

CLARE E. CONNORS 7936
Attorney General of Hawai'i

PATRICIA OHARA 3124
ROBYN B. CHUN 3661
KALIKO'ONALANI D. FERNANDES 9964
Deputy Attorneys General
Department of the Attorney General
State of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813
Tel: (808) 586-1360
Fax: (808) 586-8116
Email: robyn.b.chun@hawaii.gov
kaliko.d.fernandes@hawaii.gov

Attorneys for Appellee
HAWAI'I STATE ETHICS COMMISSION



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

ROWENA AKANA,
Appellant

v.

HAWAI'I STATE ETHICS COMMISSION,
STATE OF HAWAI'I
Appellee.

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

ORDER AFFIRMING THE HAWAI'I STATE ETHICS COMMISSION'S (1) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED FEBRUARY 5, 2019, AND (2) ORDER REGARDING JURISDICTIONAL AND CONSTITUTIONAL ISSUES RAISED BY RESPONDENT, DATED OCTOBER 16, 2018

HEARING:

Date: September 6, 2019
Time: 10:00 A.M.
Judge: Honorable James H. Ashford

ORDER AFFIRMING THE HAWAI'I STATE ETHICS COMMISSION'S (1) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED FEBRUARY 5, 2019, AND (2) ORDER REGARDING JURISDICTIONAL AND CONSTITUTIONAL ISSUES RAISED BY RESPONDENT, DATED OCTOBER 16, 2018

Pursuant to Hawai‘i Revised Statutes (“HRS”) § 91-14 and Rule 72 of the Hawai‘i Rules of Civil Procedure, Appellant Rowena Akana (“Appellant”) appealed the (1) Findings of Fact, Conclusions of Law, and Decision and Order, dated February 5, 2019 (the “Decision & Order”), and (2) Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent, dated October 16, 2018 (the “October 16 Order”), issued by Appellee Hawai‘i State Ethics Commission (the “Commission”). Oral argument on the appeal was heard before the Honorable James H. Ashford on September 6, 2019 at 10:00 a.m. Stephen M. Tannenbaum, Esq., and Jeremy K. O’Steen, Esq., appeared on behalf of Appellant, and Kaliko‘onalani D. Fernandes, Esq., and Robyn B. Chun, Esq., appeared on behalf of the Commission, with Daniel M. Gluck, Esq., Executive Director of the Commission also present.

The Court, having reviewed the briefs submitted by the parties and the records and files herein, and having heard the argument of counsel, affirms the Decision & Order and the October 16 Order.

First, Appellant argues that the Commission lacks the authority to regulate an Office of Hawaiian Affairs (“OHA”) trustee’s exercise of powers, and that the Commission exceeded its authority and jurisdiction in proceeding against Appellant for violations of HRS Chapter 84, the State Ethics Code. That argument is rejected.

The State Ethics Code applied to Appellant. There is no dispositive comparison or analogy between the facts in this case and the facts in *Boyd v. Hawaii State Ethics Commission*, 138 Hawai‘i 218, 378 P.3d 934 (2016), on which Appellant relies. Appellant has not shown any conflict of law, including through her reliance on HRS §§ 10-4(3), 10-4.5, and 10-16, and Appellant’s assertions of OHA’s exclusive authority have not been established. Appellant also relies on *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013); while *Kealoha* limits the

court's role in supervising OHA trustees' acts, it does not support Appellant's arguments regarding the Commission's authority.

Second, Appellant argues that the Commission deprived her of due process by allegedly denying her an evidentiary hearing concerning the Commission's authority and jurisdiction. There was no denial of due process. Appellant did not request a separate evidentiary hearing on the Commission's authority and jurisdiction. She did not object to the Commission's October 16 Order, or the lack of a separate evidentiary hearing on the Commission's jurisdiction and authority, and instead raised the issue for the first time in this appeal, in connection with her Motion for Additional Evidence to Be Taken. There is nothing in the record to suggest that Appellant could not have offered evidence or argument on the Commission's authority or jurisdiction during the multi-day contested case hearing that occurred before the Commission in October 2018; Appellant apparently chose not to offer any such evidence or argument.

Third, Appellant argues that HRS § 84-31 requires that written charges be issued by the Commission as a prerequisite to investigation. She points to HRS § 84-31(a)(6) in support of her argument, but that section simply sets out the applicable statute of limitations and defines when a proceeding is deemed to have been initiated for statute of limitations analysis. It does not impose the filing of a written charge as a prerequisite to investigation. Appellant also points to HRS § 84-31(b) in support of her argument, but nothing in that section imposes a written charge as a prerequisite to investigation, either.

HRS § 84-31 does contain an express prerequisite to investigation, and that is a formal resolution, supported by a vote of three or more members of the Commission. When the Legislature imposed a clear, specific prerequisite in this instance, but did not clearly express a

written charge as another prerequisite, the Court will not impose or infer the application of the written charge prerequisite Appellant advocates.

Fourth, Appellant argues that her equal protection rights were violated by the Commission. Appellant's Motion for Additional Evidence to Be Taken, referenced in her Opening Brief, was denied in June 2019. There is no evidence in the record to support Appellant's equal protection claim, and Hawai'i authority does not support Appellant's "class of one" theory. As a result, Appellant's equal protection claim is rejected.

Fifth, Appellant argues that the administrative fines imposed by the Commission in the Decision & Order are unconstitutionally excessive. That argument is rejected. Proportionality is not lacking in light of the numerosity of the violations and the nature of the violations.

Sixth, Appellant challenges the Commission's findings of fact and conclusions of law regarding certain expenditures from Appellant's Trustee Annual Allowance, discussed at pages 14 to 31 of the Opening Brief. This challenge lacks merit.

Appellant asserts that because her Trustee Annual Allowance account was reconciled every year, any disallowed expenditures were repaid, such that those expenditures were effectively never made. That assertion is rejected. Appellant's repayment of improper expenditures does not equate to those expenditures never occurring. Moreover, HRS § 84-13 prohibits a state employee from using – and also attempting to use – the employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others.

With respect to the specific expenditures raised in the Opening Brief, the Court cannot find that there is a lack of reliable, probative, and substantial evidence on the whole record. The

Commission, as the fact finder, can make determinations as to credibility, including regarding testimony before the Commission.

The Court also rejects Appellant's argument that OHA, and not Appellant, should be held accountable for any mismanagement of Appellant's Trustee Annual Allowance funds. That proposition is not supported by any applicable law or policy.

It is also not dispositive that some of the expenditures from Appellant's Trustee Annual Allowance at issue in this case were not disallowed by OHA. The fact that OHA staff might not have caught every improper expenditure does not mean that those expenditures did not occur, or that they are not actionable under the State Ethics Code.

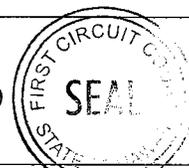
Lastly, Appellant challenges the Commission's determination that she violated HRS § 84-11 by accepting gifts paid towards her legal fees. There is no basis for error in the Commission's decision on this topic. The Court rejects Appellant's argument that she received no benefit from a third party paying \$21,000 in her legal fees, and that only her attorneys benefited. Payment of \$21,000 of a legal obligation is receipt of \$21,000 in actual value. There is no basis to disagree with the Commission's conclusion that Appellant's acceptance of the \$21,000 in legal fees violated the State Ethics Code.

Based on the foregoing and for the reasons stated on the record at the hearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decision & Order and the October 16 Order are affirmed.

DATED: Honolulu, Hawai'i, _____

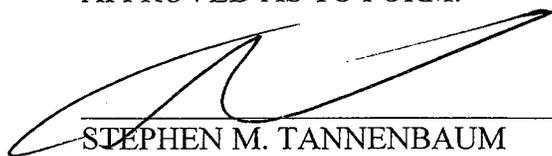
SEP 20 2019

JAMES H. ASHFORD



THE HONORABLE JAMES H. ASHFORD

APPROVED AS TO FORM:



STEPHEN M. TANNENBAUM

JEREMY K. O'STEEN

Attorneys for Appellant

ROWENA AKANA