawaii Administrative Rules, entitled “Conflicts of Interests”, is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 8

STATE ETHICS COMMISSION

CONFLICTS OF INTERESTS

- 21-8-1 Conflicts of Interests, Officer or Director of Private Organization
in Employee's State Capacity
- 21-8-2 Acquiring New Conflicts of Interests; Reason to Believe
- 21-8-3 Assist or Represent – Exception for Personal Service Contracts

§21-8-1 Conflicts of Interests, Director or Officer of Private Organization in Employee's State Capacity. (a) An employee who serves as a director or officer of a private organization in the employee's official capacity is not prohibited from taking official action affecting that organization, provided that action does not affect the personal financial interest of the employee, the employee's spouse or civil union partner, or the employee's dependent children.

(b) Any discretionary action taken by the employee as a director or officer as set forth in subsection (a) shall be considered official action for purposes of chapter 84, HRS. [Eff. _____] (Auth: HRS §§84-31(a)(5)) (Imp: HRS §§84-3, 84-14, 84-31)

Examples:

- (1) *An employee of a state agency sits as a director of a non-profit organization by virtue of the employee's state position. The employee is not prohibited from taking official action, in the employee's capacity as a state employee, affecting that non-profit organization.*
- (2) *An employee of a state agency sits as a director of a non-profit organization by virtue of the employee's state position. The employee's spouse is employed by the non-profit organization. The employee is prohibited from taking official action, in the employee's capacity as a state employee, affecting that non-profit organization.*

§21-8-2 Acquiring New Conflicts of Interests; Reason to Believe. -For purposes of section 84-14(b), HRS, ~~an employee has an employee has~~ "reason to believe" ~~that the employee "may be directly involved in official action to be taken by the employee" where a business or undertaking may be directly involved in official action to be taken by the employee where~~ there is a reasonable likelihood the employee may take official action affecting that business or undertaking. [Eff. _____] (Auth: HRS §§84-31(a)(5)) (Imp: HRS §§84-14, 84-31)

§21-8-3 Assist or Represent – Exception for Personal Service

Contracts. A legislator or employee may be permitted to provide the legislator's or employee's own personal services to the legislator's or employee's agency where there is an overriding state purpose that outweighs any appearance of a conflict of interest. The commission may evaluate the following factors in determining whether a personal services contract is permissible:

- (a) whether there is an appearance that the legislator or employee is receiving unwarranted or preferential treatment from the legislator's or employee's agency;
 - (b) whether the legislator or employee is using confidential information to obtain the personal services contract;
 - (c) whether there is a substantial public need for the legislator's or employee's expertise;
 - (d) whether the legislator or employee possesses expertise in a particular area;
 - (e) whether the agency is having difficulty obtaining services of this specialized expertise from other sources; and
 - (f) whether the personal services contract is otherwise consistent with chapter 84, HRS, and other applicable law. [Eff.]
- (Auth: HRS §§84-31(a)(5)) (Imp: HRS §§84-14, 84-31)

END OF CHAPTER 8

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Adoption of Chapter 21-9
Hawaii Administrative Rules

Month, Day, 2018

SUMMARY

Chapter 21-9, Hawaii Administrative Rules, entitled “Post-Employment Restrictions and Contracts”, is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 9

STATE ETHICS COMMISSION

POST-EMPLOYMENT RESTRICTIONS AND CONTRACTS

- 21-9-1 Agency or subdivision thereof
- 21-9-2 Responsibility to enforce contracts rules

§21-9-1 Agency or subdivision thereof. For purposes of section 84-18(c), HRS, in determining what constitutes the former employee's agency or subdivision thereof, the commission may consider the size of the agency; the likelihood that the former employee would have any unfair advantage in representing a person or business before that agency; the former employee's position within the agency; whether the former employee will communicate with former colleagues within the agency; whether the former employee has confidential information that may provide an unfair advantage; and any other factors that could reasonably give the appearance of impropriety. [Eff.] (Auth: HRS §§84-31(a)(5)) (Imp: HRS §84-18)

Comments:

- *Role in former agency: the former director of an agency would likely be prohibited from representing another person before any section of that agency; in contrast, an individual who worked for a subsection of a large agency – and had minimal contact with other subsections of the agency – may not be prohibited from representing another person before a different subsection.*

§21-9-2 Responsibility to enforce contracts rules. (a) An agency's director or acting director shall be responsible for ensuring that all agency contracts comply with section 84-15, HRS.

(b) Any violations of section 84-15, HRS shall be assessed against the director or acting director of the agency at the time the violation occurred. [Eff.] (Auth: HRS §§84-31(a)(5)) (Imp: HRS §§84-15, 84-31)

END OF CHAPTER 9

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

Adoption of Chapter 21-10
Hawaii Administrative Rules

Month, Day, 2018

SUMMARY

Chapter 21-10, Hawaii Administrative Rules, entitled “Lobbying”, is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 21

HAWAII STATE ETHICS COMMISSION

CHAPTER 10

STATE ETHICS COMMISSION

LOBBYING

21-10-1	Definitions
21-10-2	Registration and termination
21-10-3	Exclusions from registration requirement
21-10-4	Background work in support of lobbying
21-10-5	Statement of contributions and expenditures
21-10-6	Contributions for the purposes of lobbying
21-10-7	Reporting of expenditures
21-10-8	Expenditures for the purpose of lobbying
21-10-9	Accounting issues in statements of contributions and expenditures statements
21-10-10	Submission of registration forms and statements of contributions and expenditures

§21-10-1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

“Client” means the individual or entity that employs, contracts with, or retains another person for pay or other consideration to lobby on behalf of that individual or entity;

“Direct lobbying” means any oral or written communication with a legislator, or an employee, intern, or volunteer of the legislature or an agency, that would appear to a reasonable person to be an attempt to influence legislation or rulemaking. Direct lobbying includes but is not limited to drafting or submitting testimony; discussing existing or potential legislation or administrative rules; and advocating for the passage or defeat of any legislation or administrative rule;

“Employing organization” means an entity that employs or contracts with a lobbyist to act on behalf of a client;

“For pay or other consideration” includes a wage, salary, fee, or other compensation provided to an owner, director, employee, or contractor of an organization who lobbies on behalf of the organization;

“Grassroots lobbying” means any oral or written communication directed at any member of the public that both expresses an opinion about existing or potential legislation, administrative rule, or ballot issue and includes an explicit or implied call to action;

“Lobbying” has the same meaning as in section 21-1-2;

“Lobbyist” has the same meaning as in section 21-1-2;

“Person” has the same meaning as in section 97-1, HRS. [Eff.

] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-2.5, 97-3, 97-6)

Comments and Examples:

- *The Commission may consider any guidance provided by the Internal Revenue Service in determining whether an activity constitutes “lobbying.”*
- *Example 1: A lobbyist for a bank attends a political fundraiser and speaks with a state representative. The two discuss the bank’s current profits and financial outlook, but do not discuss any potential legislation or regulatory issues that might affect the bank. Such discussion is not considered lobbying.*
- *Example 2: A lobbyist for a non-profit organization that focuses on environmental issues attends a social event and speaks with a state senator.*

The two discuss, in general terms, the need to pass stronger legislation on the state level to protect coral reefs. Such discussion is considered lobbying.

- *Example 3: Several staff members of a non-profit organization research and write a paper on whether a policy proposal from another state would be feasible here in Hawaii. The organization does not engage in lobbying and does not intend to use the paper in support of any lobbying efforts. After spending many hours on the project, the organization determines the proposal would not be feasible in Hawaii and the project is shelved. The work on this project is not considered lobbying.*
- *Example 4: Same facts as in #3, except that the organization initially plans to use the paper in lobbying; after researching the issue, however, the organization abandons the issue and does not use the paper for any lobbying efforts. The work on this project is not considered lobbying.*
- *Example 5: Same facts as in #3, except after concluding the research, the organization decides that it will ask the legislature to pass legislation on the issue and uses its research paper to support its position. The work on this project is considered lobbying.*
- *Example 6: A business pays for a public opinion poll to see whether the public would support a legislative initiative. The poll does not attempt to influence the individuals being polled, but merely asks for their opinions on the issue. The results are not shared publicly and the business never pursues the issue. Expenditures on this public opinion poll are not considered expenditures for the purpose of lobbying.*
- *Example 7: Same facts as in #6, but the results are made public (to influence legislators' willingness to consider the legislation) and/or cited in the business's testimony. Expenditures on the public opinion poll are considered expenditures for the purpose of lobbying.*

Registration of Lobbyists

§21-10-2 Registration and termination. (a) Every individual who meets the threshold requirements to be deemed a lobbyist, as described in section 97-1, HRS, shall register as a lobbyist with the commission within five days of meeting those requirements

(b) For purposes of determining whether an individual has met the threshold requirements to register as a lobbyist, all time spent lobbying shall be included. Time spent lobbying includes, but is not limited to:

- (1) drafting and providing testimony;
- (2) discussing actual or potential legislation or rules with any official in the legislative or executive branch who is or may be involved in legislation or rulemaking;
- (3) waiting to testify at a hearing, when the individual who is waiting:
 - (A) is being compensated to lobby during that waiting time and is not performing other work unrelated to the lobbying;
 - (B) spends that time preparing, reviewing, or strategizing on the testimony; or
 - (C) spends that time otherwise lobbying.

(c) Time spent on the following activities need not be counted for purposes of registration:

- (7) performing work relating to service on a task force created by the legislature or an agency; and
- (8) research on and discussions regarding policy matters where the research or discussions are not reasonably likely to lead to lobbying activities within a twelve-month period.

(d) Every lobbyist shall renew the lobbyist's registration biennially by filing a registration and authorization form with the commission within ten days of the opening of every odd-numbered legislative session.

(e) If a lobbyist does not renew the lobbyist's registration as required by subsection (d), the lobbyist's registration is deemed to have expired on December 31 of the preceding even-numbered year, provided that the lobbyist shall remain subject to the requirements of chapter 97, HRS, and these rules for the period during which the registration was effective.

(f) Lobbyists' registrations shall be terminated as set forth in section 97-2, HRS. [Eff. _____] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-2.5, 97-3, 97-6)

§21-10-3 Exclusions from registration requirement. (a) The following individuals need not register as lobbyists:

- (1) any individual who represents oneself and not any other person before the legislature or administrative agency, provided that these individuals may be required to submit statements of contributions and expenditures as provided in section 97-3, HRS, and these rules. For purposes of this subsection, “any other person” includes a sole proprietorship or other business owned or operated by the individual;
- (2) any federal, state, or county official or employee acting in the official’s or employee’s official capacity, provided that if the federal, state, or county official or employee contracts for the services of a lobbyist, the lobbyist is subject to the registration and reporting requirements of chapter 97, HRS, and these rules, and the director of the agency employing the lobbyist shall be responsible for submitting statements of contributions and expenditures as required by section 97-3, HRS, and these rules;
- (3) any person engaged in the business of publishing or broadcasting news or comment on the news, while engaged in the gathering or dissemination of news and comment on the news and in the ordinary course of business;
- (4) an attorney advising a client on the construction or effect of proposed legislative or administrative action; and
- (5) any person who possesses special skills and knowledge relevant to certain areas of legislation or rulemaking, whose skills and knowledge may be helpful to the legislative and executive branches of state government and who makes an occasional appearance at the written request of the legislature, an administrative agency, or the lobbyist, even though the person receives reimbursement or other payment from the legislature, administrative agency, or the lobbyist for the appearance. A copy of the written request for an appearance made by the legislature, administrative agency, or lobbyist shall be provided to the commission within five business days of the commission’s request.

(b) Lobbying activities that exceed the scope of subsection (a) shall be reported as provided by chapter 97, HRS, and these rules. [Eff.

] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-2.5, 97-3, 97-6)

Comments and Examples, subsection (2):

- *Example 1: The director of a state agency testifies on a bill affecting one of her agency's programs. The director is not required to register as a lobbyist, nor is the agency required to submit a statement of contributions and expenditures.*
- *Example 2: A state agency hires a private sector individual to lobby on behalf of the agency. The lobbyist is subject to the registration and reporting requirements, and the director of the state agency is responsible for submitting statements of contributions and expenditures.*

Comments and Examples, subsection (4):

- *Example 3: A client seeks an attorney's advice about the application of a proposed new law. The attorney provides the advice and does not engage in any other lobbying activities. The attorney does not need to register as a lobbyist or file a statement of contributions and expenditures, and the client need not report the attorneys' fees as a lobbying expense.*
- *Example 4: A client asks for an attorney's help in amending a law. The attorney drafts testimony, meets with legislators, and testifies on the proposed amendment. This is lobbying, and the attorney must register and file a statement of contributions and expenditures if the activities meet the threshold for registration and reporting as set forth in HRS § 97-2.*

Comments and Examples, subsection (5):

- *Example 5: A Senate committee is scheduled to hear a bill amending the tax code. The committee chair emails an economist and asks her to testify and provide her expert opinion on the bill. The economist is not subject to either the registration or reporting requirements for this testimony. If the economist engages in other lobbying, however – that is, lobbying other than at the direct request of the Senator – she must register as a lobbyist and submit expenditure reports if she meets the threshold requirements for registration/reporting.*

- *Example 6: A House committee is scheduled to hear a bill that will affect the hotel industry. A Representative knows of an executive at a hotel who is interested in the bill and telephones the executive to tell him the bill has been scheduled. The executive testifies on the bill. The executive shall register as a lobbyist and submit statements of contributions and expenditures if the executive meets the threshold requirements for registration/reporting.*

§21-10-4 Background work in support of lobbying. An individual who, under the direction of a registered lobbyist, is paid to draft testimony, research legislative issues, conduct public opinion polls, or perform administrative work in support of lobbying activities, is not required to register as a lobbyist if:

- (a) the individual does not meet with or communicate directly with any official in the legislative or executive branch regarding the subject matter of any existing or potential legislation or rule; and
- (b) the expenditures for that individual's activities are reported pursuant to section 21-10-5. [Eff. _____] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments:

- *This Rule is intended to allow individuals to “ghost write” testimony – and to perform background research and administrative work – without having to register as a lobbyist, provided several strict conditions are met. A registered lobbyist must supervise the work; the work must be reported on the joint statement of contributions and expenditures or on a registered lobbyist's statement as provided by §21-10-5(c); and the individuals performing background work may not directly communicate with legislators or agency employees regarding the subject matter of the legislation.*

Reporting of Lobbying Contributions and Expenditures

§21-10-5 Statement of contributions and expenditures. (a) Each client, its lobbyists, and the lobbyists' employing organization, if any, shall file a joint statement of contributions and expenditures that includes all expenditures made for the purposes of lobbying on behalf of that client.

- (b) A joint statement of contributions and expenditures shall include:
 - (1) the names of all registered lobbyists engaged in lobbying on behalf of the client;
 - (2) all contributions for the purpose of lobbying received by the lobbyists, the employing organization, and the client, as set forth in section 97-3, HRS, and these rules;
 - (3) all expenditures made by or in support of the lobbying interests or activities of the client, including out-of-pocket expenditures made by individual lobbyists, as set forth in section 97-3, HRS, and these rules;
 - (4) the signature, digital or otherwise, by each registered lobbyist lobbying on behalf of the client, with such signature certifying the completeness and accuracy of the statement of contributions and expenditures; and
 - (5) The signature of any person making expenditures of \$1,000 or more of the person's or any other person's money for the purpose of lobbying, with such signature certifying the completeness and accuracy of the statement of contributions and expenditures.

(c) If a lobbyist expends funds or receives contributions for the purpose of lobbying that are not captured on any client's statement of contributions and expenditures, or if any person expends more than \$1,000 of the person's or any other person's money during a reported period and those expenditures are not captured on any client's statement of contributions and expenditures, the lobbyist or person expending such funds shall submit a separate statement reporting these contributions and expenditures.

(d) Each client, each of its lobbyists, and each lobbyists' employing organization, if any, shall be responsible for filing of timely, accurate, and complete statements of contributions and expenditures to the commission. [Eff.] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments:

- *This rule addresses the statutory requirement that statements of contributions and expenditures be filed by up to three different entities (the client, the*

employing organization, and the lobbyist; or, in the case of lobbyists employed in-house by the client, by the client/employing organization and the lobbyist), even though the statements refer to the same lobbying activity. This rule creates a single, client-based report, rather than requiring separate reports from the client, the employing organization, and the lobbyist. This single, client-based reporting method avoids double (or triple) reporting, and also avoids the current practice of having lobbyists submit expenditure reports listing “zero” expenditures (because all expenditures were covered by the client and/or the employing organization). This method will also provide better information to the public, insofar as the public can see – in one place, on one report – all sums expended to benefit a particular client.

- *If a lobbyist represents multiple clients, the lobbyist must sign each client’s statement of contributions and expenditures.*

§21-10-6 Contributions for the purpose of lobbying. (a) Contributions for the purposes of lobbying shall be reported as set forth in section 97-3, HRS, except where a contributor’s identity may be withheld pursuant to law.

(b) Contributions shall be reported where the contributor knows or reasonably should know that the primary purpose of the contribution is to support lobbying.

(c) Where a contribution is used in part for lobbying and in part for other expenses, the reporting entity need report only the amount used for lobbying. [Eff. _____] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments and Examples:

- *Reporting contributions: The identity of a contributor need not be reported where the United States Constitution, Hawaii Constitution, or other law permits the contributor’s identity to be withheld. Contributions need not be explicitly earmarked for lobbying to be reportable; if the contributor reasonably should know that the contribution will be used primarily to support lobbying then it is reportable. For example, if the primary purpose of an organization is legislative advocacy, then a contributor should reasonably know that a donation will be used for lobbying.*
- *Example 1: A trade organization made up of several different companies is formed to promote the industry, offer education to its members, and engage in legislative advocacy. Each member company pays annual dues. The trade*

organization must report that portion of the dues that is attributable to the lobbying effort.

§21-10-7 Reporting of expenditures. (a) Expenditures shall be reported as provided by section 97-3, HRS, and these rules, using forms and methods prescribed by the commission.

(b) Each statement of expenditures shall include:

(1) The total sum expended for the purpose of lobbying by or on behalf of the person filing the statement during the relevant reporting period, regardless of whether the expenditure was made by a registered lobbyist, along with an itemization of how that sum was expended among the following categories:

(A) Preparation and distribution of lobbying materials;

(B) Media advertising;

(C) Compensation paid to lobbyists, as follows:

(i) Where a client pays an employing organization such as a law firm, which in turn employs a lobbyist, the client shall report the amount paid to the employing organization for the purpose of lobbying during the relevant reporting period;

(ii) Where a client's employee serves as a lobbyist, the client shall report the pro rata portion of the lobbyist's salary that is attributable to the lobbyist's lobbying activities during the relevant reporting period;

provided that a client shall indicate whether the lobbyist is a salaried employee, is paid on an hourly basis, or is paid a lump sum, whether annually, monthly, or otherwise.

(D) Fees paid to consultants for services, including the name of each individual consultant or entity and the nature of the services provided;

(E) Entertainment and events;

(F) Receptions, meals, food, and beverages;

(G) Gifts;

(H) Loans;

(I) Interstate transportation, including incidental meals and lodging; and

(J) Other disbursements;

- (2) The name and address of each legislator or employee who received benefits valued at \$25 or more on any day from the filer; and
- (3) The name and address of each legislator or employee who received benefits valued at \$150 or more in a reporting period from the filer.
- (c) The sum of the expenditures on each category set forth in subsection (b)(1) shall equal the total sum expended for the purpose of lobbying in any reporting period, or the filer shall provide an explanation for any discrepancy. [Eff. _____] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments:

- *Lobbyists should be aware of the State Ethics Code's restrictions on certain gifts and benefits. See HRS §§ 84-11, 84-11.5, 84-13; HAR chapter 21-7.*

§21-10-8 Expenditures for the purposes of lobbying. (a) Expenditures made “for the purpose of lobbying” means all those expenditures in support of and in preparation for direct lobbying or grassroots lobbying. Such expenditures include, but are not limited to:

- (1) drafting and providing testimony;
- (2) discussing actual or potential legislation or rules with any official in the legislative or executive branch who is or may be involved in legislation or rulemaking;
- (3) discussing lobbying strategy;
- (4) research or polling when the primary purpose of the research or polling is to use in lobbying activities;
- (5) advertising;
- (6) monitoring the status of proposed legislation or proposed administrative rules, when the primary purpose of the monitoring is to engage in lobbying;
- (7) an event organized for the purpose of providing interaction between members of the legislature or an agency and an individual or organization that is engaged in lobbying, or intends to engage in lobbying, where the topics of the lobbying effort are discussed;
- (8) time spent waiting to testify at a hearing, when the individual who is waiting:
 - (A) is being compensated to lobby during that waiting time and is not performing other work unrelated to the lobbying;

- (B) spends that time preparing, reviewing, or strategizing on the testimony; or
 - (C) spends that time otherwise lobbying.
 - (b) Expenditures on the following activities are not considered expenditures for the purpose of lobbying:
 - (1) performing work relating to service on a task force created by the legislature or an agency; and
 - (2) research on and discussions regarding policy matters where the research or discussions are not reasonably likely to lead to lobbying activities within a twelve-month period.
- [Eff. _____] (Auth: HRS §§84-31(a)(5), 97-6(a)(5))
(Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments and examples:

- *Example 1: Paid staff of a non-profit organization dedicated to serving the needs of the elderly meet to discuss the current state of elder affairs and what issues they currently face. Without more, expenditures relating to this meeting are not reportable lobbying expenditures. However, if the group discusses proposed legislation or how the organization should respond to bills, then expenditures relating to this meeting are reportable lobbying expenditures. If the group spends a portion of the meeting discussing lobbying efforts and a portion discussing non-lobbying work, then expenditures for the pro rata share of the meeting devoted to lobbying should be reported.*
- *Example 2: A non-profit organization that lobbies on health care puts on a brunch and invites members of the legislature to discuss both the mission of the organization and legislation that the organization would like introduced. Expenditures relating to the brunch are reportable.*

§21-10-9 Accounting issues in statements of contributions and expenditures. (a) Statements of contributions and expenditures required by section 97-3, HRS, and these rules shall report expenditures during the relevant reporting period on an accrual basis.

(b) Where an entity pays a flat fee on a periodic basis for the purpose of lobbying the state legislature, the entity may report regular-session lobbying activities either by:

- (1) reporting 40% of the total expected annual expenditures as having been spent in the January-February period, 40% of the total expected annual expenditures as having been spent in the March-April period, and 20% of the total expected annual expenditures as having been spent in the May-December period; or
- (2) calculating the amount of work performed in the relevant reporting period in proportion to the entire amount of work expected to be performed on an annual basis and reporting that proportion of the annual expenditure on the relevant reporting statement.

~~(b)~~(c) Where an entity makes a lump sum expenditure for both lobbying and non-lobbying activities, the entity shall report either the entire lump sum expenditure or the pro rata share expended for the purposes of lobbying. [Eff.] (Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-3, 97-6)

Comments and Examples:

- *Example 1: A client hires a consultant to run radio ads during the January/February reporting period. The consultant does not bill the client until March. The expenditure is reported on the January/February contributions and expenditures statement.*
- *Example 2: A client pays a lobbyist a flat fee of \$24,000 a year to lobby. This fee is divided into monthly installments of \$2,000; however, the lobbyist and client do not know – when filing the January-February report – whether the lobbyist will be lobbying more or less in March-April (or May-December) than in January-February, and thus do not know how to apportion the \$24,000. Reporting only \$4,000 for the January-February period, however, generally understates the amount of lobbying done by the client during that period, whereas reporting \$16,000 for the May-December period generally overstates the amount of lobbying done by the client during that period. The lobbyist and client may make a good faith estimate as to when the lobbying activities will occur. The Ethics Commission's experience is that, where a lobbyist focuses exclusively on the state legislature, the split is generally 40% for January-February, 40% for March-April, and 20% for May-December. A client and lobbyist with this type of lump-sum (or lump-sum-in-installments) arrangement may use the 40/40/20 model unless the lobbyist has a good faith*

belief that expenditures for lobbying will deviate substantially from this model; this 40/40/20 reporting is intended as a “safe harbor” for clients and lobbyists who receive flat-fee payments on a periodic basis (excluding special sessions of the legislature). ~~However, any client who pays a lobbyist on an hourly basis should use report actual expenditures (rather than estimates) using an accrual basis.~~ Rather than using this estimate, however, clients and lobbyists may calculate the actual expenditures by first calculating the lobbyist’s effective hourly rate (that is, the number of hours the lobbyist is expected to work over the course of the year divided by the total expenditure for the year), multiplying that hourly rate by the actual number of hours lobbied, and then reporting that amount as the expenditure during the relevant reporting period. ~~However, a~~Any client who pays a lobbyist on an hourly basis, however, should use report actual expenditures (rather than estimates) using an accrual basis.

- Clients often pay lobbyists a set monthly or yearly sum, where the lobbyist may perform both lobbying and non-lobbying work for the client. In such situations, the client has two options:
 - Option #1: Report the entire sum as a lobbying expense. This is a clear and straightforward way to report expenditures, as neither the client nor the lobbyist must track the hours spent lobbying nor determine whether a particular activity constitutes “lobbying.” This method may result in over-reporting, however, as some work performed by a lobbyist may not constitute “lobbying.”
 - Option #2: Track the lobbyist’s hours on lobbying and non-lobbying activities, and report the pro rata share of the lobbying expense (taking into account the “lump sum” rules discussed above). The Commission will presume that a lobbyist’s hourly rate is the same for both lobbying and non-lobbying activities; a client that contends it pays a lobbyist \$100 an hour for lobbying but \$2,000 an hour for non-lobbying activities will likely face an enforcement action for violating the reporting requirements of HRS § 97-3 and these rules.

§21-10-10 Submission of registration forms and statements of contributions and expenditures. Registration forms and statements of

contributions and expenditures shall be filed using forms and methods prescribed by the commission. The commission may require that forms and statements be filed using an electronic filing system. [Eff. _____]
(Auth: HRS §§84-31(a)(5), 97-6(a)(5)) (Imp: HRS §§97-1, 97-2, 97-2.5, 97-3, 97-6)

END OF CHAPTER 10

These amendments to and compilations of Title 21, Chapters 1-10, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

SUNSHINE LAW MEETING
AGENDA ITEM VII

EVALUATION OF EXECUTIVE DIRECTOR DANIEL GLUCK

The Hawaii State Ethics Commission may convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(2) to discuss matters relating to the evaluation of an employee.

No attachments.