

SUNSHINE LAW MEETING



HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

NOTICE OF MEETING OF THE HAWAI'I STATE ETHICS COMMISSION

Commissioners:

Wesley Fong, Chair
Beverley Tobias, Vice-Chair • Robert Hong • Cynthia Thielen

Date: June 19, 2024

Time: 9:00 a.m.

Location: Zoom Videoconference or Phone:

Videoconference: [Join Zoom Meeting](https://us06web.zoom.us/j/84887550591?pwd=EgdbFcdRxn8Jh9XPYVp6hV5Qba8ub.1)
<https://us06web.zoom.us/j/84887550591?pwd=EgdbFcdRxn8Jh9XPYVp6hV5Qba8ub.1>

Phone: +1 (408) 638-0968 or +1 (669) 444-9171

Phone passcode: 756958

Meeting ID: 848 8755 0591

Passcode: 7Wugjw

Public Meeting Location:

Hawai'i State Ethics Commission Conference Room
1001 Bishop Street
American Savings Bank Tower, Suite 970
Honolulu, Hawai'i 96813

Pursuant to Hawai'i Revised Statutes section 92-3.7, the State Ethics Commission will meet remotely using interactive conference technology. The public may either attend the meeting in person, at the public meeting location above, or participate remotely by using the above Zoom meeting information. If participating remotely, please mute your phone/device except while testifying. If the Commission's videoconference connection is lost during the meeting, please go to the Commission's website (www.ethics.hawaii.gov) for more information, including reconnection information.

Public meeting materials for this meeting are available on the Commission's website at: www.ethics.hawaii.gov.

AGENDA

CALL TO ORDER

I. Consideration and Approval of the Minutes of the May 15, 2024 Meeting

Attachment 1: Sunshine Law Meeting Minutes of the May 15, 2024 Hawai'i State Ethics Commission Meeting

II. Directors' Report

1. Education / Training Report

Attachment 1: 2024 Training Schedule

2. Guidance and Assignment Statistics – May 2024

Attachment 2: 2024 Guidance and Assignment Statistics / Website Traffic

3. Ethics Disclosure Update

4. Miscellaneous Office Projects / Updates

III. Discussion of Media Reports Concerning Ethics or the Ethics Commission Since the Last Meeting

IV. 2024 Legislative Matters

Bills of interest are described briefly below. The blue house or senate bill number is a clickable hyperlink that goes directly to the bill language online. If the hyperlink does not work, bills can be looked up at "capitol.hawaii.gov" and the bill number can be looked up in a box in the upper right-hand corner.

- **New Law:**

- [HB 2520](#) (Commission budget). Act 002 (3/14/2024).
- [HB 1881 HD1 SD1](#) (Increasing the Commission's maximum administrative fine). Act 015 (5/3/2024).

- **Before Governor Josh Green:**
 - [HB 1916 HD1 SD1 CD1](#) (Prohibits, upon written request, making certain information public about certain public servants). Transmitted to Governor 5/2/2024.
 - [HB 2374 HD1 SD2 CD2](#) (Makes emergency appropriations for public employment cost adjustments for, among other entities, the Commission). Transmitted to Governor on 5/3/2024.
 - [SB 2216 SD1 HD1 CD1](#) (Advice & investigation procedures). Enrolled to Governor on 5/2/2024.
 - [SB 2217 HD1 CD1](#) (Fiscal reporting periods). Enrolled to Governor on 5/2/2024.
 - [SB 3191 SD1 HD2 CD1](#) (Eliminates sunset provision of the technology transfer exemption). Enrolled to Governor on 5/2/2024.

V. Discussion of Ethics Oversight over the Judicial Branch

No update

VI. Discussion of Proposed Ethics Updates Based on Civil Beat/New York Times Article (available at <https://www.civilbeat.org/2024/04/inside-the-late-night-parties-where-hawaii-politicians-raked-in-money/>)

No update

VII. Discussion of Haw. Rev. Stat. § 97-5 (Lobbying Restricted Activities)

Discussion of legal enforcement issues.

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys and/or the Department of the Attorney General on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

Attachment 1: Haw. Rev. Stat. § 97-5

Attachment 2: Haw. Rev. Stat. § 11-365

VIII. *Akana v. Hawai'i State Ethics Commission and Daniel Gluck, Civil No. 18-1-1019-06 (JHA); Akana v. Hawai'i State Ethics Commission, Civil No. 19-1-0379-03 (JHA); State of Hawai'i, Ethics Commission v. Rowena Akana, Civil No. 20-1-0453 (BIA)*

Discussion of case status.

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys and/or the Department of the Attorney General on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

Attachment 1: Response to Application for Writ of Cert, Filed May 16, 2024

Attachment 2: Office of Hawaiian Affairs's Motion for Leave to File Brief of Amicus Curiae, Filed May 16, 2024

Attachment 3: Response to OHA's Motion, Filed May 17, 2024

Attachment 4: Order Granting Motion for Leave to File Amicus Brief, Filed May 22, 2024

Attachment 5: Memo in Reply, Filed May 23, 2024

Attachment 6: Brief of Amicus Curiae, Filed May 24, 2024

Attachment 7: Memo in Reply to OHA's Brief of Amicus Curiae, Filed June 4, 2024

Attachment 8: Disclosure Notice by C.J. Recktenwald, Filed June 5, 2024

Attachment 9: Order Granting/Accepting Application for Cert, Filed June 10, 2024

Attachment 10: Notice Setting Oral Argument, Filed June 12, 2024

IX. Adjournment

Public Testimony

Anyone wishing to testify may do so during the meeting or may submit written testimony in advance of the meeting by email (info.ethics@hawaii.gov), facsimile (fax) (808-587-0470), or U.S. postal mail (State Ethics Commission, 1001 Bishop Street, American Savngs Bank Tower, Suite 970, Honolulu, Hawai'i 96813). Public testimony must be related to an item that is on the agenda and the testifier must identify the agenda item to be addressed by the testimony. Pursuant to Hawai'i Revised Statutes section 92-3 and Hawai'i Administrative Rules section 21-1-6(c), oral testimony is limited to three minutes per testifier per agenda item, subject to the reasonable discretion of the Chair.

Auxiliary Aid or Accommodation Due to a Disability

If you require an auxiliary aid or accommodation due to a disability, please contact the State Ethics Commission at (808) 587-0460 or email the Commission at info.ethics@hawaii.gov as soon as possible, preferably at least 48 hours prior to the meeting. Last-minute requests will be accepted but may be impossible to fill.

Upon request, this notice is available in alternate/accessible formats.

SUNSHINE LAW MEETING
AGENDA ITEM I

CONSIDERATION AND APPROVAL OF THE MINUTES OF THE
MAY 15, 2024 MEETING

Attachment 1: Sunshine Law Meeting Minutes of the May 15, 2024
 Hawai'i State Ethics Commission Meeting

1 SUNSHINE LAW MEETING
2 MINUTES OF THE HAWAII STATE ETHICS COMMISSION

3
4 STATE OF HAWAII

5
6
7 Date: May 15, 2024

8
9 Time: 9:00 a.m.

10
11 Location: Held via Zoom video and audio conference

12
13 Link: Recorded video available at
14 https://ethics.hawaii.gov/category/commissionmeetings/comm_videos/

15
16 Public Meeting Location

17
18 Hawaii State Ethics Commission Conference Room
19 1001 Bishop Street
20 American Savings Bank Tower, Suite 970
21 Honolulu, Hawaii 96813

22
23 Present: State Ethics Commission Members

24
25 Wesley F. Fong, Chair (present in conference room)
26 Beverley Tobias, Vice Chair (present in conference room)
27 Robert Hong, Commissioner (present in conference room)
28 Cynthia Thielen, Commissioner (present in conference room)

29
30 State Ethics Commission Staff

31
32 Robert D. Harris, Executive Director (present in conference room)
33 Kee M. Campbell, Enforcement Director (via video conference)
34 Bonita Y.M. Chang, Compliance Director (via video conference)
35 Nancy C. Neuffer, Staff Attorney (via video conference)
36 Jennifer M. Yamanuha, Staff Attorney (via video conference)
37 Jodi L. K. Yi, Staff Attorney (via video conference)
38 Patrick W.C. Lui, Computer Specialist (via video conference)
39 Jared Elster, Investigator (via video conference)
40 Barbara Gash, Investigatory Analyst (via video conference)
41 Myles A. Yamamoto, Administrative Assistant (present in conference
42 room)
43

1 Members of the Public

2
3 Judith Mills-Wong
4 Victoria Budiono
5 Blaze Lovell
6

7 **CALL TO ORDER (0:12)**

8
9 Chair Fong called the meeting to order at 9:00 a.m. Chair Fong, Vice Chair
10 Tobias, Commissioner Thielen, Commissioner Hong, and Commission staff were
11 present. All commissioners and staff participating via video or audio conference
12 confirmed no one was in the room with them at their respective remote locations.
13

14
15 **Agenda Item No. I: Consideration and Approval of the Minutes of the April 17,**
16 **2024 Meeting (3:00)**

17
18 Vice Chair Tobias made, and Commissioner Thielen seconded, a motion to
19 approve the minutes of the April 17, 2024 meeting. The motion carried (Fong,
20 Tobias, Thielen, and Hong, voting in the affirmative).
21

22
23 **Agenda Item No. II: Directors' Report (3:40)**

24
25 Compliance Director Bonita Chang reported staff is following up with the
26 Department of Human Resource Development ("DHRD") to encourage incorporating
27 training requirements into the onboarding process for new employees. She also
28 reported that staff have conducted live and virtual trainings throughout the month.
29 Director Chang reported that board and commission training information is being
30 updated as part of the annual board and commission financial disclosure update
31 process. She noted that the due date for current employee, board, and commission
32 financial disclosure filers is May 31. Director Chang reported that updated lists were
33 sent to over 100 boards and commissions. She further noted that the deadline for
34 candidate financial disclosures is June 14.
35

36 Commissioner Thielen asked about the Department of Accounting and General
37 Services ("DAGS"). She noted that their training compliance numbers seemed low.
38 Director Chang replied that staff has reached out to the departments with low
39 compliance numbers to offer assistance in increasing compliance. She noted that in
40 addition to DAGS, staff has also reached out to the Department of Transportation
41 ("DOT") and the Department of Corrections and Rehabilitation ("DCR"). Director Chang
42 further noted DCR is in a unique situation because they have absorbed employees from
43 other agencies, and the employee may have completed training in their prior
44 department assignment. She stated she is working with the agencies' HR personnel to
45 get accurate numbers and increase compliance.
46

1 Enforcement Director Kee Campbell reported 32 matters were closed, and 25
2 were opened this month. He further noted that, on average, staff is closing the same
3 number of matters as are being opened.
4

5 Executive Director Robert Harris reported no update regarding the vacancy on
6 the Commission. He noted that the Judicial Council received a sufficient number of
7 applicants. He further noted that the council is obligated to send two names to the
8 Governor. The Governor then has 45 days to make a nomination. Director Harris stated
9 that he hopes to have a new commissioner in place by July.
10

11 Executive Director Harris reported that staff is looking into producing training
12 videos on various topics to post on the Commission's website.
13
14

15 **Agenda Item No. III: Discussion of Media Reports Concerning Ethics or the Ethics**
16 **Commission Since the Last Meeting (10:22)**
17

18 Executive Director Robert Harris reported that Chair Fong appeared in an
19 interview that aired on KITV regarding the Commission's activities. In addition, Director
20 Harris helped write an article for Civil Beat.
21

22 Chair Fong noted that the KITV spot was well done and well received.
23
24

25 **Agenda Item No. IV: 2024 Legislative Matters (12:38)**
26

27 Executive Director Robert Harris reported that the legislative session has
28 adjourned. He noted that ten bills have already been signed into law by the Governor.
29 Director Harris reported that the Commission's Budget was signed by the Governor.
30 The budget amount is lower than what was requested, but should not impact normal
31 operations.
32

33 Director Harris reported that the bill increasing the Commission's administrative
34 fine authority to \$5,000/violation was also signed into law. He noted that the authority is
35 for violations in the future. The staff has been directed to develop guidelines for setting
36 fines and settlements for violations. Chair Fong stated he is pleased that the penalties
37 have been increased.
38

39 Director Harris reported that HB 1915 is pending before the Governor. This bill
40 concerns acts of violence against judges and other officials. The bill would shield certain
41 information from the public for specific classes of officials. He noted that the legislation
42 is in response to increased acts of violence against judges and other officials. Director
43 Harris believes the Commission does not publish information protected under the bill.
44 However, should an individual request it, staff will review individual requests to remove
45 protected information. He further noted that the Commissioners and staff may also fall
46 under the protections of this legislation.
47

1 Director Harris reported that HB 2374 is also before the Governor. This bill
2 makes an emergency appropriation for hazard pay for employees who worked in the
3 office during the COVID pandemic. He further noted that a final memo is also
4 forthcoming with details about who would qualify and how the pay will be distributed.
5

6 Director Harris reported that SB 2216 is pending before the Governor. It is
7 designed to update the Commission's advice procedures. The bill clarifies that advice is
8 confidential; allows for a written summary to be given, if requested; and allows the
9 Commission to issue advisory opinions independently without waiting for a request.
10 Director Harris gave the example of a situation where staff receives multiple inquiries
11 about a particular issue or concern. The proposed legislation allows the Commission to
12 issue an opinion to address this issue without an outside party requesting an opinion.
13

14 Director Harris reported on SB 2217, which is also before the Governor. This bill
15 would align the gifts reporting period to the fiscal year.
16

17 Director Harris reported that SB 2191 is also before the Governor. This bill
18 revokes the sunset clause to an existing law that exempts technology transfers at the
19 University of Hawaii from the Ethics laws.
20

21 Director Harris reported that HB 1884 did not pass the legislature and urged the
22 Commission to consider reintroducing it next year. The proposal would include lobbying
23 organizations and clients of lobbying firms as groups that must be reported on
24 disclosures. Director Harris noted the importance of transparency and disclosure to
25 identify conflicts of interest.
26

27 Chair Fong asked if legislators must disclose their ties to lobbyists and lobbying
28 organizations. Director Harris replied that the current law requires reporting on ties to
29 lobbyists but not lobbying organizations. Chair Fong asked if there is a distinction
30 between profit and non-profit entities concerning lobbying laws. Director Harris replied
31 that there is no distinction.
32

33 Commissioner Thielen asked if the bill could be reintroduced and suggested that
34 a purpose clause/preamble addressing legislators' concerns be added to a new
35 proposal and any bills proposed by the Commission.
36

37 Commissioner Hong concurred with Commissioner Thielen's suggestion.
38

39 Vice Chair Tobias also agreed with Commissioner Thielen's suggestion.
40

41 Director Harris also noted that it is essential to rally public support behind this
42 proposal.
43

44 Director Harris added that a second proposal to add procurement and executive
45 actions under the umbrella of lobbying also failed. He noted that the lobbying laws have
46 remained essentially unchanged since the 1970's. He said that the main focus of the
47 laws is on legislation and rulemaking. The new proposals include interactions between

1 officials and vendors in the definition of lobbying. He said that there was support for the
2 proposal by agencies and outside entities.
3
4

5 **Agenda Item No. V: Discussion of Civil Beat/The New York Times’ “Inside the**
6 **Late-Night Parties Where Hawai’i Politicians Raked in Money” Article (33:24)**
7

8 Executive Director Harris reported that this agenda item stems from the
9 discussion at previous meetings regarding the Civil Beat/New York Times Article,
10 “Inside the Late-Night Parties Where Hawai’i Politicians Raked in Money”. The article
11 examined data regarding campaign contributions by contractors. Director Harris noted
12 that the article underscores the importance of disclosures. The article examined
13 publically available data. Director Harris pointed out the main issues the article raised
14 were: 1) government contractors responsible for over \$24 million in contributions; 2)
15 dozens of legislators working for government contractors; and 3) employees engaging
16 in political activities during non-work hours and coordinating contacts with legislators,
17 officials, and contractors. Director Harris reported that the first issue is primarily a
18 Campaign Spending Commission issue. Campaign Spending Commission has
19 proposed expanding the ban on political contributions to include officers, owners, and
20 immediate families. He suggested that the Commission consider supporting this
21 proposal. He also suggested continued dialogue to integrate data between both
22 Commissions.
23

24 Concerning ethics, Director Harris reiterated earlier proposals to expand the
25 definition of lobbying to include contractors and vendors. He noted that the City and
26 County of Honolulu recently issued a policy pertaining to inaugural events. The question
27 was whether donations are contributions or gifts and whether they are allowed. The
28 policy increased information and oversight regarding these events. He suggested that
29 the state consider adopting a similar policy.
30

31 Regarding the issue of legislators working for contractors, it was suggested to
32 ban outside employment for legislators while in office. Director Harris noted that such a
33 proposal would be very controversial. He further said that the historical and current view
34 is that the legislature is part-time. Director Harris suggested that there needs to be an
35 acceptance of the reality that most legislators work full-time, year-round. He further
36 noted that most second jobs legislators hold are government-related in some way and
37 may ultimately be with contractors or lobbyists.
38

39 Commissioner Thielen asked if expanding the lobbying definition would help
40 disclose the events described in the article. Director Harris replied that expanding the
41 policies by the Campaign Spending Commission may capture hosting a fundraising
42 event. He noted that if a state employee hosts a fundraising event, that must be
43 reported. However, if a state employee is attending an event hosted by another entity,
44 their participation may not be reported.
45

46 Commissioner Thielen expressed her concerns about state employees hosting
47 political events and not disclosing it. Director Harris replied that the primary purpose of

1 the Commission's Financial Disclosure is to identify potential conflicts of interest rather
2 than political activities. He noted that most disclosures are confidential, so the
3 information is not public. He suggested that changes to the campaign spending
4 framework may be more effective.

5 Commissioner Thielen explained that she feels that hosting political fundraisers
6 is a form of lobbying. Director Harris noted that the current definition of lobbying
7 requires that an individual be paid for his/her work.

8
9 Chair Fong requested that this item remain on the agenda for further meetings.

10
11 Commissioner Thielen suggested looking at regulating hosting fundraising
12 events.

13
14 Director Harris explained that the Commission needs to provide direction
15 regarding what aspect(s) they would like the staff to address. He noted more
16 transparency on the campaign spending/fundraising side of the house may be effective.
17 He expressed his concern about prohibiting executive officials from participating in
18 political fundraising from a Constitutional perspective, or as a practical matter.

19
20 Commissioner Thielen recommended creating a prohibition on hosting political
21 fundraisers by officials. Director Harris asked if someone like the Governor would be
22 included in such a prohibition. Commissioner Thielen replied that the Governor should
23 not be prohibited. Director Harris asked what state employees should be banned from
24 political engagement.

25
26 Vice Chair Tobias agrees that this issue raises a significant ethical dilemma. She
27 noted that when you start to regulate an activity, people will start looking for loopholes
28 or ways around the regulation.

29
30 Commissioner Hong suggested that staff return at the next meeting with
31 recommendations and proposals to discuss.

32
33 Chair Fong asked about the prohibition on legislators holding a second job.
34 Director Harris replied that this had been previously discussed by the Commission. He
35 stated that two avenues can be pursued. First, a targeted ban on employment with
36 lobbyists or contractors. Second, a total ban on outside employment. He noted that both
37 proposals would be very controversial and face opposition by the legislature.

38
39 Chair Fong asked if the staff could come back with additional recommendations
40 and proposals.

41
42 Executive Director Harris summarized the next steps, based on direction from the
43 Commissioners, as follows: 1) review past bills with procurement interaction between
44 contractors and high-level executives; 2) look at developing a policy for inaugural
45 events; and 3) look into a prohibition of high-level officials on political activities similar to
46 the prohibition in place for the Election Commission and Ethics Commission and the

1 constitutionality of such a prohibition. The staff will put on hold the proposal to limit
2 outside employment by legislators.

3
4
5 **Agenda Item No. VI: Discussion of Ethics Oversight over the Judicial Branch**
6 **(1:03:40)**
7

8 Executive Director Harris reported that conversations with the Judiciary have
9 continued. The Judiciary is looking at proposed rule revisions related to ethical issues.
10 He noted that the Judiciary expressed interest in hosting events alongside the
11 Commission to encourage public participation.

12
13 Chair Fong noted that the Judiciary has been very receptive to the Commission's
14 feedback and suggestions.

15
16
17 **Agenda Item No. VII: Akana v. Hawaii State Ethics Commission and Daniel Gluck,**
18 **Civil No. 18-1-1019-06 (JHA); Akana v. Hawaii State Ethics Commission, Civil No.**
19 **19-1-0379-03 (JHA); State of Hawaii, Ethics Commission v. Rowena Akana,**
20 **Civil No. 20-1-0453 (BIA) (1:04:55)**
21

22 Executive Director Harris reported that the court denied an OHA Request to file
23 an Amicus Brief on this matter. He noted that OHA can refile the brief should the case
24 move forward.

25
26 Chair Fong asked about the timeline for a decision. Director Harris replied that he
27 is unsure but hopeful that the matter will be resolved in six months.

28
29
30 **Agenda Item No. VIII: Adjournment of Sunshine Law Meeting (1:10:08)**
31

32 At approximately 10:10 a.m., Vice Chair Tobias made, and Commissioner
33 Thielen seconded, a motion to adjourn the meeting. The motion carried (Fong, Tobias,
34 Hong, and Thielen voting in the affirmative).

35
36 The meeting was adjourned at 10:11 a.m.

37
38 Minutes approved on _____.

SUNSHINE MEETING
AGENDA ITEM II

EXECUTIVE DIRECTOR'S REPORT
June 19, 2024

1. Education / Training Report

Attachment 1: 2024 Training Schedule

2. Guidance and Assignment Statistics – May 2024

Attachment 2: 2024 Guidance and Assignment Statistics / Website Traffic

3. Ethics Disclosure Update

4. Miscellaneous Office Projects / Updates

| HAWAII STATE ETHICS COMMISSION | | | |
|---|---|-------------------------------|-----------------------------|
| 2024 EDUCATION PROGRAM | | | |
| (Ethics Workshops and Presentations) | | | |
| DATE | PRESENTATIONS | IN PERSON PARTICIPANTS | WEBINAR PARTICIPANTS |
| 1/4/2024 | WEBINAR: Lobbyists Law Training | 0 | 50 |
| 1/10/2024 | WEBINAR: Lobbyists Law Training | 0 | 48 |
| 1/18/2024 | WEBINAR: General Ethics Training | 0 | 8 |
| 1/19/2024 | IN PERSON: Training Refresher, Capitol, House Members | 51 | 0 |
| 2/6/2024 | WEBINAR: Training Refresher, DOH, Kauai | 0 | 13 |
| 2/8/2024 | WEBINAR: Ethics for Board and Commission Members (CANCELLED) | 0 | 0 |
| 3/6/2024 | WEBINAR: General Ethics Training | 0 | 7 |
| 4/16/2024 | WEBINAR: General Ethics Training, Charter Schools | 0 | 64 |
| 5/2/2024 | WEBINAR: General Ethics Training | 0 | 8 |
| 5/13/2024 | WEBINAR: Training Refresher, FESTPAC | 0 | 12 |
| 6/20/2024 | WEBINAR: Training Refresher, Agribusiness Development Corporation | | |
| 6/24/2024 | IN PERSON: Ethics for Board and Commission Members, Hawai'i Workforce Development Council | | |
| 7/10/2024 | IN PERSON: Ethics for Board and Commission Members, Land Use Commission | | |
| 7/24/2024 | WEBINAR: General Ethics Training | | |
| 8/8/2024 | WEBINAR: Ethics for Board and Commission Members | | |
| 9/26/2024 | WEBINAR: General Ethics Training | | |
| 10/23/2024 | WEBINAR: Ethics for Board and Commission Members | | |
| 11/7/2024 | WEBINAR: General Ethics Training | | |
| TOTAL | 18 Presentations | 51 participants | 210 participants |

| 2024 | Jan | Feb | Mar | Apr | May | June | July | Aug | Sept | Oct | Nov | Dec | Year to date |
|--|-----|-----|-----|-----|-----|------|------|-----|------|-----|-----|-----|--------------|
| Training statistics | | | | | | | | | | | | | |
| # of In-Person Trainings | 1 | 0 | 0 | 0 | 0 | | | | | | | | 1 |
| # of People Trained In Person | 51 | 0 | 0 | 0 | 0 | | | | | | | | 51 |
| # of On-Line Trainings (Self-Directed) | 958 | 707 | 487 | 450 | 423 | | | | | | | | 3,025 |
| # of Lobbyists Law Trainings | 186 | 52 | 29 | 17 | 17 | | | | | | | | 301 |
| # of Training Webinars | 3 | 1 | 1 | 1 | 2 | | | | | | | | 8 |
| # of Participants in Training Webinars | 106 | 13 | 7 | 64 | 20 | | | | | | | | 210 |
| Attorney of the Day | 118 | 89 | 94 | 97 | 97 | | | | | | | | 495 |
| New assignments | | | | | | | | | | | | | |
| Advisory Opinion | 0 | 0 | 0 | 0 | 0 | | | | | | | | 0 |
| Complaint | 67 | 25 | 39 | 25 | 26 | | | | | | | | 182 |
| Gifts/Invitations/Travel | 21 | 24 | 30 | 24 | 27 | | | | | | | | 126 |
| Guidance | 2 | 0 | 2 | 1 | 3 | | | | | | | | 8 |
| Judicial Selection Comm'n | 6 | 0 | 5 | 4 | 1 | | | | | | | | 16 |
| Training Request | 0 | 0 | 0 | 0 | 0 | | | | | | | | 0 |
| Record Request | 1 | 1 | 0 | 0 | 1 | | | | | | | | 3 |
| Project/Other | 6 | 1 | 1 | 4 | 1 | | | | | | | | 13 |
| Total | 103 | 51 | 77 | 58 | 59 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 348 |
| Closed Assignments | | | | | | | | | | | | | |
| Advisory Opinion | 0 | 0 | 0 | 1 | 0 | | | | | | | | 1 |
| Complaint | 67 | 26 | 26 | 33 | 22 | | | | | | | | 174 |
| Gifts/Invitations/Travel | 21 | 22 | 35 | 24 | 25 | | | | | | | | 127 |
| Guidance | 1 | 3 | 0 | 0 | 3 | | | | | | | | 7 |
| Judicial Selection Comm'n | 7 | 0 | 4 | 5 | 1 | | | | | | | | 17 |
| Training Request | 0 | 0 | 0 | 0 | 0 | | | | | | | | 0 |
| Record Request | 1 | 1 | 0 | 0 | 1 | | | | | | | | 3 |
| Project/Other | 2 | 2 | 2 | 2 | 4 | | | | | | | | 12 |
| Total | 99 | 54 | 67 | 65 | 56 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 341 |
| Anti-Fraud | 2 | 5 | 5 | 3 | 4 | | | | | | | | 19 |

SUNSHINE LAW MEETING
AGENDA ITEM III

DISCUSSION OF MEDIA REPORTS CONCERNING ETHICS OR THE ETHICS
COMMISSION SINCE THE LAST MEETING

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM IV

LEGISLATIVE MATTERS

No attachments

SUNSHINE LAW MEETING
AGENDA ITEM V

DISCUSSION OF ETHICS OVERSIGHT OVER THE JUDICIAL BRANCH

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM VI

DISCUSSION OF PROPOSED ETHICS UPDATES BASED ON CIVIL BEAT/NEW
YORK TIMES ARTICLE (AVAILABLE AT
[HTTPS://WWW.CIVILBEAT.ORG/2024/04/INSIDE-THE-LATE-NIGHT-PARTIES-
WHERE-HAWAII-POLITICIANS-RAKED-IN-MONEY/](https://www.civilbeat.org/2024/04/inside-the-late-night-parties-where-hawaii-politicians-raked-in-money/))

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM VII

DISCUSSION OF HAW. REV. STAT. § 97-5 (LOBBYING RESTRICTED ACTIVITIES)

Discussion of legal enforcement issues

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys and/or the Department of the Attorney General on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

Attachment 1: Haw. Rev. Stat. § 97-5

Attachment 2: Haw. Rev. Stat. § 11-365

§97-5 Restricted activities. (a) No lobbyist shall accept or agree to accept any payment in any way contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action. During any regular session or special session of the state legislature, including any extension of any regular session or special session and any legislative recess days, holidays, and weekends, and for five calendar days before and after a session, no lobbyist shall make, or promise to make at a later time, any contributions or expenditures to or on behalf of an elected official, candidate, candidate committee, or any other individual required to file an organizational report pursuant to section 11-321.

(b) For the purposes of this section, "elected official" has the same meaning as in section 11-342. [L 1975, c 160, pt of §1; am L 2023, c 128, §3]

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[§11-365] Contributions and expenditures by lobbyists prohibited during legislative session. (a) During any regular session or special session of the state legislature, including any extension of any regular session or special session and any legislative recess days, holidays, and weekends, and for five calendar days before and after a session, no lobbyist shall make, or promise to make at a later time, any contributions or expenditures to or on behalf of an elected official, candidate, candidate committee, or any other individual required to file an organizational report pursuant to section 11-321. No elected official, candidate, candidate committee, or other individual required to file an organizational report pursuant to section 11-321 shall accept, or agree to accept at a later time, any contribution from a lobbyist during the specified period under this subsection. Any contribution prohibited by this subsection shall escheat to the Hawaii election campaign fund.

(b) For the purposes of this section:

"Elected official" has the same meaning as in section 11-342.

"Lobbyist" means any person actively registered as a lobbyist with a state or county ethics board or commission. [L 2023, c 128, §2]

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SUNSHINE LAW MEETING
AGENDA ITEM VIII

AKANA v. HAWAII STATE ETHICS COMMISSION AND DANIEL GLUCK,
CIVIL NO. 18-1-1019-06 (JHA); AKANA v. HAWAII STATE ETHICS COMMISSION,
CIVIL NO. 19-1-0379-03 (JHA); STATE OF HAWAII, ETHICS COMMISSION v.
ROWENA AKANA, CIVIL NO. 20-1-0453 (BIA)

Discussion of case status.

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i 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: Response to Application for Writ of Cert
- Attachment 2: Office of Hawaiian Affairs Motion for Leave to File Brief of Amicus Curiae
- Attachment 3: Response to OHA's Motion
- Attachment 4: Order Granting Motion for Leave to File Amicus Brief
- Attachment 5: Memo in Reply
- Attachment 6: Brief of Amicus Curiae
- Attachment 7: Memo in Reply to OHA's Brief of Amicus Curiae
- Attachment 8: Disclosure Notice by C.J. Recktenwald
- Attachment 9: Order Granting/Accepting Application for Cert
- Attachment 10: Notice Setting Oral Argument

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,

Petitioner-Appellant,

v.

HAWAI'I STATE ETHICS COMMISSION,

Respondent-Appellee.

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

APPEAL FROM:

A) FINAL JUDGMENT, filed September 24, 2019;

B) 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, filed September 24, 2019;

C) ORDER DENYING APPELLANT'S MOTION FOR ADDITIONAL EVIDENCE TO BE TAKEN, filed June 18, 2019; and

D) ORDER DENYING APPELLANT'S MOTION TO STAY ENFORCEMENT OF AGENCY ORDER; CERTIFICATE OF SERVICE, filed 29-Apr-19

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**HAWAI‘I STATE ETHICS COMMISSION’S
RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI**

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The Hawai'i State Ethics Commission (the "Commission") found that Rowena Akana committed 47 violations of the State Ethics Code during her employment with the Office of Hawaiian Affairs ("OHA")—a state agency—as an elected member of the OHA Board of Trustees. Akana failed to timely report more than \$50,000 in gifts of legal fees, accepted over \$21,000 in prohibited gifts of legal fees, and spent, or attempted to spend, OHA trust funds on political contributions, cable television service for her home, a Hawaiian Airlines Premier Club membership, and food for herself, other OHA trustees, and OHA staff.

In the ICA, Akana essentially disclaimed any obligation to comply with the State Ethics Code, asserting that her fiduciary obligations to OHA beneficiaries were somehow incompatible with the State Ethics Code. In its thorough and well-reasoned Memorandum Opinion, the ICA squarely rejected each of Akana's arguments, affirming the Commission in full. Now, Akana comes to this Court with a brand new, convoluted argument that OHA is a "separate political subdivision" required to have its own ethics code and its own ethics commission, and because OHA does not, in fact, have a separate ethics commission, Akana is absolved of her State Ethics Code violations. This last-ditch attempt to avoid the Commission's enforcement authority has been waived and is wrong as a matter of law. Akana's Application should be denied.

A. OHA Trustees Are Subject to the State Ethics Code

The ICA correctly concluded that Akana, as an OHA trustee, was subject to the State Ethics Code. *See* Mem. Op. 6-7. HRS Chapter 84 is unambiguous on this point: by its plain terms, the State Ethics code applies to "every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention, but excluding justices and judges[.]" HRS § 84-2.¹ OHA trustees are also explicitly required by Chapter 84 to complete ethics training administered by the Commission. *See* HRS § 84-42(a) ("Legislators, members of the board of education, *trustees of the office of Hawaiian affairs*, the governor, the lieutenant governor, executive department heads and deputies, . . . shall complete a live ethics training course administered by the state ethics commission[.]" (emphasis added)).

Akana attempts to evade this clear statutory framework with her new "political

¹ HRS § 84-3 further defines an "employee" as "any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges."

subdivision” argument, purportedly based on article XIV of the Hawai‘i Constitution. *See* App. at 5-7. But because that argument was *never* made before the Commission, the circuit court, or the ICA—as Akana herself acknowledges, *see* App. at 7—it has been waived, and cannot serve as a basis for granting the Application.² But even leaving the clear waiver aside, Akana’s argument fails because it lacks any support in either the record or the law.

1. Akana’s “political subdivision” argument is contradicted by the record

As Akana frames it, because OHA is (allegedly) a “political subdivision,” its trustees are only required to comply with an ethics code that OHA adopts, rather than the State Ethics Code. App. at 5-6. But the only factual support Akana points to for her assertion that OHA “adopted” its own ethics code, which can only be enforced by OHA’s own (non-existent) ethics commission, is the Commission’s finding that “OHA’s Executive Policy Manual (Feb. 2012) provides in relevant part that ‘[a]ll Trustees shall abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes, as amended, and shall attend ethics training as required by law.’” App. at 5-6 and n.1 (citing JIMS 11 at PDF 160-61 (¶7)).³ This is not evidence that OHA “adopted” its *own* ethics code. To the contrary; it is an acknowledgement by OHA that its trustees *are subject to HRS Chapter 84*—which undercuts Akana’s entire argument.

That OHA trustees are required to abide by HRS chapter 84 is supported elsewhere in the record too. *See* JIMS 8 at PDF 82-84, 117-20 (materials regarding 2013 OHA “Trustee workshop” discussing the State Ethics Code); JIMS 9 at PDF 217-20 (materials regarding 2015 “[p]resentation to the [Board of Trustees] by the Hawai‘i State Ethics Commission re: State Ethics Code,” with board minutes stating that the Ethics Code “standards apply to both elected Trustees and line employees” and are “mandated” by “the law”); Mem. Op. at 2 (“At least every other year, trustees were reminded by OHA staff or the Commission about their HRS Chapter 84 obligations.”). Notably, when asked at the hearing whether the State Ethics Code applies to OHA Trustees, OHA’s former corporate counsel testified that “starting with Article 14 of the

² Akana argues that she cannot have waived this argument because it goes to “subject matter jurisdiction.” App. at 7. That is plainly incorrect. Subject matter jurisdiction refers to “*a court’s* power to act on the merits of a case.” *Schwartz v. State*, 136 Hawai‘i 258, 263, 361 P.3d 1161, 1166 (2015) (emphasis added). The concept that defects in subject matter jurisdiction cannot be waived does not extend to Akana’s argument about whether OHA trustees are subject to the State Ethics Code and the Commission’s related enforcement authority.

³ Circuit court record citations are to the JIMS docket number, as per the Case Detail Docket List in the Record on Appeal filed in the ICA, *see* ICA 23, followed by the PDF page number.

Constitution, and Chapter 84, we felt that it was totally applicable to office trustees who, by statute and otherwise, were defined as public officers and officials of state government.” JIMS 12 at PDF 397-98 (Tr. 392:19-393:3). The public record of OHA trustees’ past compliance with HRS chapter 84 provides further confirmation.⁴ Public records indicate, for example, that OHA trustees have long filed financial disclosure statements with the Commission,⁵ the Commission has responded to written requests for exemptions from OHA trustees,⁶ and OHA employees have completed the Commission’s mandatory ethics training.⁷ Akana herself even filed a formal ethics complaint against a fellow trustee alleging a “clear violation of HRS § 84-14.”⁸

In light of the record, it makes little sense for Akana to suggest that a provision in the OHA Executive Policy Manual requiring that OHA trustees comply with the State Ethics Code, *see* JIMS 8 at PDF 25, constitutes an adoption of a *separate* ethics code *not* administered by the Commission, *see* App. at 5-6. The record instead clearly indicates that OHA has acknowledged that its trustees are subject to *the State Ethics Code*, which includes the Commission’s enforcement authority, *see* HRS § 84-31, and not some other ethics code that looks like the State Ethics Code, but cannot be enforced by the Commission.

2. OHA is not a “political subdivision”

Nor is Akana correct that OHA is a “political subdivision” under Article XIV of the Hawai‘i Constitution. That assertion is belied by her admission that—unlike the counties, which, as true political subdivisions, have each adopted separate ethics codes and established ethics

⁴ This public record undercuts Akana’s suggestion that the ICA’s opinion has caused a radical sea change that “now” subjects OHA trustees to “conflicting standards” that “will negatively impact OHA trustees’ abilities to carry out their independent fiduciary functions[.]” App. at 1.

⁵ *See* Database of Disclosures by OHA Trustees, https://hawaiiethics.my.site.com/public/s/hsecd-dept/related/a066A000001IzqBQAS/Position_Cards__r (last visited May 2, 2024). The Commission is required to maintain the financial disclosure statements for public inspection for a period of six years from the date of the disclosure’s filing. HRS § 84-17.5(a). Thus, the financial disclosure statements included in the database cited here date back to 2018.

⁶ *See* Letter from Hawai‘i State Ethics Commission to Brickwood Galuteria, July 20, 2023, available at <https://files.hawaii.gov/ethics/advice/NEP2023-01.pdf> (granting a temporary good faith exception from the nepotism provision of the State Ethics Code).

⁷ *See* Notice of Meeting of Hawai‘i State Ethics Commission (Apr. 4, 2024), Attachment 2, at Page 16, available at <https://ethics.hawaii.gov/wp-content/uploads/2024-04-17SunshineLawMaterials.pdf>.

⁸ Chad Blair, *OHA Trustee Says \$21M Property Deal Was Shady*, Civil Beat (Mar. 20, 2013), <https://www.civilbeat.org/2013/03/18645-oha-trustee-says-21m-property-deal-was-shady/>.

commissions to administer them⁹—OHA “never . . . create[ed] a separate ethics commission to enforce its adopted code,” App. at 6, which would be necessary if Akana were correct. See Haw. Const. art. XIV. There is a simple reason this has not occurred since article XIV’s ratification *over 45 years ago*: OHA is a state agency, not a “political subdivision.”

Although OHA was intended to have a degree of “independen[ce] from the executive branch and all other branches of government,” the history of article XII, section 5—the provision establishing OHA—plainly indicates that OHA was nonetheless intended to “*assume the status of a state agency.*”¹⁰ Stand. Comm. Rep. No. 59 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 645 (emphasis added). The same standing committee noted that “[t]he committee developed this office based on the model of the University of Hawaii,” *id.*, which was recognized by this Court as a “state agency” even before the adoption of article XII, section 5. See *Nelson v. Miwa*, 56 Haw. 601, 606, 546 P.2d 1005, 1009 (1976) (“The presumption of constitutionality applies to policies set by *state agencies such as the Board of Regents [of the University of Hawai‘i].*” (emphasis added)).¹¹

Interpreting article XII, section 5 as creating a political subdivision would also be inconsistent with other constitutional provisions. For example, article VIII, section 2 provides that “[e]ach political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law.” Haw. Const. art. VIII, § 2. It further provides that “[c]harter provisions with respect to a political subdivision’s executive, legislative and administrative structure and organization shall

⁹ See *Ethics Commission*, City and County of Honolulu, <https://www.honolulu.gov/ethics/default.html> (last visited May 2, 2024); Board of Ethics, County of Hawai‘i, Agenda for May 8, 2024 Meeting (May 2, 2024), available at <https://records.hawaiicounty.gov/weblink/1/doc/134174/Page1.aspx>; Board of Ethics, County of Maui, <https://www.mauicounty.gov/170/Board-of-Ethics> (last visited May 2, 2024); Board of Ethics, County of Kauai, <https://www.kauai.gov/Government/Boards-and-Commissions/Board-of-Ethics> (last visited May 2, 2024).

¹⁰ “State agencies” and “political subdivisions” are two distinct creatures. See, e.g., *Sierra Club v. Dep’t of Transp. of State of Haw.*, 120 Hawai‘i 181, 228, 202 P.3d 1226, 1273 (2009) (“Through HRS § 343–7, the legislature authorized judicial review of actions that can only be carried out by state agencies *or* political subdivisions of the State.” (Emphasis added)).

¹¹ The standing committee also stated that the OHA chairperson “may be an ex officio member of the governor’s cabinet,” Stand. Comm. Rep. No. 59 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 645, which would make little sense if OHA was intended to be a political subdivision separate and apart from the State.

be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.” *Id.* Yet OHA’s organization was accounted for separately in article XII, section 5, which dictates that “[t]here shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law,” that “[t]he board members shall be Hawaiians,” that “[t]here shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii,” and that “[t]he board shall select a chairperson from its members.” OHA’s organization and structure is further subject to numerous statutory provisions applicable *only* to OHA, such as HRS §§ 10-7 (“Board of trustees”), -8 (“Organization; quorum; meeting”), and -10 (“Administrator; appointment, tenure, removal”).¹²

Put simply, article XII section 5 and the statutes enacted pursuant to that provision are not consistent with the authority given to “political subdivisions” under article VIII, section 2. A state agency created without regard to article VIII, sections 1 or 2 cannot be a political subdivision. As the Legislature has indicated in other contexts, a “[p]olitical subdivision” means a county or other political subdivision *created by the legislature pursuant to article VIII, section 1, of the constitution of the State.*” HRS § 48-1 (emphasis added). Akana has cited nothing in OHA’s history indicating that OHA was enacted pursuant to article VIII, section 1, nor does there appear to be any such indication. That is because OHA was established not as a political subdivision under article VIII, section 1, but as a state agency pursuant to article XII, section 5. Perhaps a somewhat unique state agency, but a state agency nonetheless.

Akana cites a definition of “political subdivision” from *NLRB v. Princeton Mem’l Hosp.*, 939 F.2d 174, 177 (4th Cir. 1991), a case concerning the National Labor Relations Act (NLRA), a completely irrelevant federal law. In that specific context, “[c]ourts have held that the term includes those entities that are either ‘(1) created directly by the State, so as to constitute a department or administrative arm of the government or (2) . . . administered by individuals responsible to public officials or the general electorate.’” *Id.* at 177. But there is a particular basis in the NLRA’s history for the adoption of that definition—Congress intended to exempt “the labor relations of federal, state, and municipal governments.” *NLRB v. Natural Gas Utility*

¹² In light of how article VIII, section 2 grants political subdivisions a limited freedom from legislative intrusion, adopting Akana’s argument could have significant implications beyond this case for the many statutes that apply specifically to OHA.

Dist. of Hawkins County, Tenn., 402 U.S. 600, 604 (1971) (noting that this definition of political subdivision was adopted “[i]n light of that purpose[.]”). Applying that definition in the context of the Hawai‘i Constitution makes little sense.

Akana is also flat wrong in asserting that the definition of “political subdivision” applied in the NLRA context is the term’s “ordinary meaning,” and that OHA would meet the criteria under this “or any other reasonable definition of ‘political subdivision.’” App. at 6. Political subdivisions most commonly denote “geographic or territorial division[s] of a state rather than a functional division.” *Fair v. Sch. Emp. Ret. Sys. of Ohio*, 335 N.E.2d 868, 871 (Ohio Ct. App. 1975); *id.* at 871-72 (“Almost invariably the statutory definitions of ‘political subdivision’ involve a geographic area of the state which has been empowered to perform certain functions of local government within such geographic area. Accordingly, a ‘political subdivision of the state’ is a geographic or territorial portion of the state to which there has been delegated certain local governmental functions to perform within such geographic area.”).

The delegation of one or more of the State’s traditional sovereign powers is another distinguishing feature of political subdivisions. For example, the New York courts have distinguished charter schools from “political subdivisions” in light of charter schools’ “lack of a defined, contiguous geographic territory; and the lack of the recognized sovereign powers of taxation, eminent domain and the police power” *New York Charter Sch. Ass’n, Inc. v. DiNapoli*, 857 N.Y.S.2d 450, 472 (Sup. Ct. 2008). Similarly, under federal tax law, a “political subdivision” is “any division of the State or territory which is a municipal corporation, or to which has been delegated the right to exercise part of the sovereign powers of the State or Territory,” *Comm’r of Internal Revenue v. Shamberg’s Est.*, 144 F.2d 998, 999–1000 (2d Cir. 1944), *i.e.*, the police power, the taxing power, or eminent domain, Definition of Political Subdivision, 81 Fed. Reg. 8870 (Feb. 23, 2016); *see also Philadelphia Nat. Bank v. United States*, 666 F.2d 834, 840 (3d Cir. 1981) (“With such a minimal grant of police power, and with no eminent domain or taxing power, Temple cannot be said to be a political subdivision.”).

OHA possesses none of these distinguishing characteristics. It does not have police power, taxation power, or the power of eminent domain.¹³ *See* HRS §§ 10-4, -5. And unlike the

¹³ In comparison, the counties can exercise, to varying degrees, each of these powers. *See* Haw. Const. art. VIII, § 3 (“[A]ll functions, powers and duties relating to the taxation of real property

counties, it has no defined geographic territory. OHA thus does not satisfy any traditional notion of a “political subdivision,” and Akana’s new argument must therefore be rejected.

3. No conflict exists between the State Ethics Code and OHA’s governing laws

Presenting a virtually identical argument to the one she made before the ICA, Akana incorrectly asserts that the State Ethics Code conflicts with various statutes governing OHA. App. at 7-10. The ICA properly rejected this argument, holding that “[n]othing in HRS §§ 10-4 (2009) or 10-4.5 (2009) is contrary to, or inconsistent with, the Code of Ethics.” Mem. Op. at 8. Because Akana merely regurgitates the argument from her Opening Brief, nothing in her Application comes close to explaining why the ICA was wrong.

Akana again relies on *Boyd v. Hawai‘i State Ethics Commission*, 138 Hawai‘i 218, 378 P.3d 934 (2016), but fails to explain how this case is remotely similar. In *Boyd*, this Court held that HRS Chapter 302B, which governed charter schools, set forth a comprehensive statutory scheme that required charter schools to establish a “framework of accountability” that included a conflicts of interest policy. *Id.* at 226-27, 378 P.3d at 942-43. According to the Court, under HRS Chapter 302B, “the internal policies and procedures relating to conflicts of interests that charter schools established and implemented could have been identical, more expansive, or less restrictive than the conflict of interest provision prescribed in HRS § 84-14.” *Id.* at 227, 378 P.3d at 943. Thus, because HRS § 84-14 conflicted with the portions of HRS Chapter 302B that required charter schools to adopt their own conflicts of interest policies, the charter school employee at issue was exempt from HRS § 84-14 under a separate provision of HRS Chapter 302B providing that “[c]harter schools shall be exempt from chapters 91 and 92 *and all other state laws in conflict with this chapter.*” *Id.* at 225 n.14, 378 P.3d at 941 n.14 (emphasis added) (quoting HRS § 302B-9(a) (Supp. 2006 & 2007) (repealed 2012)).

In arguing that *Boyd* applies, Akana has repeatedly referenced HRS Chapter 10, which governs OHA, but has never identified anything in that chapter requiring OHA to establish its own gifts or fair treatment policies, comparable to the requirements for charter schools in *Boyd*. Akana relies on HRS §§ 10-4 and 10-4.5, but nothing in those provisions conflicts with the State

shall be exercised exclusively by the counties[.]”); HRS §§ 46-1.5(5)(D) (zoning authority), 46-1.5(6) (eminent domain), 46-1.5(A) (various police powers).

Ethics Code.¹⁴ They describe the general powers of OHA, *not* individual trustees. Moreover, the only provision in HRS § 10-4 with any relevance to Akana’s argument—HRS § 10-4(3), which authorizes OHA to “determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid”—is explicitly “subject to provisions of law specifically applicable to the office,” *id.*, indicating that OHA’s authority over such matters is far from “exclusive,” as Akana would have it.

The same can be said for HRS § 10-4.5(a), which also sets forth a *qualified* power of OHA, and not individual trustees. That provision states, in relevant part: “notwithstanding any other law to the contrary, the office shall have and exercise the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means.” HRS § 10-4.5(a). Akana again suggests that this demonstrates OHA’s “exclusive authority over such matters,” App. at 9, but HRS § 10-4.5(a) sets forth only a qualified power, requiring that disbursements be “necessary and appropriate,” and this Court has made clear that the inclusion of “notwithstanding any other law to the contrary” does not vest OHA with unreviewable, exclusive authority. Instead, it simply means that the provision applies over conflicting law—*i.e.*, where two statutes cannot possibly both be given effect. *See State v. Schnabel*, 127 Hawai‘i 432, 448, 279 P.3d 1237, 1253 (2012).

Here, Akana has not shown that any relevant provision of the State Ethics Code cannot possibly be given effect while OHA (not individual trustees) has “the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means.” HRS § 10-4.5(a). Nor has she shown that any other conflict exists between HRS Chapter 84 and HRS Chapter 10. She has not, therefore, demonstrated that trustees cannot be held to the standards in the State Ethics Code.

4. Akana’s duty to comply with the State Ethics Code exists separate and apart from her fiduciary duties as an OHA trustee

Akana’s Application recycles her argument that an OHA trustee cannot be held accountable for Ethics Code violations unless the trustee’s actions also constitute a breach of the fiduciary duty, without engaging with the ICA’s reasoning. App. at 9-10. In any event, as the ICA correctly held, Mem. Op. at 9, Akana’s obligations under the State Ethics Code are separate

¹⁴ Indeed, even OHA’s Executive Policy Manual provided that “[a]ll Trustees shall abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawai‘i Revised Statutes,” JIMS 8 at PDF 25, further indicating the lack of conflict between OHA’s powers and the State Ethics Code.

from her fiduciary obligations under trust law. Akana’s duties as an OHA Trustee describe what Akana owed to OHA beneficiaries as a result of the trustee-beneficiary relationship. The State Ethics Code, on the other hand, describes what Akana owed to the public as a state employee. *See, e.g.*, Haw. Const. art. XIV (“The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct”); HRS ch. 84 Preamble (stating the purpose of the Ethics Code as “preserv[ing]” “public confidence in public servants”).

There is no support whatsoever for Akana’s assertion that neither the Commission nor the courts can address unethical conduct “without first finding a breach of fiduciary duty.” App. at 9. First, as discussed above, the plain language of HRS Chapter 84 plainly reaches OHA trustees. *See supra* at p.1. There are no carve-outs for OHA trustees, or for state officials exercising “discretionary power,” App. at 9, despite the Legislature demonstrating that it knew how to exempt state officials when it intended to do so. *See* HRS § 84-2. Nor is there any breach of fiduciary duty prerequisite to an Ethics Code violation anywhere in HRS Chapter 84.

Second, Akana’s reliance on *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013), is once again misplaced. According to Akana, her fiduciary duties as an OHA trustee shield her from enforcement of ethics violations because “a trustee’s conduct can be reviewed only for abuse of discretion.” App. at 9 (citing *Kealoha*, 131 Hawai‘i at 77-78, 315 P.3d at 228-29). But *Kealoha* did not involve the Commission or HRS Chapter 84, or any question of whether trustees are immune from other legal obligations; rather, it was a breach of fiduciary duty action by OHA beneficiaries against OHA Trustees. In *that* context, the *Kealoha* Court held that “[w]hen 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.” *Kealoha*, 131 Hawai‘i at 77, 315 P.3d at 228.

The *Kealoha* Court’s articulation of the standard to be applied in breach of fiduciary duty cases has no bearing on the Commission’s authority to enforce the State Ethics Code against OHA trustees. Nor does it indicate that a breach of fiduciary duty is a required predicate finding for other violations of applicable law. If that were the case, *no* state official that exercises fiduciary duties—and there are many¹⁵—would be subject to enforcement of the State Ethics

¹⁵ *See, e.g., Pele Def. Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992) (“Article XII, § 4 imposes a fiduciary duty on Hawaii’s officials to hold ceded lands in accordance with the § 5(f) trust provisions[.]”); *Honda ex rel. Kamakana v. Bd. of Trustees of Employees’ Ret. Sys. of State of Haw.*, 108 Hawai‘i 338, 343, 120 P.3d 237, 242 (2005)

Code unless a court also established that they had breached their fiduciary duties. There is simply no basis for that conclusion in *Kealoha* or in any other source of law.¹⁶

B. The Commission’s Findings are Not Clearly Erroneous

1. Akana cannot hide behind OHA’s “after-the fact” approval process

Akana argues that because her expenditures “went through OHA’s approval process and were either authorized or disallowed and reimbursed by Ms. Akana in accordance with OHA policy,” App. at 10, the Commission’s enforcement action results in “multiple and conflicting standards” and must be overruled. *Id.* at 11. But nowhere does Akana contend with the Commission’s *unchallenged* factual findings that demonstrate why this argument is meritless. *See* Mem. Op. at 9-11. First, OHA does not pre-approve any trustee expenditures; because OHA Trustees are provided with a lump sum for their yearly expenditures, which is reconciled later, OHA’s review of the trustees’ expenditures occurs “after-the-fact”—*i.e.*, after the expenditures have already been made. *Id.* Second, “[t]he fact that a particular expense is ‘not disallowed’ by OHA fiscal staff does not mean that the expenditure is ‘allowable’ or consistent with OHA policy.” *Id.* at 10. Third, Akana actively hindered attempts to determine whether her expenditures were allowable. Specifically, “Akana threatened and berated OHA fiscal staff who questioned or disallowed her Trustee Annual Allowance expenditures,” such that staff members “feared personal attacks or possible retaliation when questioning Respondent Akana about her expenditures.” *Id.* Akana’s attempts to intimidate staff members who questioned her expenditures resulted in reluctance to challenge her expenditures—even where it appeared that they should not be allowed. *Id.* at 11. These unchallenged findings bind Akana, and completely undercut her argument that the OHA approval process absolves her ethics violations.

And in any event, Akana cannot abdicate her individual responsibility to comply with the State Ethics Code, which imposes standards of conduct on individual state employees, not

(describing the fiduciary duty of the Employees’ Retirement System Board); *Ahuna v. Dep’t of Hawaiian Home Lands*, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982) (“[T]he Hawaiian Homes Commission . . . is the specific state entity obliged to implement the fiduciary duty under the HHCA on behalf of eligible native Hawaiians.”).

¹⁶ Akana’s reference to HRS § 10-16(c), *see* App. at 9-10, is also misplaced. HRS § 10-16(c) permits beneficiaries to sue OHA trustees *for breach of fiduciary duty*. But that does not mean OHA trustees are not subject to other laws. The very next paragraph—HRS § 10-16(d)—provides that “[i]n matters involving *other forms of remedies*, the office, its officers and employees, and the members of the board *shall be subject to suit as provided by any other provision of law* and by the common law.” (Emphases added).

agencies. Laying the blame at OHA’s feet is not a defense, especially when Akana knew—or at the very least should have known—of her obligations.¹⁷

2. The ICA correctly affirmed the Commission’s finding that Akana violated HRS § 84-11, the Gifts Law

In 2013, Akana filed a lawsuit in her individual and official capacities against her fellow OHA trustees regarding access to records from executive session meetings. *See* JIMS 11 at PDF 161 (¶¶ 10, 11). The lawsuit was not authorized by the OHA Board of Trustees, who later filed a counterclaim against Akana, alleging that Akana breached her fiduciary duties by disclosing confidential information. *Id.* (¶ 12-13). For her legal fees incurred during the lawsuit, Akana accepted gifts totaling more than \$21,000 from Abigail Kawanakoa, violating HRS § 84-11, the Gifts Law. *Id.* at PDF 226-27 (¶¶ 98-99).

Ignoring the text of HRS § 84-11¹⁸ itself, Akana argues that article XII, section 6 of the Hawai‘i Constitution and HRS § 10-5 authorize her, as an individual trustee, to accept monetary gifts in violation of the State Ethics Code. *See* App. at 11. This is meritless. First, neither article XII, section 6, nor HRS § 10-5 vests any power in individual trustees, but rather in “the board.” Second, both provisions are expressly subject to other laws. *See* Haw. Const. art. XII, § 6 (“The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law”); HRS § 10-5 (“The board shall have the power in accordance with law”).

Akana argues that the Commission was required to determine that her acceptance of legal fees “constituted a ‘gift’ as opposed to an appropriate exercise of her power to accept, manage, and exercise control over property and carry out her fiduciary duties.” App. at 11. But Akana again conflates powers that are given to *the Board* with her *individual* ability to accept monetary gifts. And there is little question in any event that Akana’s acceptance of legal fees constituted a

¹⁷ For example, Akana used OHA funds to purchase a Hawaiian Airlines Premier Club membership despite knowing it was not allowable, JIMS 11 at PDF 180 (¶108), and continued claiming \$80 for her home Oceanic cable bill despite having been told that the only permissible expense was for her internet at \$47.89 per month. JIMS 11 at PDF 187-88 (¶151-54).

¹⁸ HRS § 84-11 provides that:

No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator’s or employee’s official duties or is intended as a reward for any official action on the legislator’s or employee’s part.

gift that violated HRS § 84-11. Akana accepted two payments in the form of legal fees from Kawanakoa *after* Kawanakoa had herself filed a lawsuit against OHA. JIMS 11 at PDF 164 (¶ 32), 224 (¶ 86). The Commission correctly concluded that “[a] reasonable person clearly could—and, the Commission believes, would—infer that a donor who pays for more than \$21,000 of services to an elected official after suing that official’s agency intends to influence that official.” JIMS 11 at PDF 224 (¶ 87).

Akana relies on the Commission’s finding that “Kawanakoa had interests that may have been affected by official action or lack of action on the part of Respondent Akana,” App. at 12; *see also* JIMS 11 at PDF 163 (¶21), but that finding does not help her. It is not, as Akana asserts, a finding that “Ms. Kawanakoa’s donation of legal fees to Ms. Akana arose out of and in the course of Ms. Akana’s conduct as an OHA trustee and Ms. Kawanakoa’s role as a beneficiary and supporter of beneficiary rights[.]” such that the gifts were somehow acceptable. App. at 12. It is instead a finding—one that Akana has not contested—that goes to the heart of the Ethics Code’s prohibition on accepting gifts “under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator’s or employee’s official duties” HRS § 84-11; *see also* HRS ch. 84 Preamble (stating the purpose of the Ethics Code as “preserv[ing]” “public confidence in public servants”).

As the Commission noted when this Court denied transfer, after leaving aside the myriad attempts to obscure the issues, it is clear that this case involves a straightforward application of the State Ethics Code to Akana’s conduct. Akana tries her very best to come up with arguments to excuse her violations—including an argument she raises for the first time now, even though this case has been proceeding since 2018—but each argument is wholly lacking in merit. The ICA correctly affirmed the Commission’s decision and Akana’s Application should be denied.

DATED: Honolulu, Hawai‘i, May 16, 2024.

/s/ Ewan C. Rayner

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served electronically (through the Court's JEFS system), or conventionally via US Mail, upon the following parties:

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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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

APPEAL FROM THE:

(1) FINAL JUDGMENT, FILED SEPTEMBER
24, 2019;

(2) 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, FILED SEPTEMBER 24, 2019;

(3) ORDER DENYING APPELLANT’S
MOTION FOR ADDITIONAL EVIDENCE
TO BE TAKEN, FILED JUNE 18, 2019;

(4) ORDER DENYING APPELLANT’S
MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER, FILED APRIL 29, 2019;
AND

(5) THE DISPOSITION OF ALL POST-
JUDGMENT MOTIONS

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**THE OFFICE OF HAWAIIAN AFFAIRS'
MOTION FOR LEAVE TO FILE BRIEF
OF *AMICUS CURIAE*; *[PROPOSED]*
BRIEF OF *AMICUS CURIAE*;
CERTIFICATE OF SERVICE**

Circuit Court of the First Circuit
Judge: Hon. James H. Ashford

**THE OFFICE OF HAWAIIAN AFFAIRS' MOTION
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

[PROPOSED] BRIEF OF *AMICUS CURIAE*

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**THE OFFICE OF HAWAIIAN AFFAIRS' MOTION
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

THE OFFICE OF HAWAIIAN AFFAIRS, by and through its attorneys, Klein Law Group, LLLC, hereby respectfully submits its Motion for Leave to file a brief of *Amicus Curiae* (“**Motion**”) in the above-captioned matter and urges the Court to accept Petitioner-Appellant Rowena Akana’s Petition for Writ of Certiorari.

This Motion is made pursuant to Rules 27 and 28 of the Hawai‘i Rules of Appellate Procedure. The Motion is based on the attached Memorandum in Support of Motion, the pleadings and papers filed herein, and on such further evidence and argument as may be presented at any future hearing.

DATED: Honolulu, Hawai‘i, May 16, 2024.

/s/ Robert G. Klein _____
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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI'I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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(Agency Appeal)

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JUDGMENT MOTIONS

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**THE OFFICE OF HAWAIIAN AFFAIRS'
BRIEF OF *AMICUS CURIAE*;
CERTIFICATE OF SERVICE**

Circuit Court of the First Circuit
Judge: Hon. James H. Ashford

THE OFFICE OF HAWAIIAN AFFAIRS' BRIEF OF *AMICUS CURIAE*

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THE OFFICE OF HAWAIIAN AFFAIRS' BRIEF OF *AMICUS CURIAE*

I. INTRODUCTION

THE OFFICE OF HAWAIIAN AFFAIRS (“OHA”), by and through its attorneys, Klein Law Group, LLC, respectfully submits its Brief of *Amicus Curiae* (“**Amicus Brief**”) in the above-captioned matter and urges the Court to accept Petitioner-Appellant Rowena Akana’s Petition for Writ of Certiorari (“**Petition**”).

OHA believes the Petition raises critical questions about the jurisdiction and authority of Respondent-Appellee Hawai‘i State Ethics Commission (“**Commission**”) over OHA trustees. Critical issues presented to this Court are (1) whether the Intermediate Court of Appeals of the State of Hawai‘i (“**ICA**”) properly interpreted and applied *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) in its Memorandum Opinion dated January 22, 2024, *see* CAAP-19-0000668, Dkt. 77 at 8, 9, 18 (stating that *nothing* in *Machado* constrains the Commission); (2) whether the Commission has jurisdiction and/or authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees; and (3) whether there exists a conflict between Hawai‘i Revised Statutes (“**HRS**”), Chapter 84 (“**State Ethics Code**”) and the fiduciary obligations imposed on OHA trustees pursuant to HRS, Chapter 10. Implicit in this inquiry is whether the Commission has authority to shape how OHA trustees use proceeds from the ceded lands. *See* Haw. Const. art. XII, § 4; HRS § 10-1 *et seq.* Based on OHA’s review of related case law, this appears to be a matter of first impression. Accordingly, OHA urges this Court to accept the Petition.

II. CONCISE STATEMENT OF THE CASE

This case involves the constitutionally mandated semi-autonomy of OHA. *See also* Haw. Const. art. XII, § 4; HRS § 10-1 *et seq.* OHA was established by article XII, section 5 of the

Hawai‘i Constitution. *See Arakaki v. Hawaii*, 314 F.3d 1091, 1093 (9th Cir. 2002). OHA was created by HRS § 10-4. Its purpose is to better the conditions of Native Hawaiians. HRS § 10-3(1). It is governed by a nine-member board of trustees, elected by qualified voters in the state. *Arakaki*, 314 F.3d at 1093. The board is vested with certain powers and duties discussed more fully *infra*.

Respondent-Appellee Commission is an agency of the State of Hawai‘i, authorized by Article XIV of the Hawai‘i Constitution, and created under and governed by Hawai‘i Administrative Rules (“**HAR**”), Title 21. Respondent-Appellee Commission is responsible for implementing and enforcing the State Ethics Code. *See* HRS § 84-31.

On April 19, 2018, the Commission issued charges against former OHA trustee, Petitioner-Appellant Rowena Akana for violations of the State Ethics Code. JIMS Dkt. 6 at 1-21. The charges alleged that Petitioner-Appellant violated HRS §§ 84-11, -11.5, and -13. *Id.* On May 23, 2018, Petitioner-Appellant answered the charges. JIMS Dkt. 6 at 22-29. Petitioner-Appellant’s answer raised constitutional and jurisdictional issues. *Id.*

On October 16, 2018, the Commission issued its Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent [Akana] (“**Jurisdictional Ruling**”) concluding it had jurisdiction over Petitioner-Appellant’s alleged violations of the State Ethics Code. JIMS Dkt. 7. The Commission asserts that the State Ethics Code that governs the conduct of State employees also governs OHA trustees. *Id.*

Between October 22-26, 2018, the Commission conducted a contested case hearing. On February 5, 2019, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order (“**FOFCOL**”). JIMS Dkt. 11. The FOFCOL concluded Petitioner-Appellant had violated HRS §§ 84-11, -11.5, and -13 and levied fines against Petitioner-Appellant. *See id.*

On March 7, 2019, Petitioner-Appellant appealed the (1) Jurisdictional Ruling and (2) FOFCOL to the circuit court by filing her Notice of Appeal. JIMS Dkt. 1. The appeal was designated Civil Number 19-1-0379-03 (“**Agency Appeal**”). *Id.*

On September 6, 2019, the circuit court heard oral arguments on the Agency Appeal. On September 24, 2019, the circuit court issued its 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 (“**Order Affirming FOFCOL and Jurisdictional Ruling**”). JIMS Dkt. 29. Also on September 24, 2019, the circuit court entered its Final Judgment. JIMS Dkt. 30.

On October 1, 2019, Petitioner-Appellant filed her Notice of Appeal to the Intermediate Court of Appeals in CAAP-19-0000668. CAAP Dkt. 1. Thereafter, Petitioner-Appellant filed an application to transfer. *See* SCAP-19-0000668. On July 24, 2020, this honorable Court denied the application to transfer.

On January 22, 2024, the ICA issued its memorandum opinion. CAAP Dkt. 77. In its memorandum opinion, the ICA states

OHA’s Executive Policy Manual required that trustees “abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes[.]” Trustees had to attend the ethics training course conducted by the Commission (as were legislators, members of the board of education, the governor, the lieutenant governor, and executive department heads and deputies). At least every other year, trustees were reminded by OHA staff or the Commission about their HRS Chapter 84 obligations. OHA staff gave trustees gift disclosure forms and reminded them of the rules about receiving and giving gifts.

Id. at 2 (alteration retained). Additionally, the memorandum opinion notes that “neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.” *Id.* at 9. In so noting, the ICA went on to state that

“[n]othing in *Machado* constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.” *Id.*

On February 16, 2024, the ICA entered its Judgment on Appeal. CAPP Dkt. 78. The ICA Opinion affirmed the circuit court’s Amended Final Judgment and the Commission’s FOFCOL. *Id.* On April 16, 2024, Petitioner-Appellant timely filed the Petition.

III. CONCISE STATEMENT OF THE POINTS OF ERROR

1. Whether the Intermediate Court of Appeals of the State of Hawai‘i (“ICA”) properly interpreted and applied *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) in its Memorandum Opinion dated January 22, 2024, *see* CAAP-19-0000668, Dkt. 77 at 8, 9, 18 (stating that *nothing* in *Machado* constrains the Commission).

2. Whether the Commission has jurisdiction and/or authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees, pursuant to HRS Chapters 10 and 84 and articles XII and XIV of the Hawai‘i Constitution.

3. Whether there exists a conflict between Hawai‘i Revised Statutes, Chapter 84 and the fiduciary obligations imposed on OHA trustees pursuant to HRS, Chapter 10. Whether there exists a conflict between HRS Chapters and 10 regarding the fiduciary obligations imposed on OHA trustees.

IV. ARGUMENT

A. The ICA’s Interpretation of *Machado* Threatens the Semi-Autonomy of OHA

OHA was established by article XII, section 5 of the Hawai‘i Constitution. *See Arakaki*, 314 F.3d at 1093. OHA was created by HRS § 10-4. Its purpose is to better the conditions of native Hawaiians and Hawaiians. HRS § 10-3(1). OHA is governed by a nine-member board of trustees, elected by qualified voters in the state. *See Arakaki*, 314 F.3d at 1093. The board is vested with certain powers and duties, including, but not limited to,

- managing, investing, and administering “the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3”, HRS § 10-5(1);
- collecting, receiving, depositing, withdrawing, and investing “money and property on behalf of the office”, HRS § 10-5(3);
- “[f]ormulat[ing] policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution”, HRS § 10-5(4);
- “the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means”, HRS § 10-4.5(a);
- “the power to deposit any of its moneys in any banking institution within or outside the State, to the extent necessary to implement subsection (a)”, HRS § 10-4.5(b); and
- To expend “[t]wenty per cent of all funds derived from the public land trust for purposes of [HRS Chapter 10]”, HRS § 10-13.5.

See Kealoha v. Machado, 131 Haw. at 67, 315 P.3d at 218 (“Among the powers and duties the legislature granted to the OHA board of trustees is the power to ‘[m]anage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3[.]’”). “Under the duty of loyalty, a ‘trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust.’” *Id.* at 77 (quoting Restatement (Third) of Trusts § 78 cmt. f.).

Based on the foregoing, OHA asserts an interest in the public trust and management of its moneys, including, but not limited to dispersals of such moneys via discretionary funds provided for the trustees to use towards the betterment of the conditions of native Hawaiians. The

Commission claims jurisdiction and authority to prosecute OHA trustees based on their use of the aforementioned funds. Additionally, if the Commission indeed has the authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA's trustees, the Commission could, intentionally or not, influence trustees to act in a way that is in accordance with the Commission's expectations but in breach of the trustees' duty of loyalty to OHA's beneficiaries, native Hawaiians and Hawaiians. Thus, there is a 'relationship' between OHA's legally protected interests and the Commission's claims against Petitioner-Appellant.

The outcome of this appeal will have ramifications well beyond Petitioner-Appellant's rights, which may impact or impede OHA and its trustees from fulfilling their duties. In addition to the Commission's position discussed above (affirmed by the circuit court and the ICA), the ICA's memorandum opinion has potentially severe impacts on the prospective application of *Machado* and OHA's semi-autonomous status as established by article XII, § 5, of the Hawai'i Constitution. *See Rice*, 528 U.S. at 521. The ICA's memorandum opinion discusses in some detail HRS, Chapter 10, and OHA's power with regard to the use of proceeds from the ceded lands. *See* Dkt. 77 § IV.A (at 6-11).

In its opinion, the ICA states:

[Petitioner-Appellant] argues that the circuit court improperly interfered by affirming the Decision and Order because neither the Commission nor the circuit court found that she abused her discretionary power. **But neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.** They reviewed whether Akana met her obligations under the Code of Ethics, not whether she breached her fiduciary duty as an OHA trustee. **Nothing in *Machado* constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.**

Id. at 9 (emphases added). OHA disagrees.

Contrary to the ICA’s opinion, there is most certainly “something” in *Machado* that constrains the Commission, *e.g.*, a trustee’s fiduciary duty. That neither the Commission nor the circuit court considered whether Petitioner-Appellant’s duties as trustee required or even permitted her conduct is precisely what is at odds in *Machado*. *See Machado*, 131 Haw. 62, 78 (stating “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’”). Indeed, the ICA acknowledged that “neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.” CAAP Dkt. 77 at 9. The ICA’s holding is obviously contrary to this Court’s holding in *Machado* that OHA trustees’ expenditures are to be reviewed for abuse of discretion. *Compare id. with Machado*, 131 Haw. 62, 78. On this basis alone, this Court should accept the Petition.

B. The Commission’s Purported Jurisdiction and/or Authority to Initiate, Receive, and Consider Charges Concerning Alleged Violations of Ethical Requirements Governing OHA’s Trustees is Highly Questionable

The Commission asserts that the State Ethics Code that governs the conduct of State employees also governs OHA trustees. JIMS Dkt. 7. The ICA affirmed the Commission’s assertion, stating:

OHA’s Executive Policy Manual required that trustees “abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes[.]” Trustees had to attend the ethics training course conducted by the Commission (as were legislators, members of the board of education, the governor, the lieutenant governor, and executive department heads and deputies). As the Petition accurately reflects,

the Constitution places an additional requirement on each such subdivision
– each code of ethics must have its own “separate” ethics commission:

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Haw. Const. Art. XIV, § 1 (emphasis added). It is for this reason that each County in the State has its own County Ethics Commission, and the county ethics codes are not administered or enforced by the State Ethics Commission. *See, e.g.*, Revised Ordinances of Honolulu (“ROH”), Chapter 3, Article 6, Section 3-6.3 (Ethics Commission of the City & County of Honolulu).

SCWC Dkt. 1 at 4-5 (emphases omitted).

The Petition further accurately reflects that OHA adopted the State Ethics Code as the guidelines for its trustees. *See id.* at 5 (citing Record on Appeal vol. 1f at p. 1585-86, Feb. 5, 2019 Findings of Fact, Conclusions of Law and Decision and Order of the Commission, at ¶7). OHA has not established its own separate ethics commission. Thus, critical issues are presented as to whether (1) by adopting the State Ethics Code as guidelines for its trustees OHA is subject to the jurisdiction and authority of the Commission to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing its trustees and (2) whether OHA is permitted or in fact required to establish its own separate ethics commission. The foregoing issues must be resolved by this Court, forming a second basis for accepting the Petition.

V. CONCLUSION

For the foregoing reasons and authorities, the Petition should be accepted.

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DATED: Honolulu, Hawai'i, May 16, 2024.

/s/ Robert G. Klein

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NO. CAAP-19-0000668

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

ROWENA AKANA, Respondent-Appellant-Appellant,
v.
HAWAI'I STATE ETHICS COMMISSION, Complainant-Appellee-Appellee,
and
DANIEL M. GLUCK, EXECUTIVE DIRECTOR

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CC191000379)

MEMORANDUM OPINION

(By: Leonard, Acting Chief Judge, Hiraoka and Nakasone, JJ.)

After a contested case hearing, the Hawai'i State Ethics **Commission** determined that Rowena **Akana** violated the Hawai'i code of ethics and imposed an administrative fine. Akana appealed. The Circuit Court of the First Circuit affirmed.¹ Akana filed this secondary appeal. We affirm.

I. BACKGROUND²

Akana was an elected member of the Board of Trustees of the Office of Hawaiian Affairs (**OHA**). She had served as an OHA

¹ The Honorable James H. Ashford presided.

² Some of the background comes from the Commission's findings of fact which Akana has not challenged on appeal. See Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (citation omitted)).



trustee for 28 years, until 2018. OHA trustees receive a salary plus an annual allowance – funded by OHA trust funds – intended to improve the trustees' ability to communicate with and help OHA beneficiaries.³ OHA's Executive Policy Manual required that trustees "abide by the Standards of Conduct of the State of Hawai'i, Chapter 84, Hawaii Revised Statutes[.]" Trustees had to attend the ethics training course conducted by the Commission (as were legislators, members of the board of education, the governor, the lieutenant governor, and executive department heads and deputies). At least every other year, trustees were reminded by OHA staff or the Commission about their HRS Chapter 84 obligations. OHA staff gave trustees gift disclosure forms and reminded them of the rules about receiving and giving gifts.

On April 19, 2018, the Commission charged Akana with violating Hawaii Revised Statutes (HRS) § 84-11 (the **Gifts Law**), HRS § 84-11.5 (the **Gifts Reporting Law**), and HRS § 84-13 (the **Fair Treatment Law**). These laws are part of the **Code of Ethics**, Part II of HRS Chapter 84. Akana denied violating the law. She alleged that the Commission "does not have jurisdiction over the discretionary spending accounts of the OHA Trustees, since such funds comprise 'trust funds' and do not constitute 'state funds[.]'" She also alleged that the charges violated her rights under the Hawai'i Constitution. The Commission entered the **Order Regarding Jurisdictional and Constitutional Issues** Raised by Respondent. It concluded it had jurisdiction over the charges against Akana under article XIV of the Hawai'i Constitution and HRS Chapter 84.

A contested case hearing was held on October 22, 24, 25, and 26, 2018. On February 5, 2019, the Commission entered its Findings of Fact, Conclusions of Law, and **Decision and Order**. It determined that Akana violated the Gifts Reporting Law, the Gifts Law, and the Fair Treatment Law. It imposed an

³ From 1991 to 2013, the allowance was \$7,200 per trustee. In 2013 the allowance was increased to \$22,200 per trustee.

administrative fine of \$23,106.53. It also filed a complaint and referred the matter to the Attorney General.

Akana appealed to the circuit court. She moved to stay enforcement of the Decision and Order. The circuit court denied the motion. She also moved to let additional evidence be presented on appeal. The circuit court denied the motion.

On September 24, 2019, the circuit court entered an order affirming the Commission's Decision and Order, and a judgment. Akana's notice of appeal to this court was filed on October 1, 2019. On October 2, 2019, the Commission moved to amend the judgment. The Amended Final Judgment was entered on November 27, 2019.

II. POINTS OF ERROR

Akana's opening brief states nine points of error, which we have numbered as contemplated by Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4) and restated to reflect the secondary nature of our review: **(1)** the Commission exceeded its jurisdiction by prosecuting Akana for discretionary conduct as an OHA trustee; **(2)** the Commission was not authorized to adopt the administrative rule under which Akana was charged; **(3)** the Commission deprived Akana of due process by issuing the Order Regarding Jurisdictional and Constitutional Issues without conducting an evidentiary hearing; **(4)** the Commission's selective prosecution of Akana violated her constitutional right to equal protection; **(5)** the fines imposed against Akana were excessive; **(6)** the Commission made erroneous findings of fact and wrong conclusions of law in applying the Fair Treatment Law to Akana's spending from her trustee allowance; **(7)** the Commission made erroneous findings and wrong conclusions in applying the Gifts Law and Gifts Reporting Law to a third party's payment of Akana's legal fees; **(8)** the circuit court abused its discretion by denying Akana's motion to stay enforcement of the Commission's Decision and Order; and **(9)** the circuit court erred by granting

the Commission's motion to amend the judgment after Akana filed her notice of appeal.

III. STANDARDS OF REVIEW

A. Administrative Agency Appeals

Our review of the circuit court's decision on Akana's appeal from the Commission's Decision and Order is a secondary appeal; we determine whether the circuit court was right or wrong, applying the standards in HRS § 91-14(g) to the Commission's decision based on the agency record. Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 120, 424 P.3d 469, 475 (2018) (citation omitted).

HRS § 91-14(g) (Supp. 2018) provides:

Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

We review an agency's findings of fact for clear error. Del Monte Fresh Produce (Haw.), Inc. v. International Longshore and Warehouse Union, Local 142, 128 Hawai'i 289, 302, 287 P.3d 190, 203 (2012). An agency's conclusions of law are usually reviewed de novo. Id. But when we review an agency's determination, we first examine whether the legislature granted

the agency discretion to make the determination being reviewed. If the legislature granted the agency discretion over a particular matter, we review the agency's action under the deferential abuse of discretion standard (remembering the legislature determines the boundaries of that discretion). Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 419-20, 91 P.3d 494, 501-02 (2004).

The legislature granted the Commission discretion to administer and enforce HRS Chapter 84. See Boyd v. Haw. State Ethics Comm'n, 138 Hawai'i 218, 225, 378 P.3d 934, 941 (2016) (citing HRS Chapter 84, Preamble (1993));⁴ HRS § 84-1 (2012) ("This chapter shall be liberally construed to promote high standards of ethical conduct in state government."). When we review the Commission's decision, we "cannot consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the finding of an expert agency in dealing with a specialized field." Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawai'i 505, 522, 364 P.3d 213, 230 (2015) (cleaned up).

B. Jurisdiction

An administrative agency may determine its own jurisdiction. See HOH Corp. v. Motor Vehicle Indus. Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987). The existence of jurisdiction is a question of law we review de novo under the

⁴ The Preamble states:

The purpose of this chapter is to (1) prescribe a code of ethics for elected officers and public employees of the State as mandated by the people of the State of Hawaii in the Hawaii constitution, article XIV; (2) educate the citizenry with respect to ethics in government; and (3) establish an ethics commission which will administer the codes of ethics adopted by the constitutional convention and by the legislature and render advisory opinions and enforce the provisions of this law so that public confidence in public servants will be preserved.

right/wrong standard. In re Kanahale, 152 Hawai'i 501, 509, 526 P.3d 478, 486 (2023).

C. Statutory Interpretation

Interpretation of a statute is a question of law reviewed de novo. Barker v. Young, 153 Hawai'i 144, 148, 528 P.3d 217, 221 (2023). We start with the statute's language; "implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Id. (citation omitted).

IV. DISCUSSION

We discuss Akana's points of error in the order presented in her opening brief.

A. The Commission could investigate and take appropriate action against Akana for violating HRS Chapter 84.

Article XIV of the Hawai'i Constitution provides in relevant part:

The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government. To keep faith with this belief, the legislature, each political subdivision and the constitutional convention shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies.

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission.

The code of ethics applicable to state officers and employees, and members of state boards, commissions and other bodies, is HRS Chapter 84. The Commission was established by HRS § 84-21 (2012). It may "initiate, receive, and consider charges

concerning alleged violation of" HRS Chapter 84, and "initiate or make investigation, and hold hearings[.]" HRS § 84-31(a)(3) (2012). It has "jurisdiction for purposes of investigation and taking appropriate action on alleged violations of" HRS Chapter 84. HRS § 84-31(a)(6) (2012).

OHA was established by article XII, section 5 of the Hawai'i Constitution, see Arakaki v. Hawaii, 314 F.3d 1091, 1093 (9th Cir. 2002), and created by HRS § 10-4 (1979). It is governed by a nine-member board of trustees, elected by qualified voters in the state. Arakaki, 314 F.3d at 1093. Akana was an elected member of OHA's board of trustees. She is subject to the Code of Ethics, and the Commission had authority to investigate her alleged violations of the Gifts Law, the Gifts Reporting Law, and the Fair Treatment Law.

Akana argues she isn't subject to the Code of Ethics because it contradicts her obligations under HRS Chapter 10, the statute governing OHA. She cites Boyd, 138 Hawai'i 218, 378 P.3d 934. There, the supreme court held that the Commission did not have authority to adjudicate conflicts-of-interest proceedings under HRS § 84-14 against Boyd, a state charter school employee. Id. at 228, 378 P.3d at 944. The charter school statute in effect at the time of the alleged violations, HRS Chapter 302B,⁵ exempted charter schools "from all other State laws in conflict with Chapter 302B." Id. at 227, 378 P.3d at 943 (citing HRS § 302B-9(a) (Supp. 2006 & 2007) (repealed 2012)). The Commission found Boyd in violation of HRS § 84-14 and fined him \$10,000. Id. at 228 n.24, 378 P.3d at 944 n.24. The supreme court noted Boyd was fined "for the same conduct that was in compliance with [the charter school]'s conflict of interest policy, which was adopted in accordance with HRS §§ 302B-5(d)(6) or 302B-6(d)(6)." Id. The court held:

⁵ HRS Chapter 302B was repealed in 2012 and replaced with HRS Chapter 302D. Boyd, 138 Hawai'i at 219 n.1, 378 P.3d at 935 n.1. Under HRS § 302D-12(i) (Supp. 2012), "[a]ll charter school employees and members of governing boards shall be subject to [HRS] chapter 84." Id. at 227 n.23, 378 P.3d at 943 n.23.

If both HRS § 84-14 and Chapter 302B applied to a charter school employee during the relevant time period, then that employee would have been subject to two separate conflict of interest standards. Thus, that same employee could have been subject to punishment under one set of standards, but not the other, for the same conduct.

Id. at 228, 378 P.3d at 944.

Akana cites HRS §§ 10-4 ("Office of Hawaiian affairs; established; general powers") and 10-4.5 ("Authority over disbursements") as the statutes that "caused conflicting standards to be applied" to her conduct. "Two statutes conflict where it is not possible to give effect to both." Carmichael v. Bd. of Land & Nat. Res., 150 Hawai'i 547, 567, 506 P.3d 211, 231 (2022) (citation omitted). Nothing in HRS §§ 10-4 (2009) or 10-4.5 (2009) is contrary to, or inconsistent with, the Code of Ethics. See Off. of Hawaiian Affs. v. Kondo, 153 Hawai'i 170, 178, 528 P.3d 243, 251 (2023) (noting that "[g]enerally, two laws conflict when they 'are explicitly contrary to, or inconsistent with, each other.'" (quoting Boyd, 138 Hawai'i at 227, 378 P.3d at 943)). "[I]f laws can be interpreted harmoniously, there is no conflict." Id. OHA's Executive Policy Manual requires that "Trustees shall abide by the Standards of Conduct of the State of Hawai'i, Chapter 84, Hawaii Revised Statutes, as amended, and shall attend ethics training as required by law." Akana's argument lacks merit.

Akana also contends that the Commission erred because she "acted appropriately at all times in accordance with her fiduciary duties and capacity as trustee." She cites Kealoha v. Machado, 131 Hawai'i 62, 315 P.3d 213 (2013). The plaintiffs in Machado sued several OHA trustees (including Akana) for breaching their fiduciary duty by spending trust funds "without regard to blood quantum on lobbying efforts[.]" Id. at 71, 315 P.3d at 222. The supreme court noted that HRS Chapter 10 didn't mandate how OHA trustees should spend trust funds to better the conditions of native Hawaiians. Id. at 78, 315 P.3d at 229. "[T]he trustees have broad discretion in making that

determination." Id. (citation omitted). In that context, the court held:

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. 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.

Id. at 77, 315 P.3d at 228 (cleaned up) (emphasis added).

Akana argues that a court can only review her conduct for breach of fiduciary duty, and "cannot interfere with an OHA trustee's exercise of discretionary power without first making a finding of breach of fiduciary duty." She argues that the circuit court improperly interfered by affirming the Decision and Order because neither the Commission nor the circuit court found that she abused her discretionary power. But neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries. They reviewed whether Akana met her obligations under the Code of Ethics, not whether she breached her fiduciary duty as an OHA trustee. Nothing in Machado constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.

Akana argues for reversal of the Commission's findings that she violated the Fair Treatment Law because "each and every expenditure [she] made . . . went through the approval process created by OHA and was either authorized, or was disallowed and then reimbursed by Ms. Akana in accordance with OHA policy." That, she contends, resulted "in inconsistent and conflicting standards being applied." But OHA does not pre-authorize trustee spending. The Commission found, and Akana does not challenge:

79. Because Trustees are provided with Trustee Annual Allowance funds in a lump sum at the beginning of the fiscal year, the OHA fiscal staff's review of a Trustee's quarterly report is an "after-the-fact"

review; by the time the fiscal staff receives a quarterly report from a Trustee, the expenditures listed in the report have already been made by the Trustee.

. . . .

82. The quarterly and year-end reviews of Trustee Annual Allowance expenditures are a "tedious" and "time-consuming" process, inasmuch as OHA fiscal staff reviews each expenditure manually and it is not possible for staff to catch all disallowed expenditures, primarily because each Trustee is allowed to spend \$22,200 annually, which includes many small expenditures.

. . . .

86. The fact that a particular expense is "not disallowed" by OHA fiscal staff does not mean that the expenditure is "allowable" or consistent with OHA policy; it could simply mean that the expense was not "flagged" by the fiscal staff. As stated by former Controller Kim in his testimony, the failure to disallow a prohibited expense was a deficiency in the process of reviewing these expenditures; however, the fact that an expenditure was not disallowed does not necessarily mean that the expenditure was allowable pursuant to OHA policy.

. . . .

91. The Commission finds, based upon credible evidence, that Respondent Akana threatened and berated OHA fiscal staff who questioned or disallowed her Trustee Annual Allowance expenditures. Current and former OHA staff members testified that they and their colleagues feared personal attacks or possible retaliation when questioning Respondent Akana about her expenditures.

92. OHA fiscal staff found that trying to get additional information and documentation from Respondent Akana about her expenditures was difficult and the staff was intimidated to ask Respondent Akana for information "because they don't want to get yelled at."

. . . .

96. There were many incidents that affected how [former OHA Chief Financial Officer (CFO)] Ms. Iona approached Respondent Akana with respect to her Trustee Allowance expenditures:

[I]t really all boils down to there was an effort by administration to enforce policies and procedures the best that we could. There was disagreement from trustee Rowena Akana in doing so, and that, in itself would cause a lot of personal attacks against members of the administration, including myself. And that was really the standard in really the almost six years that I was the CFO.

97. Because of Respondent Akana's threats to and intimidation of OHA fiscal staff, more than one OHA employee was reluctant to challenge Respondent Akana regarding her spending of Trustee Annual Allowance funds.
98. In January 2014, then-CFO Iona decided not to question Respondent Akana about the purchase of a \$50 iTunes gift card (Count 7, discussed at FOFs # 99-104, below) – even though Ms. Iona believed the purchase should not have been allowed – expressly because Ms. Iona did not want to upset Respondent Akana.

(Citations to evidence omitted.) These unchallenged findings bind Akana. See Poe, 97 Hawai'i at 536, 40 P.3d at 938. Akana's argument that she could not have violated the Code of Ethics because her spending was not disallowed by OHA lacks merit.

B. The Commission was authorized to adopt the administrative rule under which Akana was charged.

The charges against Akana were brought under Hawaii Administrative Rules (**HAR**) § 21-5-2 (eff. 1981). Akana contends that HAR § 21-5-2 exceeds the statutory authority granted to the Commission. The rule provided:

(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. 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.

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

Akana argues that the Commission "may only investigate a matter *after* the issuance of written charges." Her argument lacks merit. HRS § 84-31(a)(3) empowers the Commission to "initiate, receive, and consider charges concerning alleged

violation of this chapter, *initiate or make investigation*, and hold hearings[.]" (Emphasis added.) HAR § 21-5-2 follows the Commission's statutory authority to "initiate or make investigation" into violations of the Code of Ethics.

C. Akana was not deprived of due process.

Akana contends that she "was denied due process in so far as she was not given an evidentiary hearing to contest the Commission's authority and jurisdiction to bring charges against her in the first place." The record does not show that Akana asked for an evidentiary hearing to determine the Commission's jurisdiction, either before or after entry of the Order Regarding Jurisdictional and Constitutional Issues. We decline to consider this argument, made for the first time on appeal. See State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases." (citations omitted)).

At any rate, the purpose of an evidentiary hearing is to resolve factual disputes. Safeway, Inc. v. Nordic PCL Constr., Inc., 130 Hawai'i 517, 531-32, 312 P.3d 1224, 1238-39 (App. 2013). There were no genuine factual issues material to the Commission's authority and jurisdiction to determine whether Akana violated the Code of Ethics. Akana did not dispute she was an elected, salaried member of OHA's board of trustees. As an OHA trustee, she is subject to the Code of Ethics as a matter of law. The Commission could investigate her alleged violations of the Gifts Law, the Gifts Reporting Law, and the Fair Treatment Law, and take appropriate action. See HRS § 84-31(a)(3).

D. The Commission did not violate Akana's constitutional right to equal protection.

Akana contends she was selectively prosecuted in violation of her right to equal protection under article I,

section 5 of the Hawai'i Constitution. She must "present sufficient evidence to establish the existence of intentional or purposeful discrimination . . . that is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 226-27, 615 P.2d 730, 734-35 (1980) (cleaned up). Akana's briefs don't cite to any evidence presented to the Commission that supports her selective prosecution defense.

Akana argues that she tried to present this evidence to the circuit court, but the court denied her motion to present new evidence. Her motion cited HRS § 91-14(e) (2012), which lets the circuit court order that new evidence be presented *to the agency*, which may then change its findings, decision, and order. Akana's motion sought to present new evidence "to this [Circuit] Court on appeal." This procedure is not allowed by HRS § 91-14(e). See also HRS § 91-14(f) (Supp. 2018) ("The review shall be . . . confined to the record[.]"). The circuit court did not err by denying Akana's motion.

In this secondary appeal, Akana argues that the new evidence she sought to present (to the circuit court) would have shown that the Commission "had no rational basis to proceed solely against Ms. Akana for the exact same types of transactions made by other OHA trustees during the same time period, and therefore the Commission's prosecution was unlawful and violated Ms. Akana's equal protection rights." "It is insufficient to show merely that other offenders have not been prosecuted[.]" Kailua Auto Wreckers, 62 Haw. at 227, 615 P.2d at 735 (citation omitted). Akana makes a conclusory argument that "a group of OHA trustees and members of the OHA Board who were politically opposed to" her persuaded the Commission to "bring a retaliatory action against" her. She presented no such evidence to the Commission. Akana's contention of selective prosecution lacks merit.

E. The fines imposed were not unconstitutionally excessive.

The Commission fined Akana \$23,106.52 for 47 violations of the Code of Ethics. Akana argues that "a \$1,000.00 fine, or *any fine at all beyond a nominal one, is excessive*" because her spending violations "were either approved by OHA itself or else promptly reimbursed to OHA in accordance with internal OHA protocols." We've already dismissed Akana's argument that she could not have violated the Code of Ethics because her spending was "authorized" or "not disallowed" by OHA.

The Commission found and concluded:

IV. ADMINISTRATIVE FINE

. . . .

5. The Commission concludes that Respondent Akana's failure to report gifts totaling more than \$50,000 from Ms. [Abigail] Kawananakoa constituted violations of the State Ethics Code, and that each violation warrants the maximum administrative fine of \$500 applicable at the time the offenses occurred.
6. The Commission concludes that Respondent Akana's receipt of gifts totaling more than \$21,000 from Ms. Kawananakoa on or about April 28, 2017 and June 17, 2017 constituted violations of the State Ethics Code, and that each violation warrants the maximum administrative fine of \$500 applicable at the time the offense occurred.
7. The Commission concludes that Respondent Akana's expenditure of her Trustee Annual Allowance for her Hawaiian Airlines Premier Club membership, political contributions – including the political action committee event – and home cable television service constituted violations of the State Ethics Code, and that each violation warrants the maximum administrative fine applicable at the time the offense occurred.
8. Regarding Respondent Akana's expenditures on food: the Commission concludes that it is proper for Respondent Akana to pay an administrative fine equivalent to the amount of each expenditure, essentially requiring Respondent Akana to use personal funds to pay for these expenditures. The Commission has taken this approach in similar cases. Regarding Respondent Akana's expenditure for food for OHA Trustees' holiday party (Count 48) – an expenditure that was disallowed by OHA, such that Respondent Akana eventually used personal funds to pay for the expenditure – no administrative fine will be imposed.

9. Upon consideration of the evidence and the arguments of counsel, the Hawaii State Ethics Commission hereby determines and concludes that the following administrative fines for each of the violations of HRS chapter 84 that occurred are appropriate and shall be assessed:
- a. Counts 1-4 (Failure to Report Gifts): \$500 each (\$2,000 total)
 - b. Counts 5-6 (Improper Acceptance of Gifts): \$500 each (\$1,000 total)
 - c. Counts [sic] 8 (Expenditures [sic] - Premier Club): \$500
 - d. Counts 10, 12-28 (Expenditures - Cable Television): \$500 each (\$9,000 total)
 - e. Counts 29-36 (Expenditures - Cable Television): \$1,000 each (\$8,000 total)
 - f. Count 38 (Expenditure - Food): \$17.80
 - g. Count 39 (Expenditure - Food): \$268.59
 - h. Count 40 (Expenditure - Food): \$31.94
 - i. Count 41 (Expenditure - Food): \$61.83
 - j. Count 42 (Expenditure - Food): \$66.49
 - k. Count 43 (Expenditure - Food): \$39.48
 - l. Count 44 (Expenditure - Food): \$31.01
 - m. Count 45 (Expenditure - Food): \$20.73
 - n. Count 46 (Expenditure - Food): \$43.66
 - o. Count 47 (Expenditure - Food): \$25.00
 - p. Count 48 (Expenditure - Food): \$0.00
This expenditure was disallowed by OHA.
 - q. Counts 49-50 (Expenditures - Political Contributions): \$500 each (\$1,000 total)
 - r. Count 51 (Expenditure - Contribution PAC Event): \$1,000
10. Contrary to Respondent Akana's assertion that any administrative penalties assessed against her would be excessive, the Commission finds that the maximum administrative penalties imposed above are appropriate in light of the breadth and egregious nature of Respondent Akana's conduct. The evidence established that Respondent Akana committed dozens of violations of the State Ethics Code by accepting illegal gifts valued at over \$21,000; failing to timely report gifts valued at over \$50,000; and using Trustee Annual

Allowance funds for her own personal benefit or for political contributions.

11. The administrative penalties imposed above are appropriate given the especially troubling actions of the Respondent with respect to the use of her Trustee Annual Allowance. Because OHA staff who administered the Trustee Annual Allowance were fearful of personal attacks and threats for questioning Respondent's expenditures, it cannot be said that any expenditure that was "not disallowed" complied with OHA's own policies. Indeed, Respondent Akana seemingly displayed a "pattern of consistently trying to get away with spending that a prudent person would not otherwise be able to push that boundary."

(Citations omitted.)

Akana argues that her "belated reporting of 'gifts' of legal fees" was "purely a technical violation." The Commission addressed that issue:

III. CONCLUSIONS OF LAW

. . . .

76. The Commission disagrees that Respondent Akana's failure to report four gifts (amounting to over \$50,000) from Ms. Kawananakoa is a "technical" violation warranting only a "nominal penalty per instance" or that "any fine at all[] is excessive when considering the nature of the alleged violations[.]"
77. Respondent Akana's failure to report the gifts that she received from Ms. Kawananakoa are not mere "technical" violations. Gifts [sic] disclosures serve the vital purposes of government transparency and accountability. They provide the Commission and the public with information needed to hold government employees to the highest ethical standards. As reflected in the legislative history of HRS § 84-11.5, gifts [sic] disclosures may be a slight inconvenience for filers, but they are necessary to promote public confidence in government and in public officials.
78. Had Respondent timely filed her gifts disclosure statements by the June 30, 2016 deadline, the Commission and the public would have had this information a year earlier. Calling this a "technical" violation entirely misses the point of the Gifts Reporting law.
-
81. The Commission concludes that the maximum fine of \$500 per violation (Counts 1-4) applicable at the time of Respondent Akana's misconduct is consistent with applicable law and appropriate.

(Citations omitted.)

The Commission's fine of \$500 for each violation was authorized by HRS § 84-39 (2012).⁶ Akana has not challenged the constitutionality of that statute. The Commission's characterization of Akana's conduct was supported by substantial evidence and was not clearly erroneous. Given the record here, we cannot say the Commission abused its discretion by imposing the maximum administrative fines allowed under HRS § 84-39 (2012).

F. The Commission's findings and conclusions about Akana's spending were supported by substantial evidence and were neither clearly erroneous nor wrong.

OHA trustees receive their allowance as a lump sum at the beginning of each fiscal year. OHA's Board of Trustees sets policies for the trustees' use of their allowance. OHA's Executive Policy Manual states that the allowance is "not intended to be used for personal gain by a Trustee[.]" (Underscoring omitted.) OHA's Trustee Scholarship and Annual Allowance Fund (**TSAAF**) Handbook states that political contributions are not allowed. Trustees must submit quarterly spending reports; OHA's controller reconciles the reports and works with the trustees to clear any discrepancies. At the end of the fiscal year, any unspent allowance must be returned to OHA. If OHA disallows a trustee's spending, the amount is added to what that trustee must repay to OHA at the end of the fiscal year. The quarterly and fiscal-year-end reviews are tedious and time-consuming because OHA staff manually review each expenditure, many of which are small in amount, and it is impossible to catch all improper spending. Thus, a particular expense not being disallowed does not mean it was a proper use of the trustee's allowance.

⁶ HRS § 84-39 was amended in 2017 to increase the maximum administrative fine to \$1,000 per violation. 2017 Haw. Sess. Laws Act 50, § 1 at 305.

The Fair Treatment Law provided, in relevant part:

No . . . employee shall use or attempt to use the . . . employee's official position to secure or grant **unwarranted privileges**, exemptions, advantages, contracts, or treatment, for [the employee] or others[.]

HRS § 84-13 (2012) (emphasis added).

Akana argues that the Commission applied the wrong standard to determine what constituted "unwarranted" privileges. She contends she may use her trustee allowance in ways she felt would help OHA or its beneficiaries. She conflates her fiduciary duty as an OHA trustee with her obligations under the Code of Ethics. She again cites Kealoha v. Machado, 131 Hawai'i 62, 315 P.3d 213 (2013). As we previously stated, Machado does not constrain the Commission from investigating alleged violations of the Code of Ethics by OHA trustees, or from taking appropriate action on violations.

1. Hawaiian Airlines Premier Club Membership. Akana challenges the Commission's decision on Count 8, which charged:

53. Respondent AKANA, by using Trustee Annual Allowance funds to purchase a Premier Club membership with Hawaiian Airlines costing \$249.00, used or attempted to use her official position to secure an unwarranted personal benefit for herself, in violation of HRS § 84-13 (COUNT 8).

Akana argues she believed her purchase "was in the best interests of the OHA beneficiaries" because it "would save money for the trust over time[.]" She also argues that she paid the \$249 back after OHA disallowed the expense. She does not challenge these findings and conclusions:

II. FINDINGS OF FACT

. . . .

105. On or about July 15, 2014, Respondent Akana used \$249 of Trustee Annual Allowance funds to purchase a Hawaiian Airlines Premier Club membership (hereinafter "Premier Club membership").

106. Benefits of the Premier Club membership included access to Hawaiian Airlines' airport Premier Clubs,

priority check-in and boarding, complimentary "Unlimited TV & More Pack" on certain flights to and from the mainland, and two free checked bags.

107. OHA had allowed Trustees to purchase Premier Club memberships in the past, but a former [Board of Trustees (**BOT**)] Chair stopped the practice before Respondent Akana purchased her Premier Club membership in 2014.

. . . .

110. Respondent Akana claimed that she saved OHA money by paying for her Premier Club membership.

111. At the hearing, Respondent's attorney argued that Respondent Akana saved money by paying for her Premier Club membership rather than paying baggage fees for three or four bags each way.

112. OHA's corporate account with Hawaiian Airlines permitted each OHA traveler – including OHA Trustees – to take one free checked bag.

113. The Premier Club membership permitted two free checked bags - only one more free bag than already allowed by OHA's corporate account with Hawaiian Airlines.

. . . .

115. Notwithstanding her knowledge that OHA's policy regarding Premiere [sic] Club membership had changed, Respondent Akana never consulted with the OHA fiscal office about her purchase of a Premier Club membership for herself.

. . . .

III. CONCLUSIONS OF LAW

. . . .

102. Respondent Akana purchased the Premier Club membership knowing that it was disallowed. She informed the Commission that she was aware that the practice of Trustees being allowed to purchase this membership had previously ended under a prior BOT Chairperson. Even though this expenditure was disallowed by OHA, such that Respondent Akana eventually used personal funds to reimburse OHA for this purchase, she expended Trustee Annual Allowance funds on this purchase and submitted a quarterly report to OHA in which she sought to have this purchase offset against her Trustee Annual Allowance balance.

(Citations to evidence omitted.)

Akana challenges these findings and conclusions:

II. FINDINGS OF FACT

. . . .

116. The Commission finds that Respondent Akana used or attempted to use her Trustee Annual Allowance for her personal benefit by purchasing a Premier Club membership for herself.

. . . .

III. CONCLUSIONS OF LAW

. . . .

101. Although Respondent Akana maintains that she purchased the Hawaiian Airlines Premier Club membership to save money on baggage fees, Respondent Akana was already entitled to one free bag when she traveled on Hawaiian Airlines through OHA's corporate account. The Premier Club membership allowed Respondent Akana to enjoy the other personal benefits of membership – such as access to the airline's club lounge and complimentary "Unlimited TV & More Pack" on certain flights – conferring an unwarranted benefit upon her.

These findings and conclusions are supported by substantial evidence in the record and by the Commission's unchallenged findings, and reflect an application of the correct rule of law. The Commission did not abuse its discretion on this issue.

2. Cable Television Bills. Akana challenges the Commission's decisions on Counts 10 and 12-36, which charged:

56. Respondent AKANA, by using Trustee Annual Allowance funds to pay the total amount of Oceanic's monthly bill for the Surf Pak Xtra package on or about each of the dates listed below, where the approximate monthly cost of the type of internet service she used was under \$50.00, used or attempted to use her official position to secure unwarranted personal benefits for herself – that is, home cable television service – in violation of HRS § 84-13:

a. November 20, 2015 (\$127.90) (COUNT 10);

. . . .

c. January 22, 2016 (\$127.90) (COUNT 12);

d. February 15, 2016 (\$135.78) (COUNT 13);

e. March 5, 2016 (\$132.43) (COUNT 14);

f. April 10, 2016 (\$134.37) (COUNT 15);

- g. May 9, 2016 (\$133.55) (COUNT 16);
- h. June 6, 2016 (\$133.55) (COUNT 17);
- i. June 30, 2016 (\$133.55) (COUNT 18);
- j. August 8, 2016 (\$133.55) (COUNT 19);
- k. September 5, 2016 (\$133.55) (COUNT 20);
- l. October 22, 2016, (\$136.83) (COUNT 21); and
- m. November 24, 2016 (\$136.83) (COUNT 22).

. . . .

59. Respondent AKANA, by using Trustee Annual Allowance funds of \$80.00 or \$82.00 on or about each of the dates listed below to pay a portion of Oceanic's or Spectrum's total monthly bill for the Surf Pak Xtra package, purportedly, for home internet service, when the approximate monthly cost of the type of internet service she used was under \$50.00, used Trustee Annual Allowance funds to partly pay for home cable television service. Respondent AKANA's actions constituted the use or attempted use of her official position to secure unwarranted personal benefits for herself – that is, home cable television service – in violation of HRS § 84-13:

- a. December 21, 2016 (used \$80.00 to pay Oceanic) (COUNT 23);
- b. January 20, 2017 (used \$80.00 to pay Oceanic) (COUNT 24);
- c. February 13, 2017 (used \$80.00 to pay Oceanic) (COUNT 25);
- d. March 15, 2017 (used \$80.00 to pay Oceanic) (COUNT 26);
- e. April 20, 2017 (used \$80.00 to pay Oceanic) (COUNT 27);
- f. May 20, 2017 (used \$80.00 to pay Oceanic) (COUNT 28);
- g. June 25, 2017 (used \$80.00 to pay Oceanic) (COUNT 29);
- h. July 21, 2017 (used \$80.00 to pay Spectrum) (COUNT 30);
- i. August 24, 2017 (used \$80.00 to pay Spectrum) (COUNT 31);
- j. September 10, 2017 (used \$82.00 to pay Spectrum) (COUNT 32);
- k. October 10, 2017 (used \$80.00 to pay Spectrum) (COUNT 33);

- l. November 20, 2017 (used \$80.00 to pay Spectrum) (COUNT 34);
- m. December 13, 2017 (used \$80.00 to pay Spectrum) (COUNT 35); and
- n. December 30, 2017 (used \$80.00 to pay Spectrum) (COUNT 36).

Akana argues she "made proper discretionary decisions to spend monies on OHA-related communications and to gain a broader understanding of Hawaiian issues for in [sic] her role as an OHA Trustee via watching CNN, Olelo and other news programs."

Akana does not challenge these findings:

- 117. In 2015 to 2017, Respondent Akana subscribed to a home cable television and internet bundled service package called "Surf Pak Xtra," offered by Oceanic Time Warner Cable ("Oceanic"), a company that was rebranded as "Spectrum" in or around 2017.
- 118. The Surf Pak Xtra package consisted of standard television service as well as access to additional channels, and "Extreme Internet" service.
- 119. In 2015 and 2016, Respondent Akana used Trustee Annual Allowance funds to pay the entire amount of her monthly bills from Oceanic for the Surf Pak Xtra package.
-
- 124. Respondent Akana used her Trustee Annual Allowance to pay the entire amount of her monthly Oceanic cable bill on or about the following dates, without reimbursing OHA or the Trustee Annual Allowance fund for the portion related to her home cable television service:
 - a. November 20, 2015 (\$127.90) (Count 10).
 - b. January 22, 2016 (\$127.90) (Count 12).
 - c. February 15, 2016 (\$135.78) (Count 13).
 - d. March 5, 2016 (\$132.43) (Count 14).
 - e. April 10, 2016 (\$134.37) (Count 15).
 - f. May 9, 2016 (\$133.55) (Count 16).
 - g. June 6, 2016 (\$133.55) (Count 17).
 - h. June 30, 2016 (\$133.55) (Count 18).
-

130. On August 8, 2016, Respondent Akana used Trustee Annual Allowance funds to pay for her entire Oceanic cable bill (\$133.55) (Count 19).
131. On September 5, 2016, Respondent Akana used Trustee Annual Allowance funds to pay for her entire Oceanic cable bill (\$133.55) (Count 20).
132. Respondent Akana submitted her quarterly report for July 1, 2016 - September 30, 2016 on October 7, 2016; Respondent Akana's quarterly report included the August 8, 2016 and September 5, 2016 payments to Oceanic.
-
134. [OHA] CEO [Kamana'opono] Crabbe's [October 17, 2016] memorandum explained: "Standard TV, Digital Variety Pak, 2-Way Addressable Box is not considered communications to constituents. Only internet is allowed under the TSAAF. Based on inquiry with Oceanic customer service the breakdown of internet charge is \$47.89 (Internet \$42.07 + Olelo Capital Funding \$0.26 + Cable franchise fee \$3.58 + State GET \$1.98)."
135. OHA fiscal staff determined that OHA policy only allowed Respondent Akana to use her Trustee Annual Allowance to pay \$47.89 for her monthly home internet service from Oceanic.
136. The portion of the Oceanic bill not attributable to Respondent Akana's home internet service was disallowed by OHA fiscal staff because those Oceanic services were for the personal benefit of Respondent Akana.
-
148. On or about October 22, 2016 and November 24, 2016, Respondent Akana made payments of \$136.83 - the full amount of her monthly bill for the Surf Pak Xtra package, including her home cable television service - to Oceanic (Counts 21 and 22).
149. The checks for these expenditures were drawn from the same bank account as Respondent's previous expenditures to pay for her Oceanic cable bills.
150. On the memo line of the check pertaining to the November 24, 2016 expenditure is a handwritten note that says "allowable."
151. Despite receiving notification from CEO Crabbe on October 17, 2016 and November 21, 2016 that expenditures on cable television service would be disallowed and that internet service could be claimed at only \$47.89, Respondent Akana claimed \$80.00 of Trustee Annual Allowance funds when she submitted her quarterly report for the October 2016 and November 2016 expenditures.

152. Respondent Akana was charged with using her Trustee Annual Allowance to pay the entire amount (\$136.83) of her Oceanic cable bills on October 22, 2016 (Count 21) and November 24, 2016. (Count 22). Respondent Akana appears to have initially paid for the entire amount of both bills with funds from a checking account used by Respondent for her previous Trustee Annual Allowance expenditures. However, at a later date, Respondent Akana claimed \$80 of Trustee Annual Allowance funds for each of those payments.
153. Although Respondent used her Trustee Annual Allowance to pay \$80 and not \$136.83 to Oceanic on October 22, 2016 (Count 21) and November 24, 2016 (Count 22), this amount was still more than Respondent was allowed to claim for her home internet service.
154. On or about December 21, 2016, Respondent Akana again used Trustee Annual Allowance funds to pay \$80.00 to Oceanic (Count 23).
-
160. In documentation attached with the December 21, 2016 Oceanic expenditure (Count 23), there appears to be a printout of a screen shot of the Oceanic website listing three options for internet service: "Extreme" Internet - 100/10 Mbps - for \$29.95 a month, "Ultimate 200" Internet - 200/20 Mbps - for \$39.99 a month; and "Ultimate 300" Internet - 300/20 Mbps - for \$59.99 a month.
161. Just below this screen shot appears a handwritten note:
- | | |
|--------|---------------------------------|
| 4/5/17 | \$59.99 monthly rate |
| | +\$10.00 modem lease |
| | <u>+\$10.00</u> estimated taxes |
| | \$79.99 |
162. This handwritten note provides the only possible basis on which Respondent Akana may have determined that she could use \$80 a month of Trustee Annual Allowance funds (rather than \$47.89 a month) for her home internet service. However, as set forth above, Complainant introduced competent and substantial evidence that the cost of home internet service was less than \$50 a month, and Respondent Akana did not present any evidence to contradict Complainant's evidence.
163. Moreover, this screenshot and handwritten note below the screenshot do not support Respondent Akana's claims for \$80.00 a month for home internet service. As part of the Surf Pak Xtra package, Respondent Akana received "Extreme Internet" - the lowest level of internet service, offered at \$29.95 a month. Thus, if Respondent Akana was, in fact, using \$59.99 a month as a baseline for her home internet service, it would mean she was using an artificially high baseline - the most expensive internet service ("Ultimate 300" at \$59.99 a month), rather than the less expensive

service she was actually receiving ("Extreme" at \$29.95 a month).

. . . .

166. Between January 2017 and December 2017, Respondent Akana continued to use Trustee Annual Allowance funds to pay approximately \$80 – for her home internet service and to subsidize her home cable television service, without reimbursing OHA or the Trustee Annual Allowance fund for such expenditures:
 - a. January 20, 2017 (\$80) (Count 24).
 - b. February 13, 2017 (\$80) (Count 25).
 - c. March 15, 2017 (\$80) (Count 26).
 - d. April 20, 20017 [sic] (\$80) (Count 27).
 - e. May 20, 2017 (\$80) (Count 28).
 - f. June 25, 2017 (\$80) (Count 29).
 - g. July 21, 2017 (\$80) (Count 30).
 - h. August 24, 2017 (\$80) (Count 31).
 - i. September 10, 2017 (\$82) (Count 32).
 - j. October 10, 2017 (\$80) (Count 33).
 - k. November 20, 2017 (\$80) (Count 34).
 - l. December 13, 2017 (\$80) (Count 35).
 - m. December 30, 2017 (\$80) (Count 36).

(Footnotes and citations to evidence omitted.)

Akana challenges these findings and conclusions:

II. FINDINGS OF FACT

. . . .

120. OHA policy (stated in the 2013 Amendment to the Executive Policy Manual) allowed Trustee Annual Allowance funds to be used for expenses for communications with constituents. Thus, internet service was an allowed expense. However, the policy did not provide for home cable television service as an allowable expense.
121. The Commission finds that Respondent Akana's testimony that she very rarely watched television or mostly watched Olelo or the news is not a sufficient justification to use her Trustee Annual Allowance to pay for her home cable television service. Instead, the Commission finds that Respondent Akana's home cable television service was a personal benefit to Respondent.

122. Respondent Akana's use of Trustee Annual Allowance funds to pay the entire amount of her monthly Oceanic bill was not allowable under OHA policy because the Oceanic bill included charges for home cable television service, which was a personal benefit to her.

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125. For each of the transactions listed above (relating to Count 10 and Counts 12-18), the Commission finds that Respondent Akana used her Trustee Annual Allowance for her personal benefit by paying for her home cable television service.

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147. For the August 8, 2016 and September 5, 2016 transactions (relating to Counts 19 and 20), the Commission finds that Respondent Akana used or attempted to use her Trustee Annual Allowance for her personal benefit by paying for her home cable television service.

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164. As such, in each of the months in which Respondent used more than \$47.89 of Trustee Annual Allowance funds to pay her Oceanic bill, the Commission finds that Respondent was using Trustee Annual Allowance funds to subsidize her purchase of home cable television service – despite previously being informed by OHA staff that she was allowed to claim only \$47.89 for internet service. Thus, she received an unwarranted benefit of approximately \$32.11 per month (\$80.00 - \$47.89).

165. By using \$80.00 a month of Trustee Annual Allowance funds to pay her Oceanic bill, Respondent Akana also failed to comply with the directive from CEO Crabbe that Trustee Annual Allowance funds not be used for home cable television service.

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167. For each of the transactions listed above (relating to Counts 21-36), the Commission finds that Respondent Akana used her Trustee Annual Allowance for her own personal benefit by subsidizing her payments for her home cable television service.

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III. CONCLUSIONS OF LAW

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106. Respondent Akana used or attempted to use her official position to secure unwarranted personal benefits for herself – that is, home cable television service – in violation of HRS § 84-13 by paying for or attempting to pay for all or some of the monthly charges for

Respondent's home cable television service with Trustee Annual Allowance funds on or about each of the dates listed below:

- a. November 20, 2015 (Count 10);
- b. January 22, 2016 (Count 12);
- c. February 15, 2016 (Count 13);
- d. March 5, 2016 (Count 14);
- e. April 10, 2016 (Count 15);
- f. May 9, 2016 (Count 16);
- g. June 6, 2016 (Count 17);
- h. June 30, 2016 (Count 18);
- i. August 8, 2016 (Count 19);
- j. September 5, 2016 (Count 20);
- k. October 22, 2016 (Count 21);
- l. November 24, 2016 (Count 22);
- m. December 21, 2016 (Count 23);
- n. January 20, 2017 (Count 24);
- o. February 13, 2017 (Count 25);
- p. March 15, 2017 (Count 26);
- q. April 20, 2017 (Count 27);
- r. May 20, 2017 (Count 28);
- s. June 25, 2017 (Count 29);
- t. July 21, 2017 (Count 30);
- u. August 24, 2017 (Count 31);
- v. September 10, 2017 (Count 32);
- w. October 10, 2017 (Count 33);
- x. November 20, 2017 (Count 34);
- y. December 13, 2017 (Count 35); and
- z. December 30, 2017 (Count 36).

107. Even though the August 8, 2016 (Count 19) and September 5, 2016 (Count 20) expenditures were disallowed in part by OHA, such that Respondent Akana eventually used personal funds to pay for a portion of these purchases, Respondent submitted a quarterly report to OHA in which she sought to have these

purchases offset against her Trustee Annual Allowance balance. Her attempts to use Trustee Annual Allowance funds to confer a personal benefit upon herself are violations of the Fair Treatment Law.

108. Each expenditure made by Respondent Akana out of the Trustee Annual Allowance for home television service constitutes a separate violation of HRS § 84-13.
109. There is no evidence to suggest that Respondent Akana reimbursed OHA or the Trustee Annual Allowance fund for any of these purchases of home cable television service, other than her eventual use of personal funds to pay for a portion of the August 2016 and September 2016 purchases. However, even if Respondent Akana had reimbursed OHA or the Trustee Annual Allowance fund, each attempt by Respondent Akana to use her official position to make the above-referenced purchases of home cable television service using Trustee Annual Allowance funds constitutes a violation of HRS § 84-13.
110. The Commission concludes that the violations in Counts 21-36 are especially troubling. Respondent Akana continued to claim \$80 for reimbursement for internet service even after being informed by OHA staff that she was only allowed to claim \$47.89. In other words, Respondent Akana dishonestly continued to claim \$80 for internet service knowing that she was not entitled to reimbursement from her Trustee Allowance for this amount.

(Citations to evidence omitted.)

The Commission's findings and mixed findings and conclusions are supported by substantial evidence in the record, including testimony by OHA's controller Gloria Li, OHA's former chief financial officer Hawley Iona, and OHA's former controller John Kim, all of whom the Commission found to be credible. They are also supported by the Commission's unchallenged findings. They were not clearly erroneous, and reflect an application of the correct rule of law. They will not be overturned. See Est. of Klink ex rel. Klink v. State, 113 Hawai'i 332, 351, 152 P.3d 504, 523 (2007). The Commission did not abuse its discretion in deciding that Akana using her trustee allowance to pay for her home cable television service was an unwarranted privilege.

3. Food Purchases. Akana challenges the Commission's decisions on Counts 38 through 48, which charged:

62. Respondent AKANA, by using Trustee Annual Allowance funds on or about each of the following dates, for the purposes and in the amounts stated below, to pay for food or meals for her [sic] herself and/or OHA Trustees and/or OHA staff, used or attempted to use her official position to secure unwarranted personal benefits for OHA personnel, including herself, in violation of HRS § 84-13:

. . . .

- b. March 17, 2014, refreshments for staff, from Leonard's Bakery, \$17.80 (COUNT 38);
- c. July 3, 2014, food for a "going away party" for a staff member, from 1132 Cafe & Catering, \$268.59 (COUNT 39);
- d. August 4, 2014, breakfast for staff, from Liliha Bakery, \$31.94 (COUNT 40);
- e. February 10, 2015, food for a staff "birthday celebration," from Zippy's Nimitz, \$61.83 (COUNT 41);
- f. January 23, 2015, manapua for staff, from Royal Kitchen, \$66.49 (COUNT 42);
- g. July 9, 2015, food for a staff meeting, from Liliha Bakery, \$39.48 (COUNT 43);
- h. December 2, 2015, food for staff from Chinatown Express Ala Moana, \$31.01 (COUNT 44);
- i. August 15, 2016, refreshments for staff from Leonard's Bakery, \$20.73 (COUNT 45);
- j. October 5, 2016, lunch for staff from Tanaka Saimin, \$43.66 (COUNT 46);
- k. February 17, 2017, the cost of food that had been purchased for a party for a staff member's "last day," \$25.00 (COUNT 47); and
- l. December 5, 2017, noodles from Royal Kitchen for a "pot luck" OHA Trustees' holiday party, \$23.72 (COUNT 48).

Each expenditure made by Respondent AKANA out of Trustee Annual Allowance funds to pay for food [for] herself, other OHA Trustees, and/or OHA staff constituted a separate violation of HRS § 84-13.

Akana argues that she may use her trustee allowance to buy food for staff meetings and for functions where OHA work was done or where OHA beneficiaries attended. She challenges these findings:

174. OHA fiscal staff's understanding of the policy was that Trustees could spend Trustee Allowance funds on food for meetings with outside beneficiaries, but not for internal meetings with staff. As former Controller Kim explained, "we looked for some kind of link that established [that trustees were] working with either beneficiaries or constituents or some kind of other partners that we would typically work with."
175. Trustee food expenditures for staff meetings could be permissible under the policy if there was a "clear business purpose" for the meeting, such as bringing in lunch to a remote location during a staff retreat, and if the expenditure amount was reasonable.
176. However, a Trustee's notation that Trustee Annual Allowance funds were used for a "staff lunch" would not be sufficient to justify a food expenditure because such a notation would not indicate a clear business need for the expenditure.
177. Expenditures for purely internal functions, including a staff birthday party or a going-away party for a staff member, would typically be disallowed under OHA policy.

(Brackets in original) (citations to evidence omitted). OHA's Trustee Allowance Meal Form cites to the Board of Trustees Executive Policy Section 3.5.n, which lets trustees use their allowance to cover "associated costs to attend conferences, seminars or meetings[.]" OHA's Trustee Sponsorship and Allowance Fund Internal Guidelines and Procedures lists permissible spending to include: (a) developing and maintaining an ongoing communication network with beneficiaries and the general public; (b) promoting a broader understanding of Hawaiian issues within the Hawaiian community and among the general public to encourage participating in the resolution of those issues; (c) covering costs of social and charitable functions a trustee is expected to support, including sponsoring or assisting a faith based organization's halau, youth group, extracurricular after school activities and sports activities that do not involve religious practices or activities; (d) covering official travel, registration fees, and associated costs to attend conferences, seminars or meetings; (e) providing support for beneficiaries in their personal quest for self-improvement, capacity building, and education; (f) providing funds to purchase school and educational

supplies and materials, audio-visual presentation equipment, and capacity building aids for schools and organizations; and (g) providing compassionate help to beneficiaries and their families for emergencies, natural disasters, and other times of need.

On Count 38, the Commission found the "purchase of refreshments for a staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 39, the Commission found the "purchase of food for a staff 'going away' party or for 'morale building' was a personal expense rather than an expense that was necessary or required for OHA business." On Count 40, the Commission found the "purchase of refreshments for a staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 41, the Commission found the "purchase of food for a birthday lunch celebration for staff or for 'morale building' was a personal expense rather than an expense that was necessary or required for OHA business." On Count 42, the Commission found the "purchase of food for an internal staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 43, the Commission found the "purchase of food for an internal staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 44, the Commission found the "purchase of food for an internal staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 45, the Commission found the "purchase of refreshments for staff was a personal expense rather than an expense that was necessary or required for OHA business." On Count 46, the Commission found the "purchase of lunch for an internal staff meeting was a personal expense rather than an expense that was necessary or required for OHA business." On Count 47, the Commission found the "purchase of lunch for a staff member's last day at work or for 'morale building' was a personal expense rather than an expense that was necessary or

required for OHA business." On Count 48, the Commission found the "purchase of food for a [Board of Trustees] staff holiday party or for 'morale purposes' was a personal expense rather than an expense that was necessary or required for OHA business." These findings were supported by substantial evidence and were not clearly erroneous.

The Commission found and concluded:

111. Although OHA policy relating to the purchase of food with Trustee Annual Allowance funds was not the model of clarity, substantial evidence was adduced that Trustees were not allowed to spend Trustee Annual Allowance funds on staff parties, or on purely internal meetings absent some documented need to do so.
112. Even if OHA policy allowed Trustees to use Trustee Allowance funds for food expenditures without restriction, the State Ethics Code does not. The Fair Treatment law does not permit an employee to use her official position to obtain unwarranted benefits for herself or anyone else. The Fair Treatment law prohibits Trustees from using Trustee Allowance funds for food expenditures to obtain unwarranted personal benefits for themselves or other OHA employees.
113. Respondent Akana used her Trustee Allowance to purchase refreshments or lunches for herself and her staff. Such expenditures are generally considered personal expenses for state employees unless they are necessary for state business. In this case, the Fair Treatment law prohibited Respondent's expenditures of Trustee Allowance funds for personal purchases of food for herself and her staff unless the expenditures were necessary or required for state (i.e., OHA) business.
114. The Commission understands that Hawaii has a cultural practice of using food to express appreciation and Aloha. The State Ethics Code does not prohibit OHA employees from purchasing food to share with work colleagues. However, Trustees seeking to purchase food as an expression of appreciation to OHA staff should make these purchases using personal funds rather than the OHA Trustee Allowance, which is specifically dedicated to benefitting Hawaiian beneficiaries by, among other things, promoting a broader understanding of Hawaiian issues or developing a communication network with beneficiaries and the general public. Using Trustee Allowance funds to purchase food for the office without any clear business need provides OHA employees with an unwarranted benefit in contravention of the Fair Treatment Law and the purpose of the Trustee Allowance fund.
115. The Commission concludes, based upon competent and substantial evidence, that Respondent Akana's food

purchases were personal expenses and were not necessary or required for OHA business. The purchase of pastries, coco puffs, or manapua for a staff meeting is a personal expense rather than an expense that is necessary for the performance of OHA business. (Counts 38, 40, 42, 43, 45). The purchase of food for a staff lunch – even if work is discussed during lunch -- is also a personal expense unless it is necessary for staff to perform OHA business during lunch (Counts 44, 46). The Commission concludes that Respondent Akana's use of her Trustee Annual Allowance fund to pay for these personal food expenses was an unwarranted personal benefit for Respondent Akana and OHA staff.

116. Likewise, although the Commission understands that a Trustee – or any state agency head -- may wish to promote office morale by purchasing food to celebrate staff birthdays or holiday parties, this was not an allowed expenditure under OHA policy; nor was it allowed under the State Ethics Code. These are personal expenses for which Trustee Annual Allowance funds should not have been used. The State Ethics Code does not permit the expenditure of Trustee Annual Allowance funds (rather than personal funds) on staff birthday, going away, or holiday parties (Counts 39, 41, 47, 48). The Commission concludes that Respondent Akana's use of her Trustee Annual Allowance fund to pay for these personal food expenses was an unwarranted personal benefit for Respondent Akana and OHA staff.
117. The Commission is not persuaded by Respondent Akana's attempt to justify her food expenditures by asserting that members of her staff for whom she purchased refreshments and lunches were also OHA beneficiaries. The evidence clearly showed that Respondent's food purchases were to benefit herself and her "staff" – that is, the employees who worked for her at OHA. The evidence does not support Respondent's contention that she used Trustee Annual Allowance funds to purchase food for her "staff" because they were OHA beneficiaries.
118. Respondent Akana used or attempted to use her official position to secure unwarranted personal benefits for herself and other OHA employees, in violation of HRS § 84-13, by paying for food for herself and/or OHA Trustees and/or OHA staff with Trustee Annual Allowance funds on the following dates:
 - a. March 17, 2014, "refreshments for staff meeting," from Leonard's Bakery, \$17.80 (Count 38);
 - b. July 3, 2014, food for a staff "going away party", [sic] from 1132 Café & Catering, \$268.59 (Count 39);
 - c. August 4, 2014, food for a staff[]"working meeting," from Liliha Bakery, \$31.94 (Count 40);

- d. February 10, 2015, food for a "birthday celebration" for staff, from Zippy's Nimitz, \$61.83 (Count 41);
 - e. January 23, 2015, manapua for staff, from Royal Kitchen, \$66.49 (Count 42);
 - f. July 9, 2015, food for a "staff meeting," from Liliha Bakery, \$39.48 (Count 43);
 - g. December 2, 2015, food for a "working lunch" with staff, from Chinatown Express Ala Moana, \$31.01 (Count 44);
 - h. August 15, 2016, "refreshments for staff" from Leonard's Bakery, \$20.73 (Count 45);
 - i. October 5, 2016, lunch for a "staff lunch," from Tanaka Saimin, \$43.66 (Count 46);
 - j. February 17, 2017, the cost of food that had been purchased for a staff member's "last day," \$25.00 (Count 47); and
 - k. December 5, 2017, noodles from Royal Kitchen for a "pot luck" OHA Trustees' holiday party, \$23.72 (Count 48).
119. Each expenditure made by Respondent Akana out of Trustee Annual Allowance funds to pay for food for herself, other OHA Trustees, and/or OHA staff constitutes a separate violation of HRS § 84-13.
120. Even if one or more of these purchases had been "disallowed" by OHA, such that Respondent Akana eventually used personal funds to pay for the expenditures, each attempt by Respondent Akana to use her official position to make the above-referenced purchases of food constitutes a violation of HRS § 84-13.

These mixed findings and conclusions are supported by substantial evidence in the record, and by the Commission's unchallenged findings. They were not clearly erroneous, and reflect an application of the correct rule of law. The Commission's findings that Akana spending her allowance on refreshments for internal staff meetings, parties, and "morale building" were for her, her staff's, and her fellow trustees' benefit, and not to benefit OHA beneficiaries, was not clearly erroneous. The Commission's conclusions that Akana's spending was an unwarranted privilege in violation of the Fair Treatment Law was not wrong, an abuse of discretion, or arbitrary or capricious.

4. Political Contributions. Akana challenges the Commission's decisions on Counts 49 through 51, which charged:

64. Respondent AKANA, by using Trustee Annual Allowance funds to make a political contribution of \$50.00 to the Hawaii County Democrats on or about February 11, 2014, used or attempted to use her official position for political purposes – that is, to unfairly benefit a political party – in violation of HRS § 84-13 (COUNT 49).

65. Respondent AKANA, by using Trustee Annual Allowance funds to make a political contribution of \$50.00 to the Democratic National Committee on or about February 11, 2014, used or attempted to use her official position for political purposes – that is, to unfairly benefit a political party – in violation of HRS § 84-13 (COUNT 50).

66. Respondent AKANA, by using Trustee Annual Allowance funds on or about December 5, 2017 to make a donation of \$500.00 to pay for entertainment for the Kanaka Maoli Political Action Committee event, used or attempted to use her official position for political purposes – that is, to unfairly benefit one or more political action committees – in violation of HRS § 84-13 (COUNT 51).

Akana argues that her \$50 contributions to the Hawaii County Democrats and the Democratic National Committee were both allowed by OHA, or OHA "at least allowed one and the other was repaid[.]" We've already rejected the argument that Akana could not have violated the Code of Ethics because her spending was not disallowed by OHA.

Akana also argues that her donations were proper because they benefitted "social platforms" and "social events" and that her \$500 contribution to Kanaka Maoli was "to pay DeMont Connor for entertainment for Kanaka Maoli, an event presented on January 16, 2018, by the Ho'omana Pono Political Action Committee and the Ka Lahui Hawai'i Political Action Committee."

Akana does not challenge these findings:

Count 49

. . . .

277. The "Hawaii County Democrats" is affiliated with the Democratic Party of Hawaii, a political party.

278. Margaret Wille, the Chair of the Democratic Party for the County of Hawaii, was called as a witness by Respondent Akana.

279. Every year, there is a county convention of the Democratic Party to which all Democratic candidates and elected officials are invited.
280. The public is invited to attend and watch the event, but only Democratic officials and candidates are allowed to speak:

Q. (Respondent's Counsel) And just to be clear, it's not just all elected officials and all candidates within the democratic party. It's bipartisan; is that accurate?

A. (Ms. Wille) No. It's - it is democrat, all democrats.

Tr. IV:617:25 - 618:10. See also Tr. IV:618:18 - 619:3 ("We don't - we don't invite - there's a republican candidate, they're not invited to speak.").

281. Donations received for the event are used to cover expenses at the event, with any extra proceeds rolled over to the next political event - such as the Grand Rally the night before the primary election.
282. At one of the Hawaii County Democrats' events, some Republicans were handing out materials and Ms. Wille "sort of shooed them"; Republicans would not be permitted to take over the Hawaii County Democrats' event.

. . . .

284. Although Respondent Akana maintains that her \$50 donation to the Hawaii County Democrats was for refreshments for the event, she reported it on her quarterly report (January 1, 2014 - March 31, 2014) as a "political contribution."

. . . .

Count 50

. . . .

290. The Democratic National Committee is a political party.
291. Respondent Akana's quarterly report (January 1, 2014 - March 31, 2014) included supporting documentation for Respondent's political contribution to the Democratic National Committee. The supporting documentation included a copy of a Democratic National Committee donation form soliciting donations "to help take back the House, protect our Senate majority, and win crucial Democratic victories at all levels."
292. Respondent Akana reported the \$50 donation to the Democratic National Committee on her quarterly report as a "political contribution."

. . . .

Count 51

. . . .

296. On or about December 5, 2017, Respondent Akana used \$500 of Trustee Annual Allowance funds to pay DeMont Connor for entertainment for Kanaka Maoli, an event presented on January 16, 2018, by the Ho'omana Pono Political Action Committee (HPAC) (of which Mr. Connor was President[]) and the Ka Lahui Hawai'i Political Action Committee (KPAC)[.]
297. Respondent Akana reported the \$500 payment to DeMont Connor as a "Donation for entertainment for 01/16/18 event" on her quarterly report for October 1, 2017 - December 31, 2017.
298. Respondent Akana's Trustee Allowance Beneficiary/Organization Donation Form described the purpose of the \$500 donation as, "Funding For Entertainment At January 16, 2018 Event."
299. In an email to Respondent Akana's aide Kay Watanabe, dated November 29, 2017, DeMont Connor stated: "Aloha e Kay! Here is the flyer for the event on January 16, 2018. I am NOT asking funding for the political event. My request is for Entertainment."

(Some citations to evidence omitted.)

On Count 49, Akana challenges the Commission's finding that she "used her Trustee Annual Allowance to benefit a political party by making a political contribution to the Hawaii County Democrats on or about February 11, 2014." She acknowledges that OHA's TSAAF Handbook "states explicitly that 'political contributions' are not allowed[.]" But she argues that "the fiduciary duties given an OHA trustee take precedence over OHA internal policy or guidelines." She hasn't explained why she reasonably believed she had a fiduciary duty to give \$50 to the Hawaii County Democrats, but not to any other political organization (other than the Democratic National Committee).

The Commission found and concluded:

123. Respondent Akana used or attempted to use her official position to provide an unwarranted benefit to a political party in violation of HRS § 84-13 (Count 49) by making a political contribution of \$50 to the Hawaii County Democrats on or about February 11, 2014 with her Trustee Annual Allowance funds (Count 49).

. . . .

128. One of the basic precepts of the State Ethics Code is that state employees cannot use state resources (or in this case, resources given to a state employee because of her official position) for political campaign purposes or activities. Additionally, OHA policy clearly prohibited the use of Trustee Annual Allowance funds for political contributions or political action committee events. Thus, Respondent Akana should have been well aware that the use of Trustee Allowance funds for political contributions or political action committee events (Counts 49-51) was prohibited.

These mixed findings and conclusions are supported by substantial evidence in the record, and by the Commission's unchallenged findings. They were not clearly erroneous, and reflect an application of the correct rule of law. On this record, we cannot conclude that the Commission abused its discretion in determining that Akana's spending violated the Fair Treatment Law.

On Count 50, Akana challenges the Commission's finding that she "used her Trustee Annual Allowance to benefit a political party by making a political contribution to the Democratic National Committee on or about February 11, 2014." She makes no specific arguments to challenge the Commission's mixed finding and conclusion:

124. Respondent Akana used or attempted to use her official position to provide an unwarranted benefit to a political party in violation of HRS § 84-13 by making a political contribution of \$50 to the Democratic National Committee on or about February 11, 2014 with her Trustee Annual Allowance funds (Count 50).

We cannot conclude that the Commission abused its discretion by determining that Akana's spending violated the Fair Treatment Law.

On Count 51, Akana challenges these findings and conclusions:

II. FINDINGS OF FACT

. . . .

300. Notwithstanding Mr. Connor's statement that he was not asking for funding for the "political event" on January 16, 2018, Respondent Akana's donation to Mr. Connor was for the purpose of funding

entertainment for the event and therefore directly benefitted the political action committee event.

301. OHA policy prohibited the use of Trustee Annual Allowance funds for this contribution to a political action committee event.

.

303. The Commission finds that Respondent Akana used her Trustee Annual Allowance to benefit one or more political action committees by making a contribution on or about December 5, 2017, for entertainment for the Kanaka Maoli political action committee event presented by HPAC and KPAC.

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III. CONCLUSIONS OF LAW

.

125. Respondent Akana used or attempted to use her official position to provide an unwarranted benefit to one or more political action committees in violation of HRS § 84-13 by using Trustee Annual Allowance funds to make a contribution of \$500 on or about December 5, 2017 to pay for entertainment for the Kanaka Maoli Political Action Committee event (Count 51).

Akana argues her spending was for "OHA beneficiaries solely for entertainment purposes." Substantial evidence in the record shows that the entertainment for which Akana paid was part of a political event, and that trustee allowances were not to be used as "resources for the support of any political activity[.]" On this record, we cannot conclude that the Commission abused its discretion by determining that Akana's spending violated the Fair Treatment Law.

G. The Commission's findings and conclusions about Akana's violations of the Gifts Reporting Law and Gifts Law were supported by substantial evidence and were neither clearly erroneous nor wrong.

Counts 1 through 4 alleged that Akana violated the Gifts Reporting Law. The Gifts Reporting Law requires that a state employee file an annual disclosure statement with the Commission if:

- (1) The . . . employee . . . received directly or indirectly from one source any gift or gifts valued singly or in the aggregate in excess of \$200, whether the gift is in the form of money, service, goods, or in any other form;
- (2) The source of the gift or gifts have interests that may be affected by official action or lack of action by the . . . employee; and
- (3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.[⁷]

HRS § 84-11.5(a) (2012).

Counts 5 and 6 alleged that Akana violated the Gifts Law. The Gifts Law provides:

No . . . employee shall solicit, accept, or receive, directly or indirectly, any gift, . . . under circumstances in which it can reasonably be inferred that the gift is intended to influence the . . . employee in the performance of the . . . employee's official duties or is intended as a reward for any official action on the . . . employee's part.

HRS § 84-11 (2012).

The Commission found, and Akana does not challenge, that: In 2013, Akana sued the other OHA trustees over OHA's practices and procedures for giving trustees and beneficiaries access to minutes and other records of executive session meetings. The trustee defendants counterclaimed against Akana for breaching her fiduciary duty and revealing privileged and confidential information. Some of Akana's legal fees were paid by Abigail **Kawanakoa**, an OHA beneficiary. Akana's lawsuit and the other trustees' counterclaim were settled in November 2017.

⁷ HRS § 84-11.5(d) (2012) exempts gifts: (1) received by will or intestate succession; (2) received from distribution of any inter vivos or testamentary trust established by a spouse or ancestor; (3) from a spouse, fiancé, fiancée, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancée of such a relative (but a gift from such a person is a reportable gift if the person is acting as an agent or intermediary for any person not covered by HRS § 84-11.5(d)(3)); (4) that are political campaign contributions complying with state law; (5) available to or distributed to the public generally without regard to the official status of the recipient; (6) that, within thirty days after receipt, are returned to the giver or delivered to a public body or to a bona fide educational or charitable organization without the donation being claimed as a charitable contribution for tax purposes; and (7) of approximately equal value exchanged on holidays, birthdays, or special occasions. None of these exemptions apply in this case.

In February 2017 (while Akana's lawsuit was still pending), Kawananakoa sued OHA, OHA trustee and former board chair Robert K. **Lindsey**, and OHA chief executive officer Kamana'opono **Crabbe**. Kawananakoa sought to set aside Crabbe's employment contract with OHA. Akana's answer to the charges admitted that Kawananakoa had interests that may have been affected by official action or lack of action by Akana, and that Akana participated in at least one OHA Board of Trustees executive session meeting about Kawananakoa's lawsuit.

Akana challenges these findings and conclusions:

II. FINDINGS OF FACT

. . . .

21. As an OHA beneficiary who has over many years maintained a personal interest in OHA business, Ms. Kawananakoa had interests that may have been affected by official action or lack of action on the part of Respondent Akana.

. . . .

36. Respondent Akana participated in at least one executive session meeting of the OHA BOT regarding the Kawananakoa v. OHA lawsuit. Further Statement ¶34; Answer ¶1 (admits ¶34).

37. Specifically, Respondent Akana was present for the entire executive session of the BOT on March 9, 2017, in which the BOT consulted with its attorney, Paul Alston, regarding the Kawananakoa v. OHA lawsuit.

. . . .

44. Respondent Akana received the value of Ms. Kawananakoa's gifts – payments of more than \$70,000 – in the form of legal services provided by the Bickerton Dang law firm.

. . . .

III. CONCLUSIONS OF LAW

. . . .

52. Ms. Kawananakoa had interests that may have been affected by official action or lack of action on the part of Respondent Akana, which Respondent admitted in her Answer to the Further Statement of Alleged Violation. Further Statement ¶33; Answer ¶1 (admits to ¶33).

53. Ms. Kawananakoa's interests stemmed from her status as an OHA beneficiary, as the plaintiff in the

Kawananakoa v. OHA lawsuit, and as the funder of the Akana v. OHA BOT lawsuit (which Respondent Akana brought in both her individual and official capacities).

. . . .

56. As the plaintiff in a lawsuit against OHA, Ms. Kawananakoa – the source of the gifts (payments of legal fees) to Respondent Akana – had interests that may have been affected by official action, or lack thereof, by Respondent Akana. Respondent Akana, as a member of the BOT overseeing and directing OHA, a defendant in the lawsuit, could and did participate in at least one executive session meeting in which the OHA Trustees discussed the Kawananakoa lawsuit with their legal counsel and was in a position to take official action affecting Ms. Kawananakoa (such as a recommendation to settle the lawsuit).

57. As the source of funding for the Akana v. OHA BOT lawsuit, Ms. Kawananakoa had interests that may have been affected – and indeed were affected – by Respondent Akana's decision (Respondent's "official action") to initiate and continue her lawsuit against the other OHA Trustees, and to defend against the other Trustees' counterclaim against her. Ms. Kawananakoa's interests stemmed from her continuing financial support for Respondent Akana's lawsuit and legal defense.

. . . .

60. The legal fees paid by Ms. Kawananakoa to the Bickerton Dang law firm for legal services provided to Respondent Akana were gifts to Respondent Akana within the meaning of HRS § 84-11.5; Bickerton Dang's legal services, paid for by Ms. Kawananakoa, were "service[s]" that were "received directly or indirectly" by Respondent Akana.

61. Each of the following payments of legal fees by Ms. Kawananakoa to the Bickerton Dang law firm for legal services provided to Respondent Akana was a gift valued at over \$200:

- a. July 1, 2015 (\$10,478.52) (Count 1);
- b. August 10, 2015 (\$9,521.48) (Count 2);
- c. March 24, 2016 (\$6,000.00) (Count 3);
- d. April 19, 2016 (\$24,125.50) (Count 4).

62. None of these gifts were exempted by HRS § 84-11.5(d) from the gifts reporting requirements.

63. Gifts received at different times must be reported separately: HRS § 84-11.5 requires an individual filing a gifts disclosure statement to report "[t]he date the gift was received[.]" HRS § 84-11.5(c)(3); see also HRS § 84-11.5(a)(1) (requires reporting of "any gift or gifts valued singly or in the aggregate

in excess of \$200, whether the gift is in the form of money, service, goods, or in any other form").

64. Each payment of legal fees by Ms. Kawananakoa to the Bickerton Dang law firm for legal services provided to Respondent Akana, constituted a separate and distinct, reportable gift for purposes of HRS § 84-11.5.
65. Respondent Akana was clearly required to report each payment of legal fees by Ms. Kawananakoa to the Bickerton Dang law firm on an annual gifts disclosure statement filed with the Commission, by the deadlines set forth in HRS § 84-11.5.
66. Respondent Akana was required to report Ms. Kawananakoa's payment of legal fees on July 1, 2015 (\$10,478.52) by the statutory deadline of June 30, 2016 (Count 1).
67. Respondent Akana was required to report Ms. Kawananakoa's payment of legal fees on August 10, 2015 (\$9,521.48) by the statutory deadline of June 30, 2016 (Count 2).
68. Respondent Akana was required to report Ms. Kawananakoa's payment of legal fees on March 24, 2016 (\$6,000) by the statutory deadline of June 30, 2016 (Count 3).
69. Respondent Akana was required to report Ms. Kawananakoa's payment of legal fees on April 19, 2016 (\$24,125.50) by the statutory deadline of June 30, 2016 (Count 4).
70. Respondent Akana's contention that she did not need to report these legal fees and that they were not "gifts" because she received them in her "official capacity" is wholly without merit: if she were correct, then state employees could simply ignore HRS § 84-11.5 altogether by claiming that gifts – whether cash, meals, tangible goods, or services – were being provided to them in their official capacities. This contradicts the plain language of HRS § 84-11.5.
71. Respondent Akana accepted Ms. Kawananakoa's offer to pay for her legal fees. It was incumbent upon Respondent to ascertain the value of these legal fees for gift reporting purposes and to report these gifts in a timely fashion as required by HRS § 84-11.5. Her claim that she was not provided with copies of the Bickerton Dang law firm's invoices and that, during the course of the litigation, she did not know the specific amounts of her legal fees does not absolve Respondent of her responsibilities under the State Ethics Code.
72. Respondent Akana violated HRS § 84-11.5 by failing to report a gift (the payment of Respondent's legal fees) from Ms. Kawananakoa received on July 1, 2015 (\$10,478.52) by the statutory deadline of June 30, 2016 (Count 1).

73. Respondent Akana violated HRS § 84-11.5 by failing to report a gift (the payment of Respondent's legal fees) from Ms. Kawananakoa received on August 10, 2015 (\$9,521.48) by the statutory deadline of June 30, 2016 (Count 2).
74. Respondent Akana violated HRS § 84-11.5 by failing to report a gift (the payment of Respondent's legal fees) from Ms. Kawananakoa received on March 24, 2016 (\$6,000.00) by the statutory deadline of June 30, 2016 (Count 3).
75. Respondent Akana violated HRS § 84-11.5 by failing to report a gift (the payment of Respondent's legal fees) from Ms. Kawananakoa received on April 19, 2016 (\$24,125.50) by the statutory deadline of June 30, 2016 (Count 4).
-
86. Respondent Akana's continued acceptance of gifts of legal fees – on two occasions, totaling more than \$21,000 – after Ms. Kawananakoa filed a lawsuit against OHA, creates a reasonable inference "that the gift is intended to influence [Respondent Akana] in the performance of [Respondent Akana's] official duties or is intended as a reward for any official action on [Respondent Akana's] part." HRS § 84-11.
87. A reasonable person clearly could – and, the Commission believes, would – infer that a donor who pays for more than \$21,000 of services to an elected official after suing that official's agency intends to influence that official.
-
97. Respondent Akana contends that she did not violate the Gifts law because she was not asked to give anything in return for Ms. Kawananakoa's payment of legal fees and the payment of these fees did not result in any official acts by Respondent benefitting Ms. Kawananakoa. The Commission concludes that Respondent's contention is without merit. A donor's actual intent in giving a gift does not determine whether a gift is prohibited by the Gifts law; similarly, it does not matter whether the gift actually influences the recipient's actions. If a gift is given under circumstances where it can reasonably be inferred that an intent to influence or reward exists, the gift is prohibited. This interpretation of the Gifts law fully comports with the plain language of the law as well as the purpose of the State Ethics Code to preserve public confidence in public officials.
98. Respondent Akana violated HRS § 84-11 by accepting a gift (the payment of Respondent's legal fees) from Ms. Kawananakoa on or about April 28, 2017 (\$15,513.15) when the OHA BOT, including Respondent Akana, was engaged in the Kawananakoa vs. OHA lawsuit (Count 5).

99. Respondent Akana violated HRS § 84-11 by accepting a gift (the payment of Respondent's legal fees) from Ms. Kawanakoa on or about June 17, 2017 (\$6,000.00) when the OHA BOT, including Respondent Akana, was engaged in the Kawanakoa vs. OHA lawsuit (Count 6).

(Citation omitted.)

The Commission weighs three factors to determine whether a gift is prohibited under the Code of Ethics: (1) the value of the gift; (2) the relationship between the recipient and the donor, including whether the recipient takes official action regarding the donor; and (3) whether the gift benefits the recipient personally or serves legitimate state interests. Haw. State Ethics Comm'n Advisory Op. No. 2018-002, 2018 WL 4599569, at *2 (June 21, 2018). Akana argues that she may accept Kawanakoa paying her attorneys' fees because her lawsuit against the other trustees was brought to further the interests of OHA beneficiaries. She misses the point. Kawanakoa paying Akana's attorneys' fees for her lawsuit against the other trustees could reasonably be seen as possibly influencing Akana's position on Kawanakoa's lawsuit against OHA. The value of the gift – over \$70,000 – satisfies the first factor.

Akana argues she had no significant relationship with Kawanakoa before Kawanakoa began paying her attorneys' fees. But this weighs against any inference that Kawanakoa paid Akana's attorneys' fees out of friendship, and supports the inference that Kawanakoa paid Akana's attorneys' fees to try to influence the positions taken by Akana in the Kawanakoa v. OHA lawsuit. Akana also argues "the un rebutted evidence [shows] that no action had ever been taken on" Kawanakoa's lawsuit. She again misses the point. Akana, as a trustee, could influence OHA's decisions on Kawanakoa's lawsuit. No action – rather than aggressive defensive action – being taken could have been the result of Akana's influence. The second factor was satisfied.

Akana notes that the Commission made no finding on the third factor, because it felt the strength of the first two

factors made the third factor inconsequential. Still, she argues that she did not benefit from Kawananakoa's payment of her attorneys' fees. The Commission found, and Akana doesn't challenge, that the Bickerton Dang law firm provided legal services to Akana for her lawsuit against the other trustees. Akana offered no evidence to the Commission that she would not have been personally liable for her attorneys' fees had Kawananakoa not paid them. The record indicates that the third factor was also satisfied.

The Commission's findings, conclusions, and mixed findings and conclusions were supported by substantial evidence and by the Commission's unchallenged findings, and reflected a correct application of the law. They were neither clearly erroneous nor wrong. The Commission did not abuse its discretion by deciding that Akana violated the Gifts Reporting Law and the Gifts Law.

H. Akana waived her appeal from the order denying her motion for a stay.

Akana contends the circuit court abused its discretion by denying her request for a stay pending appeal and concluding the factors under HRS § 91-14(c) were not met. Akana's opening brief makes no discernable argument on this point. The Commission argues the point should be deemed waived. Akana's reply brief argues the point should not be deemed waived because it involved motions briefed and argued in the circuit court, her argument on this point was referenced in her statement of the points of error, and the argument was not made in her opening brief for economy. Attempts to incorporate by reference in the opening brief arguments made before the trial court violate the 35-page limitation in HRAP Rule 28(a). Kapiolani Com. Ctr. v. A & S P'ship, 68 Haw. 580, 584-85, 723 P.2d 181, 184-85 (1986) ("Since this is in violation of our rules, we will disregard those points.").

I. The circuit court retained jurisdiction to rule on the Commission's motion to amend the judgment.

Akana contends that her notice of appeal immediately divested the circuit court of jurisdiction to grant the Commission's motion to amend the judgment. The Commission argues this point too should be deemed waived because it was not argued in Akana's opening brief. But "lack of subject matter jurisdiction can never be waived by any party at any time." Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003) (citation omitted).

The Commission's motion to amend was filed within the time required by Hawai'i Rules of Civil Procedure Rule 59(e). The circuit court's jurisdiction was extended for up to 90 days after the motion was filed. See HRAP Rule 4(a)(3) ("The presiding court or agency in which the motion was filed shall dispose of any such post-judgment motion by entering an order upon the record within 90 days after the date the motion was filed."). The circuit court retained jurisdiction to enter the Amended Final Judgment.

The Amended Final Judgment substantially and materially altered the Final Judgment by adding fines of \$23,106.53 against Akana. Ordinarily, if amendment of a final judgment materially alters rights or obligations determined by the prior judgment, a notice of appeal from the amended judgment must be filed. See Korsak v. Haw. Permanente Med. Grp., 94 Hawai'i 297, 304, 12 P.3d 1238, 1245 (2000). But the Final Judgment affirmed the Commission's imposition of the fines; it just didn't liquidate the amount. Akana's notice of appeal was timely as to the Amended Final Judgment under HRAP Rule 4(a)(2) ("If a notice of appeal is filed after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal.").

V. CONCLUSION

For all of these reasons, the circuit court's Amended Final Judgment and the Commission's Findings of Fact, Conclusions of Law, and Decision and Order are affirmed.

DATED: Honolulu, Hawai'i, January 22, 2024.

On the briefs:

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for Respondent-Appellant-
Appellant.

/s/ Katherine G. Leonard
Acting Chief Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Karen T. Nakasone
Associate Judge

Kaliko'onalani D. Fernandes,
Solicitor General,
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for Complainant-Appellee-
Appellee.

NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the foregoing document was duly served upon the following parties electronically through the Judiciary Electronic Filing System (“JEFS”), or via U.S. Mail, postage prepaid, as set forth below:

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DATED: Honolulu, Hawai'i, May 16, 2024.

/s/ Robert G. Klein

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SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,

Petitioner-Appellant,

v.

HAWAI'I STATE ETHICS COMMISSION,

Respondent-Appellee.

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

APPEAL FROM:

A) FINAL JUDGMENT, filed September 24, 2019;

B) 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, filed September 24, 2019;

C) ORDER DENYING APPELLANT'S MOTION FOR ADDITIONAL EVIDENCE TO BE TAKEN, filed June 18, 2019; and

D) ORDER DENYING APPELLANT'S MOTION TO STAY ENFORCEMENT OF AGENCY ORDER; CERTIFICATE OF SERVICE, filed 29-Apr-19

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**HAWAI'I STATE ETHICS COMMISSION'S RESPONSE TO OFFICE OF
HAWAIIAN AFFAIRS' MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

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**HAWAI'I STATE ETHICS COMMISSION'S RESPONSE TO OFFICE OF
HAWAIIAN AFFAIRS' MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

The Office of Hawaiian Affairs (“OHA”) seeks leave to file a brief of *amicus curiae* in support of Petitioner-Appellant Rowena Akana’s Application for Writ of Certiorari. Because the motion is premature and because OHA’s proposed amicus brief would be of little help to the Court, the motion should be denied.

As Respondent-Appellee Hawai‘i State Ethics Commission (the “Commission”) argued in opposition to OHA’s prior motion for leave to file an amicus brief, *see* Dkt. 7, OHA’s motion is premature. Hawai‘i Rules of Appellate Procedure (“HRAP”) Rule 28(g)—which governs amicus briefs—is nested within the HRAP provision on “briefs” that covers only briefs on the merits; applications for writs of certiorari and related filings are covered in an entirely separate rule, which, unlike Rule 28, is notably silent regarding the filing of amicus curiae briefs. *See* HRAP Rule 40.1. Rule 28(g) also specifically states that “[a]ll amicus curiae briefs shall comply with the applicable provisions of subsection (b) of this Rule[,]” the provision governing opening briefs—an odd reference if the Rule contemplated the filing of amicus briefs in support of or in opposition to applications for writs of certiorari under Rule 40.1, where there are separate content requirements, *see* HRAP Rule 40.1(d). Rule 28(g) also provides: “The attorney general may file an amicus curiae brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai‘i is drawn into question, provided that the attorney general shall file the brief *within 30 days after the filing of the answering brief*, or within 30 days after notice was received pursuant to Rule 44 of these Rules, whichever period last expires.” (emphasis added). This again contemplates amicus briefs on the merits.

Even if an amicus brief may be filed at this stage, the proposed brief OHA attaches to its motion would provide little—if any—assistance to the Court in its consideration of Akana’s

Application. Much of OHA's proposed brief is a recounting of the basic facts and procedural history of the case, *see* Dkt. 19 at PDF 11-14, and the majority of the argument is simply a word-for-word refile of the argument contained in OHA's prior motion for leave to file an amicus brief, to which no proposed brief was attached.¹ *Compare* Dkt. 3 at PDF 7-10 *with* Dkt. 19 at PDF 14-17. That argument is already on the record as part of OHA's prior motion, so there is little need for OHA to re-hash the exact same points in an amicus brief.

For these reasons, the Commission respectfully requests that the Court deny OHA's motion. In the alternative, in the event that the Court grants OHA's motion, the Commission respectfully requests that it be given an opportunity to file a response.

DATED: Honolulu, Hawai'i, May 17, 2024.

/s/ Ewan C. Rayner

KALIKO'ONĀLANI D. FERNANDES

EWAN C. RAYNER

Attorneys for Respondent-Appellee HAWAI'I
STATE ETHICS COMMISSION

¹ As the Commission noted in its opposition to OHA's prior motion, OHA's position in its proposed amicus brief also appears inconsistent with evidence of OHA's past position in the record in this case. *See* Dkt. 7 at PDF 4 n.1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served electronically (through the Court’s JEFS system), or conventionally via US Mail, upon the following parties:

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SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,
Petitioner/Respondent-Appellant-Appellant,

vs.

HAWAI'I STATE ETHICS COMMISSION,
Respondent/Complainant-Appellee-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-19-0000668; CIV. NO. 1CC191000379)

ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
(By: Recktenwald, C.J.)

Upon consideration of the Office of Hawaiian Affairs' Motion for Leave to File a Brief of Amicus Curiae, filed on May 16, 2024, the Hawai'i State Ethics Commission's Response, filed on May 17, 2024, and the record herein,

IT IS HEREBY ORDERED that the motion is granted as follows:

1. Within two (2) days of this order, the Office of Hawaiian Affairs may file an amicus brief in substantially the same form as the proposed brief that was submitted with its motion; and

2. Within six (6) days of the filing of the amicus brief, any party to this proceeding may file a response to the same, not to exceed ten (10) pages in length.

DATED: Honolulu, Hawai'i, May 22, 2024.

/s/ Mark E. Recktenwald
Chief Justice



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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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

APPEAL FROM THE:

(1) FINAL JUDGMENT, FILED
SEPTEMBER 24, 2019;

(2) 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, FILED SEPTEMBER 24, 2019;

(3) ORDER DENYING APPELLANT’S
MOTION FOR ADDITIONAL EVIDENCE
TO BE TAKEN, FILED JUNE 18, 2019;

(4) ORDER DENYING APPELLANT’S
MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER, FILED APRIL 29, 2019;
AND

(5) THE DISPOSITION OF ALL POST-
JUDGMENT MOTIONS.

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**PETITIONER-APPELLANT ROWENA AKANA'S REPLY
ON APPLICATION FOR WRIT OF CERTIORARI**

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I. ARGUMENT

A. Petitioner-Appellant Akana Did Not Waive Her Argument Regarding The Commission's Subject Matter Jurisdiction

“[S]ubject matter jurisdiction is fundamental to [an agency's] power to act on the merits of a case from the outset of the action” and “may be challenged *at any time*...” *Schwartz v. State*, 136 Hawai‘i 258, 263, 361 P.3d 1161, 1165 (2015) (emphasis added). If an agency lacks jurisdiction, “its proceedings and decision must be rendered void and legally ineffective.” *Baker v. Galuteria*, 141 Hawai‘i 468, 481, 413 P.3d 372, 385 (App. 2018).

The Response does not come to grips with the well-settled rule of non-waiver of subject matter jurisdiction. Although Ms. Akana raised the issue of whether the Office of Hawaiian Affairs (“OHA”) is a political subdivision which must have its own separate ethics commission for the first time in her Application for Writ of Certiorari, this issue raises the subject matter jurisdiction of the Hawai‘i State Ethics Commission (“HSEC” or “Respondent”) to prosecute Ms. Akana for violations of the State Ethics Code (“SEC”). Should this Court agree that the State Constitution requires OHA to have its own separate ethics commission, this deprives the HSEC of all power to enforce the SEC against Ms. Akana, thereby depriving it of subject matter jurisdiction. Therefore, this issue cannot have been waived and is properly before this Court regardless of when it was raised.

B. OHA Constitutes a Political Subdivision and The Ethics Commission Therefore Has No Jurisdiction Over OHA

In any question of the relationship of OHA to the rest of government, the historical context leading up to the Constitutional Convention of Hawai‘i of 1978 (“Con-Con”) which created OHA is critical. As scholars have recognized, the creation of OHA grew from the Hawaiian Land and Sovereignty Movements of the 1970s and its establishment was inspired by the mobilization of Native Hawaiians and their journey for justice and self-determination. *See generally* Lisset M. Pino, *Colonizing History: Rice v. Cayetano and the Fight for Native Hawaiian Self-Determination*, 129 *Yale L.J.* 2574 (2020); *and see* Troy J.H. Andrade, *Hawai‘i ’78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 *U. Pa. J.L. & Soc. Change* 2 (2021).

This historical context finally culminated in the creation of OHA, which was intended to be “independent from the executive branch and all other branches of government.” 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, Standing Committee Rep. No. 59, at 645 (hereinafter “Convention Proceedings”). Thus, the Hawaiian Affairs Committee “indicated it was creating a new entity that would operate *as an autonomous branch of the government*” and “sought to return power to Kānaka Maoli by providing a form of self-determination.” Andrade, *supra*, at

124 (emphasis added). “From the beginning, OHA was not simply a state agency but rather an initial step towards Kānaka Maoli self-determination” and “the idea of creating OHA emerged from unprecedented grassroots sessions in which Kānaka Maoli came together to consider a path to *self-governance*.” Pino, *supra*, at 2585 (emphasis added).

Instead of starting with these concepts, the HSEC first points to public records indicating OHA’s past adoption of or compliance with the SEC, arguing that this demonstrates OHA has acknowledged all along that it is subject to the SEC. *See* HSEC Response at 2-3. However, the issue is the jurisdiction of HSEC, not which code OHA has elected to follow. Moreover, any mistake by OHA as to its own status as a political subdivision and the constitutional ramifications cannot alter the HSEC’s subject matter jurisdiction. One might just as easily wonder, if OHA is simply just another state agency, why did it have to vote to adopt the SEC text as its own ethics code? In any event, if OHA is a political subdivision, its past recognition of the SEC text as its own code does not change the fact that it should have its own commission under Article XIV of the Constitution.

Respondent also argues that OHA was founded by article XII, section 5, of the Constitution, and not by the legislature as it claims is required, so it cannot be a “political subdivision.” Leaving aside that, as discussed below, the 1978 Constitutional amendments also directed the legislature to complete the creation of OHA *and it did so* (by enacting HRS Chapter 10), the HSEC points to *another statute*, HRS § 48-1, which defines political subdivision as “a county or other political subdivision created by the legislature pursuant to article VIII, section 1,” to argue that there is nothing indicating that OHA was established under article VIII and so therefore it is not a political subdivision. However, nothing suggests that the definition chosen by the legislature in enacting *a statute* must be the controlling definition of a term used in a *constitutional* provision.

In fact, article VIII, section 1 states: “The legislature shall create counties, *and may create other political subdivisions within the State*, and provide for the government thereof.” Haw. Const. Art. VIII, § 1 (emphasis added). This explicitly recognizes that there may be political subdivisions *other than counties*. Moreover, the fact that article VIII, section 1 grants the legislature the power to create a political subdivision in no way makes that power exclusive to the legislature or precludes the Constitutional Convention itself from initiating the creation of a political subdivision.

Other provisions in the Constitution militate against the HSEC’s narrow reading of “political subdivision.” Could the Con Con have intended that an elected OHA Trustee could sit on the Judicial Selection Commission while elected officials of the State and its “political subdivisions” may not, per article IV, section 6? Did the Con Con intend OHA to be exempt from the duty of “the

State and its political subdivisions” to “conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and [] promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State,” as article XI, section 1 requires?

In any event, as noted, the legislature *did* create OHA, inasmuch as article XVIII, §18 directed that *the legislature* must make the enactment needed to implement article XII, §§ 5 and 6. It did so in enacting HRS Chapter 10, so any requirement that the legislature “create” OHA in order for it to be a “political subdivision” has been fulfilled.

When the legislature created OHA by enacting Chapter 10 of the Hawai‘i Revised Statutes, it stated “[t]here shall be an office of Hawaiian affairs *constituted as a body corporate* which shall be a *separate entity independent of the executive branch*,” and enumerated a list of powers including the power “[t]o adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law.” HRS § 10-4. “Separate entity independent from the executive branch” is as clear as language can be in marking a political subdivision. Moreover, although not explicitly labeled a “charter,” the power to adopt its own bylaws for its own business, powers and duties is the functional equivalent of “adopt[ing] a charter for its own self-government” as allowed for political subdivisions under Article VIII, §2.

Unlike other states, Hawai‘i utilizes a unique system of governance in which there are no independent or separate cities or other municipalities, school districts or townships, but rather the only local governments below the state are the four counties.¹ In light of Hawai‘i’s unique system of governance and contrary to HSEC’s definitions, this Court should adopt a practical and flexible definition of a political subdivision as simply “[a] division of a state that exists primarily to discharge *some function* of local government.” Black’s Law Dictionary (11th ed. 2019) (emphasis added). This definition, or similar, has been employed by courts that have ruled political subdivisions to include public power authorities, *see Slay v. La. Energy & Power Auth.*, 473 So. 2d 51, 53 (La. 1985), mass transit districts, *see Feist v. Dep’t of Revenue*, 18 OTR-MD 471, 474 (2003), and local boards of education, *see Hanson v. Charlotte-Mecklenburg Bd. of Educ.*, 898 S.E.2d 337, 341 (N.C. Ct. App. 2024), to name a few.

¹ See Swenson, J. Patricia Morgan, Motteler, Lee S., Heckathorn, John. “Government and society.” *Brittanica*, August 3, 2020, <https://www.britannica.com/place/Hawaii-state/Government-and-society>. Accessed May 21, 2024. (“Hawaii’s local governmental structure is unique among the U.S. states in that it is limited to two levels of government: the state and the four counties, each with a mayor and a council. There are no municipal governments.”); *see also* HRS Chapter 46.

Looking at all the powers and duties of OHA granted by the Constitution and the legislature in HRS Chapter 10, OHA is clearly a division of Hawai'i that exists primarily to discharge some function of local government, to wit, functions relating to the Native Hawaiian population and specific lands dedicated for the benefit of that group. If OHA is not a political subdivision of the State, it may be the only government entity in the U.S. whose officers are elected statewide, with its own lands and purse, that is "separate" and "independent from the executive branch," yet is *not* a political subdivision.

C. Ms. Akana's Fiduciary Duties and Her Duties under HRS Chapter 10 conflict with her duties under the Ethics Code, Thereby Depriving the Commission of Its Jurisdiction to Prosecute Ms. Akana.

The HSEC's argument appears to miss the point. By asserting that Ms. Akana was not being prosecuted for breaching her fiduciary duties and there was no finding that she had breached them, it avoids addressing the central argument that a fiduciary duty can compel a trustee to make an expenditure of funds that is not permitted by the ethics code. Examples would be expenditures for staff morale, donations to non-profit groups or expenditures for internet service to facilitate communications with beneficiaries. All of these could be correctly deemed proper expenditures required by Ms. Akana's fiduciary duties as a Trustee, were accepted by OHA itself as such, yet all are alleged to violate the SEC.

This Court in *Boyd v. Hawaii State Ethics Commission*, 138 Hawai'i 218 (2016), laid out the clear rule that where a state employee's conduct is subject to a separate and comprehensive legislative regime, and where "that same employee could have been subject to punishment under one set of standards [the State Ethics Code], but not the other, for the same conduct," a conflict is said to exist and the Commission exceeds its jurisdiction in prosecuting the employee under the State Ethics Code. Ms. Akana was subject to a separate and distinct set of conflicts of interest rules, just as in *Boyd*, as her powers, authority, and obligations were derived through HRS Chapter 10.

HRS § 10-4 grants OHA a list of general powers, which shall be used "under the direction of the board of trustees," thereby establishing these powers as those to be taken by the individual trustees. In enumerating the powers and duties of OHA and its trustees in HRS Chapter 10, the legislature notably and repeatedly used the language "necessary and appropriate." However, it is not for the HSEC to determine what is necessary and appropriate, this determination is to be made in the sole discretion of the trustees, who are bound to follow what they conclude are their fiduciary duties. Further, "in matters of misapplication of funds and resources in breach of fiduciary duty" the legislature clearly established that only beneficiaries can bring suit against board members. HRS §

10-16. In creating OHA, the Committee emphasized that “[beneficiaries] would best protect their own rights.” Convention Proceedings at 644-45.

Further, *Kealoha v. Machado*, 131 Hawai‘i 62, 77–78, 315 P.3d 213, 228–29 (2013), unequivocally established the rule that “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.’” Allowing the HSEC to have power and authority over OHA would be in direct contradiction with the founders’ intention of creating an independent and autonomous branch of government that would “have maximum control over its budget, assets and personnel.” 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645, quoted in *Rice v. Cayetano*, 528 U.S. 495, 521 (2000).

Moreover, in establishing OHA, the Con Con’s Committee of the Whole highlighted OHA’s independence, noting that: “[t]he most important aspect of this model is *the power to govern itself*. The public trust entity provides a democratic process for the beneficiaries in order to insure accountability and opportunity for scrutiny of the trustees *by the beneficiaries*.” Convention Proceedings at 1018 (emphasis added).

OHA trustees are beholden to its beneficiaries, and must always act in their best interest as fiduciaries. However, if OHA trustees are required to conform their conduct and decisions completely in line with the SEC, they will inevitably be placed in a Catch-22 – act in the interest of the beneficiaries but in violation of the SEC, or act in accordance with the SEC but against the interests of the beneficiaries. This would result in a chilling effect on trustees’ abilities to act and is exactly the conflict contemplated by the Court in *Boyd*. Thus, OHA trustees must only be held accountable by its beneficiaries and internal governance, and it is the only way to maintain harmony with the creators’ intent of establishing OHA as independent and autonomous.

II. CONCLUSION

For the reasons set forth, Ms. Akana respectfully requests that the application for a writ of certiorari be granted and the ICA’s decision be reversed and vacated.

DATED: Honolulu, Hawai‘i, May 23, 2024.

/s/ James J. Bickerton
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NO. SCWC-19-0000668

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

ROWENA AKANA

Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Appellee.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following parties listed below on May 23, 2024, via Electronic Filing (JEFS):

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DATED: Honolulu, Hawai‘i, May 23, 2024.

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NO. SCWC-19-0 000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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

APPEAL FROM THE:

(1) FINAL JUDGMENT, FILED SEPTEMBER
24, 2019;

(2) 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)
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MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER, FILED APRIL 29, 2019;
AND

(5) THE DISPOSITIONS OF ALL POST-
JUDGMENT MOTIONS

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**THE OFFICE OF HAWAIIAN AFFAIRS'
BRIEF OF *AMICUS CURIAE*;
CERTIFICATE OF SERVICE**

Circuit Court of the First Circuit
Judge: Hon. James H. Ashford

THE OFFICE OF HAWAIIAN AFFAIRS' BRIEF OF AMICUS CURIAE

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THE OFFICE OF HAWAIIAN AFFAIRS' BRIEF OF AMICUS CURIAE

I. INTRODUCTION

THE OFFICE OF HAWAIIAN AFFAIRS (“OHA”), by and through its attorneys, Klein Law Group, LLLC, respectfully submits its Brief of *Amicus Curiae* (“**Amicus Brief**”) in the above-captioned matter and urges the Court to accept Petitioner-Appellant Rowena Akana’s Petition for Writ of Certiorari (“**Petition**”) and reverse the Intermediate Court of Appeals of the State of Hawai‘i’s (“**ICA**”) to correct the errors identified by OHA herein.

OHA believes the Petition raises critical questions about the jurisdiction and authority of Respondent-Appellee Hawai‘i State Ethics Commission (“**Commission**”) over OHA trustees. Critical issues presented to this Court are (1) whether the ICA properly interpreted and applied *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) in its Memorandum Opinion dated January 22, 2024, *see* CAAP-19-0000668, Dkt. 77 at 8, 9, 18 (stating that *nothing* in *Machado* constrains the Commission); (2) whether the Commission has jurisdiction and/or authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees; and (3) whether there exists a conflict between Hawai‘i Revised Statutes (“**HRS**”), Chapter 84 (“**State Ethics Code**”) and the fiduciary obligations imposed on OHA trustees pursuant to HRS, Chapter 10. Implicit in this inquiry is whether the Commission has authority to shape how OHA trustees use proceeds from the ceded lands. *See* Haw. Const. art. XII, § 4; HRS § 10-1 *et seq.* Based on OHA’s review of related case law, this appears to be a matter of first impression. Accordingly, OHA urges this Court to accept the Petition and hold that the ICA erred in its interpretation and application of *Machado* given the facts of this case.

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II. CONCISE STATEMENT OF THE CASE

This case involves the constitutionally mandated semi-autonomy of OHA. *See* Haw. Const. art. XII, § 4; HRS § 10-1 *et seq.* OHA was established by article XII, section 5 of the Hawai‘i Constitution. *See Arakaki v. Hawaii*, 314 F.3d 1091, 1093 (9th Cir. 2002). OHA was created by HRS § 10-4. Its purpose is to better the conditions of native Hawaiians and Hawaiians. HRS § 10-3(1). It is governed by a nine-member board of trustees, elected by qualified voters in the state. *Arakaki*, 314 F.3d at 1093. The board is vested with certain powers and duties discussed more fully *infra*.

Respondent-Appellee Commission is an agency of the State of Hawai‘i, authorized by Article XIV of the Hawai‘i Constitution, and created under and governed by Hawai‘i Administrative Rules (“**HAR**”), Title 21. Respondent-Appellee Commission is responsible for implementing and enforcing the State Ethics Code. *See* HRS § 84-31.

On April 19, 2018, the Commission issued charges against former OHA trustee, Petitioner-Appellant Rowena Akana for violations of the State Ethics Code. JIMS Dkt. 6 at 1-21. The charges alleged that Petitioner-Appellant violated HRS §§ 84-11, -11.5, and -13. *Id.* On May 23, 2018, Petitioner-Appellant answered the charges. JIMS Dkt. 6 at 22-29. Petitioner-Appellant’s answer raised constitutional and jurisdictional issues. *Id.*

On October 16, 2018, the Commission issued its Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent [Akana] (“**Jurisdictional Ruling**”) concluding it had jurisdiction over Petitioner-Appellant’s alleged violations of the State Ethics Code. JIMS Dkt. 7. The Commission asserts that the State Ethics Code that governs the conduct of State employees also governs OHA trustees. *Id.*

Between October 22-26, 2018, the Commission conducted a contested case hearing. On February 5, 2019, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order (“**FOFCOL**”). JIMS Dkt. 11. The FOFCOL concluded Petitioner-Appellant had violated HRS §§ 84-11, -11.5, and -13 and levied fines against Petitioner-Appellant. *See id.*

On March 7, 2019, Petitioner-Appellant appealed the (1) Jurisdictional Ruling and (2) FOFCOL to the circuit court by filing her Notice of Appeal. JIMS Dkt. 1. The appeal was designated Civil Number 19-1-0379-03 (“**Agency Appeal**”). *Id.*

On September 6, 2019, the circuit court heard oral arguments on the Agency Appeal. On September 24, 2019, the circuit court issued its 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 (“**Order Affirming FOFCOL and Jurisdictional Ruling**”). JIMS Dkt. 29. Also on September 24, 2019, the circuit court entered its Final Judgment. JIMS Dkt. 30.

On October 1, 2019, Petitioner-Appellant filed her Notice of Appeal to the Intermediate Court of Appeals in CAAP-19-0000668. CAAP Dkt. 1. Thereafter, Petitioner-Appellant filed an application to transfer. *See* SCAP-19-0000668. On July 24, 2020, this honorable Court denied the application to transfer.

On January 22, 2024, the ICA issued its memorandum opinion. CAAP Dkt. 77. In its memorandum opinion, the ICA states:

OHA’s Executive Policy Manual required that trustees “abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes[.]” Trustees had to attend the ethics training course conducted by the Commission (as were legislators, members of the board of education, the governor, the lieutenant governor, and executive department heads and deputies). At least every other year, trustees were reminded by OHA staff or the Commission about their HRS Chapter 84 obligations. OHA staff gave trustees gift disclosure forms and reminded them of the rules about receiving and giving gifts.

Id. at 2 (alteration retained). Additionally, the memorandum opinion notes that “neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.” *Id.* at 9. In so noting, the ICA went on to state that “[n]othing in *Machado* constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.” *Id.*

On February 16, 2024, the ICA entered its Judgment on Appeal. CAPP Dkt. 78. The ICA Opinion affirmed the circuit court’s Amended Final Judgment and the Commission’s FOFCOL. *Id.* On April 16, 2024, Petitioner-Appellant timely filed the Petition.

III. CONCISE STATEMENT OF THE POINTS OF ERROR

1. Whether the Intermediate Court of Appeals of the State of Hawai‘i (“ICA”) properly interpreted and applied *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) in its Memorandum Opinion dated January 22, 2024, *see* CAAP-19-0000668, Dkt. 77 at 8, 9, 18 (stating that *nothing* in *Machado* constrains the Commission).

2. Whether the Commission has jurisdiction and/or authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees, pursuant to HRS Chapters 10 and 84 and articles XII and XIV of the Hawai‘i Constitution.

3. Whether there exists a conflict between HRS Chapter 84 and the fiduciary obligations imposed on OHA trustees pursuant to HRS, Chapter 10. Whether there exists a conflict between HRS Chapters and 10 regarding the fiduciary obligations imposed on OHA trustees.

IV. ARGUMENT

A. The ICA’s Interpretation of *Machado* Threatens the Semi-Autonomy of OHA

OHA was established by article XII, section 5 of the Hawai‘i Constitution. *See Arakaki*, 314 F.3d at 1093. OHA was created by HRS § 10-4. Its purpose is to better the conditions of

native Hawaiians and Hawaiians. HRS § 10-3(1). OHA is governed by a nine-member board of trustees, elected by qualified voters in the state. *See Arakaki*, 314 F.3d at 1093. The board is vested with certain powers and duties, including, but not limited to,

- managing, investing, and administering “the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3”, HRS § 10-5(1);
- collecting, receiving, depositing, withdrawing, and investing “money and property on behalf of the office”, HRS § 10-5(3);
- “[f]ormulat[ing] policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution”, HRS § 10-5(4);
- “the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means”, HRS § 10-4.5(a);
- “the power to deposit any of its moneys in any banking institution within or outside the State, to the extent necessary to implement subsection (a)”, HRS § 10-4.5(b); and
- To expend “[t]wenty per cent of all funds derived from the public land trust for purposes of [HRS Chapter 10]”, HRS § 10-13.5.

See Kealoha v. Machado, 131 Haw. at 67, 315 P.3d at 218 (“Among the powers and duties the legislature granted to the OHA board of trustees is the power to ‘[m]anage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3[.]’”). “Under the duty of loyalty, a ‘trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust.’” *Id.* at 77 (quoting Restatement (Third) of Trusts § 78 cmt. f.).

Based on the foregoing, OHA asserts an interest in the public trust and management of its moneys, including, but not limited to dispersals of such moneys via discretionary funds provided for the trustees to use towards the betterment of the conditions of native Hawaiians and Hawaiians. The Commission claims jurisdiction and authority to prosecute OHA trustees based on their use of the aforementioned funds. Additionally, if the Commission indeed has the authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA's trustees, the Commission could, intentionally or not, influence trustees to act in a way that is in accordance with the Commission's expectations but in breach of the trustees' duty of loyalty to OHA's beneficiaries, native Hawaiians and Hawaiians. Thus, there is a 'relationship' between OHA's legally protected interests and the Commission's claims against Petitioner-Appellant.

The outcome of this appeal will have ramifications well beyond Petitioner-Appellant's rights, which may impact or impede OHA and its trustees from fulfilling their duties. In addition to the Commission's position discussed above (affirmed by the circuit court and the ICA), the ICA's memorandum opinion has potentially severe impacts on the prospective application of *Machado* and OHA's semi-autonomous status as established by article XII, § 5, of the Hawai'i Constitution. *See Rice*, 528 U.S. at 521. The ICA's memorandum opinion discusses in some detail HRS, Chapter 10, and OHA's power with regard to the use of proceeds from the ceded lands. *See* Dkt. 77 § IV.A (at 6-11).

In its opinion, the ICA states:

[Petitioner-Appellant] argues that the circuit court improperly interfered by affirming the Decision and Order because neither the Commission nor the circuit court found that she abused her discretionary power. **But neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.** They reviewed whether Akana met her obligations under the Code of Ethics, not whether she breached her fiduciary duty as an OHA trustee. ***Nothing in Machado constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.***

Id. at 9 (emphases added). OHA disagrees.

Contrary to the ICA's opinion, there is most certainly "something" in *Machado* that constrains the Commission, *e.g.*, a trustee's fiduciary duty. That neither the Commission nor the circuit court considered whether Petitioner-Appellant's duties as trustee required or even permitted her conduct is precisely what is at odds in *Machado*. *See Machado*, 131 Haw. at 78 (stating "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'"). Indeed, the ICA acknowledged that "neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries." CAAP Dkt. 77 at 9. The ICA's holding is obviously contrary to this Court's holding in *Machado* that OHA trustees' expenditures are to be reviewed for abuse of discretion. *Compare id. with Machado*, 131 Haw. at 78. On this basis alone, this Court should accept the Petition.

B. The Commission's Purported Jurisdiction and/or Authority to Initiate, Receive, and Consider Charges Concerning Alleged Violations of Ethical Requirements Governing OHA's Trustees is Highly Questionable

The Commission asserts that the State Ethics Code that governs the conduct of State employees also governs OHA trustees. JIMS Dkt. 7. The ICA affirmed the Commission's assertion, stating:

OHA's Executive Policy Manual required that trustees "abide by the Standards of Conduct of the State of Hawai'i, Chapter 84, Hawaii Revised Statutes[.]" Trustees had to attend the ethics training course conducted by the Commission (as were legislators, members of the board of education, the governor, the lieutenant governor, and executive department heads and deputies). As the Petition accurately reflects,

the Constitution places an additional requirement on each such subdivision – each code of ethics must have its own "separate" ethics commission:

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in

political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Haw. Const. Art. XIV, § 1 (emphasis added). It is for this reason that each County in the State has its own County Ethics Commission, and the county ethics codes are not administered or enforced by the State Ethics Commission. *See, e.g.*, Revised Ordinances of Honolulu (“ROH”), Chapter 3, Article 6, Section 3-6.3 (Ethics Commission of the City & County of Honolulu).

SCWC Dkt. 1 at 4-5 (emphases omitted).

The Petition further accurately reflects that OHA adopted the State Ethics Code as the guidelines for its trustees. *See id.* at 5 (citing Record on Appeal vol. 1f at p. 1585-86, Feb. 5, 2019 Findings of Fact, Conclusions of Law and Decision and Order of the Commission, at ¶7). OHA has not established its own separate ethics commission. Thus, critical issues are presented as to whether (1) by adopting the State Ethics Code as guidelines for its trustees OHA is subject to the jurisdiction and authority of the Commission to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing its trustees and (2) whether OHA is permitted or in fact required to establish its own separate ethics commission. The foregoing issues must be resolved by this Court, forming a second basis for accepting the Petition.

V. CONCLUSION

For the foregoing reasons and authorities, the Petition should be accepted. Thereafter, OHA respectfully requests this Honorable Court reverse on the bases that (1) the ICA’s interpretation and application of *Machado* is overly broad, and (2) the Commission lacked jurisdiction over charges concerning an OHA trustee’s discretionary use of trust funds.

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DATED: Honolulu, Hawai'i, May 24, 2024.

/s/ Robert G. Klein

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THE OFFICE OF HAWAIIAN AFFAIRS

NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the foregoing document was duly served upon the following parties electronically through the Judiciary Electronic Filing System (“**JEFS**”), or via U.S. Mail, postage prepaid, as set forth below:

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SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,

Petitioner-Appellant,

v.

HAWAI'I STATE ETHICS COMMISSION,

Respondent-Appellee.

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

APPEAL FROM:

A) FINAL JUDGMENT, filed September 24, 2019;

B) 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, filed September 24, 2019;

C) ORDER DENYING APPELLANT'S MOTION FOR ADDITIONAL EVIDENCE TO BE TAKEN, filed June 18, 2019; and

D) ORDER DENYING APPELLANT'S MOTION TO STAY ENFORCEMENT OF AGENCY ORDER; CERTIFICATE OF SERVICE, filed 29-Apr-19

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**HAWAI‘I STATE ETHICS COMMISSION’S RESPONSE TO
OFFICE OF HAWAIIAN AFFAIRS’ BRIEF OF AMICUS CURIAE**

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**HAWAI‘I STATE ETHICS COMMISSION’S RESPONSE TO
OFFICE OF HAWAIIAN AFFAIRS’ BRIEF OF AMICUS CURIAE**

I. INTRODUCTION

Contrary to the Office of Hawaiian Affairs’ (“OHA”) assertion in its amicus brief, this case is not about “whether the Commission has authority to shape how OHA trustees use proceeds from the ceded lands.” OHA Amicus Brief (“Am. Br.”) at 1. Instead, it is simply about whether the Hawai‘i State Ethics Commission (the “Commission”) has the same authority to address violations of the State Ethics Code by OHA trustees as it does for other state employees. It unquestionably does. As state employees, OHA trustees are plainly subject to the State Ethics Code and, by extension, the Commission’s authority to enforce the code. And despite much posturing, neither Petitioner-Appellant Rowena Akana (“Akana”), and now, OHA, have ever identified anything about an OHA trustee’s duties or anything in OHA’s governing law that conflicts with the State Ethics Code.

Akana’s arguments—and her attempts to disclaim any obligation to comply with the State Ethics Code—were squarely rejected on appeal by both the circuit court and the ICA. OHA presents no new arguments, or any sound or logical basis, for this Court to come to any different conclusion. The Commission therefore requests that this Court reject OHA’s arguments and reject Akana’s Application.

II. ARGUMENT

A. The ICA’s Decision Does Not “Threaten the Semi-Autonomy of OHA”

In its amicus brief, OHA questions the Commission’s “authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees,” Am. Br. at 6, and asserts that the ICA’s confirmation of that authority “[t]hreatens the [s]emi-autonomy of OHA[.]” *Id.* at 4. This position, though, is contrary to OHA’s past, and

well-documented, understanding that its trustees are in fact subject to the State Ethics Code, and that they are indeed subject to the Commission’s authority to enforce the State Ethics Code. OHA held workshops and presentations for trustees regarding compliance with the State Ethics Code. *See* JIMS 8 at PDF 82-84, 117-20; JIMS 9 at PDF 217-20. It regularly reminded trustees of their obligations under HRS Chapter 84. *See* ICA Mem. Op. at 2. Its former corporate counsel testified that Chapter 84 was “totally applicable to office trustees[.]” JIMS 12 at PDF 397-98 (Tr. 392:19-393:3). And OHA trustees have certainly acted as if they are bound by the State Ethics Code (as they undoubtedly are). Public records indicate, for example, that OHA trustees have long filed financial disclosure statements with the Commission,¹ the Commission has responded to written requests for exemptions from OHA trustees,² and OHA employees have completed the Commission’s mandatory ethics training.³

This record of OHA’s past acknowledgement of both the applicability of the State Ethics Code and the Commission’s authority makes its current assertion that the ICA decision will have sudden “ramifications . . . which may impact OHA and its trustees from fulfilling their duties[.]” and “severe impacts on . . . OHA’s semi-autonomous status[.]” Am. Br. at 6, all the more bewildering. The ICA’s decision did not change the status quo. OHA trustees previously made gift disclosures, financial disclosures, attended Ethics Commission trainings, and otherwise

¹ *See* Database of Disclosures by OHA Trustees, https://hawaiiethics.my.site.com/public/s/hsecd-dept/related/a066A000001IzqBQAS/Position_Cards__r (last visited May 31, 2024).

² *See* Letter from Hawai‘i State Ethics Commission to Brickwood Galuteria, July 20, 2023, available at <https://files.hawaii.gov/ethics/advice/NEP2023-01.pdf> (granting a temporary good faith exception from the nepotism provision of the State Ethics Code).

³ *See* Notice of Meeting of Hawai‘i State Ethics Commission (Apr. 4, 2024), Attachment 2, at Page 16, available at <https://ethics.hawaii.gov/wp-content/uploads/2024-04-17SunshineLawMaterials.pdf>.

complied with the State Ethics Code, and yet were still able to fulfill their duties as OHA trustees. OHA's assertion, then, is belied by the record. And it is also wrong as a matter of law.

The thrust of OHA's argument is that an OHA trustee's fiduciary duties to his or her beneficiaries override any obligation to comply with the State Ethics Code. *See* Am. Br. at 7. But that simply is not the law. There is no reason that a trustee's fiduciary duties cannot co-exist alongside his or her obligations to act in accordance with the State's ethics law. Indeed, "[a] trustee has a duty *not* to comply with a trust provision that the trustee knows or should know . . . is contrary to public policy." Restatement (Third) of Trusts § 72 (2007); *see also id.* at § 29 ("An intended trust or trust provision is invalid if . . . it is contrary to public policy.").⁴ Acts that are in violation of the State Ethics Code are plainly acts that are "contrary to public policy." *See* Haw Const. art. XIV ("The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government."); HRS Chapter 84, Preamble ("The purpose of this chapter is . . . so that public confidence in public servants will be preserved."); *Smith v. Chaney Brooks Realty, Inc.*, 10 Haw. App. 250, 257, 865 P.2d 170, 173-74 (App. 1994) (recognizing a "public policy exception" for "actions against an employer by an at will employee who was discharged for . . . refusing to violate a professional code of ethics[.]").

In short, "the duty of prudence . . . as under the common law of trusts, does not require a fiduciary to break the law." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 428 (2014)

⁴ This Court has previously relied upon the Restatements of Trusts to explain the fiduciary duties of Hawai'i officials acting in a trustee capacity. *See, e.g., Ching v. Case*, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019).

(citing Restatement (Second) of Trusts § 166, cmt. a).⁵ It cannot be, then, that Akana’s “duties as trustee required or even permitted her” to violate HRS Chapter 84—or any other applicable state law—as OHA argues. Am. Br. at 7. Actions that would violate the State Ethics Code are simply not part of Akana’s fiduciary duties. This is a “bedrock principle of trusts[,]” *Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*, 25 F.4th 12, 19 (D.C. Cir. 2022), and for good reason: any other result would be absurd. It would permit any official with fiduciary duties to disregard other applicable law, including the State Ethics Code, as long as the action is allegedly in furtherance of the trustee’s duty to the beneficiaries of the trust. Nothing in OHA’s governing statutes, the State Ethics Code, trust law, or this Court’s decisions demands such a result.

OHA’s suggestion that the ability of OHA trustees to perform their duties is threatened by the State Ethics Code can therefore be rejected with a simple application of black-letter trust law. OHA trustees’ fiduciary duties cannot compel or permit them to violate other applicable law, including the State Ethics Code. As explained in the Commission’s Response to Akana’s Application, *see* Dkt. 17 at 9-10, and in its Answering Brief, *see* ICA Dkt. 48 at 6-9, *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013), is therefore irrelevant here. *Kealoha* establishes only that, under a *claim for breach of fiduciary duty*, an OHA trustee’s actions are reviewable for abuse of discretion. *Id.* at 77, 315 P.3d at 228. It says nothing that contradicts the fundamental tenets of trust law explained above. Akana’s obligations under the State Ethics Code exist separate and apart from her fiduciary obligations under trust law. And although she must comply with both, this case involves only the former.

⁵ Restatement (Second) of Trusts § 166, is the precursor to Restatement (Third) of Trusts § 72. It provides, in relevant part, that “[t]he trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.” Restatement (Second) of Trusts § 166 (1959).

B. The Commission Has Authority Over Alleged Violations of the State Ethics Code by OHA Trustees

OHA—like Akana in her Application—attempts to twist the record of OHA’s past recognition of the Commission’s authority and characterize it as somehow demonstrating the exact opposite of what it actually demonstrates. Thus, OHA’s recognition in its Executive Policy Manual that “[a]ll Trustees shall abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes, as amended, and shall attend ethics training as required by law,” JIMS 11 at PDF 160-61 (¶7), becomes, in OHA’s view, evidence that OHA “adopted” its own ethics code, *see* Am. Br. at 8, which, according to OHA, raises the question of whether OHA trustees are “subject to the jurisdiction and authority of the Commission.” *Id.*

There are two major problems with OHA’s argument. First, the provision in the Executive Policy manual quoted above is plainly not an “adoption” of a separate ethics code that is identical to the State Ethics Code, but which cannot be enforced by the Commission; that interpretation truly strains credulity. The provision, instead, is an explicit acknowledgement by OHA that its trustees are subject to HRS Chapter 84, which is enforced by the Commission. *See* HRS § 84-31. Interpreting the provision any other way would be inconsistent with the overwhelming, additional evidence in the record demonstrating OHA’s acknowledgment of the Commission’s authority. It would also overlook the inherent inconsistency in OHA’s position: OHA—like Akana—asserts that OHA has “adopted” the State Ethics Code as its own, yet simultaneously suggests that applying the very same ethics code to OHA trustees “may impact or impede OHA and its trustees from fulfilling their duties.” Am. Br. at 6. OHA cannot have it both ways.

Second, regardless of any purported “adoption” of the State Ethics Code, OHA provides no reason whatsoever to disregard the clear constitutional and statutory framework that makes

OHA trustees, like other state employees, subject to the State Ethics Code. Established pursuant to article XIV of the Hawai‘i Constitution, HRS Chapter 84 applies to “*every nominated, appointed, or elected officer, employee, and candidate to elected office of the State* and for election to the constitutional convention, but excluding justices and judges[.]” HRS § 84-2 (emphasis added). “Employee” is further defined as “*any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.*” HRS § 84-3 (emphasis added). Chapter 84 also explicitly requires OHA trustees to complete ethics training administered by the Commission. *See* HRS § 84-42(a) (“Legislators, members of the board of education, *trustees of the office of Hawaiian affairs*, the governor, the lieutenant governor, executive department heads and deputies, . . . shall complete a live ethics training course administered by the state ethics commission[.]” (emphasis added)). And despite certain other State employees being specifically excluded, *see* HRS § 84-3, there are no exclusions for OHA trustees.

OHA asserts that the Commission’s jurisdiction over OHA trustees is “[h]ighly [q]uestionable.” Am. Br. at 7. That is simply not so. The law plainly makes OHA trustees subject to the State Ethics Code, which is enforced by the Commission. If anything, it is OHA’s past acknowledgment of the State Ethics Code’s applicability, along with its acquiescence to the Commission’s jurisdiction, that makes OHA’s current position itself suspect. OHA’s brief provides no reason for this Court to disturb the ICA’s sound reasoning, and the Commission, therefore, respectfully requests that this Court reject OHA’s arguments and deny Akana’s Application.

DATED: Honolulu, Hawai‘i, June 4, 2024.

/s/ Ewan C. Rayner

KALIKO‘ONĀLANI D. FERNANDES

EWAN C. RAYNER

Attorneys for Respondent-Appellee HAWAI‘I
STATE ETHICS COMMISSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served electronically (through the Court’s JEFS system), or conventionally via US Mail, upon the following parties:

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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,
Petitioner/ Respondent-Appellant-Appellant,

vs.

HAWAI‘I STATE ETHICS COMMISSION,
Respondent/Complainant-Appellee-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-19-0000668; CIV. NO. 1CC191000379)

NOTICE

(By: Recktenwald, C.J.)

This is to advise the parties that as Chief Justice, I am the Chair of the Judicial Council, which is tasked, under Hawai‘i Revised Statutes § 84-21, with screening applicants to serve as commissioners on the Hawai‘i State Ethics Commission. The Judicial Council is currently in the process of screening applicants for two upcoming vacancies on the commission, and will nominate two

individuals for each vacancy, the names of which will be submitted to the Governor for final selection.

DATED: Honolulu, Hawai'i, June 5, 2024.

/s/ Mark E. Recktenwald

Chief Justice



Electronically Filed
Supreme Court
SCWC-19-0000668
10-JUN-2024
10:38 AM
Dkt. 37 OGAC

SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,
Petitioner/ Respondent-Appellant-Appellant,

vs.

HAWAI‘I STATE ETHICS COMMISSION,
Respondent/Complainant-Appellee-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000668; CIV. NO. 1CC191000379)

ORDER ACCEPTING APPLICATION FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., McKenna, Eddins, Ginoza, and Devens, JJ.)

Petitioner Rowena Akana’s Application for Writ of Certiorari, filed on April 16, 2024, is hereby accepted and will be scheduled for oral argument. The parties will be notified by the appellate clerk regarding scheduling.

DATED: Honolulu, Hawai‘i, June 10, 2024.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Lisa M. Ginoza

/s/ Vladimir P. Devens



Electronically Filed
Supreme Court
SCWC-19-0000668
12-JUN-2024
08:44 AM
Dkt. 39 AR

NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAII

Rowena Akana, Petitioner/Appellant-Appellant,

vs.

Hawai'i State Ethics Commission, State of Hawai'i, Respondent/Appellee-Appellee.

NOTICE OF SETTING FOR ORAL ARGUMENT

Pursuant to Hawai'i Rules of Appellate Procedure Rule 34, the above-captioned case has been set for argument on the merits at:

Supreme Court Courtroom
Ali'iōlani Hale
417 South King Street
Honolulu, HI 96813

on **TUESDAY, 16-JUL-2024 2:00 PM**

The oral argument will also be livestreamed for public viewing via the Judiciary's YouTube channel at [YouTube.com/hawaiicourts](https://www.youtube.com/hawaiicourts) and 'Olelo at olelo.org/tv-schedule/.

PARTIES ARE ADVISED:

- (1) Each side is allowed a maximum of one-half hour for argument. Multiple parties on one side of the appeal must share the one-half hour of argument time. The parties are encouraged to agree on a division of time prior to the argument and abide by the agreement.
- (2) Attorneys/Self-represented Litigant parties must appear and argue unless, at their request, the court permits otherwise.
- (3) No oral argument will be heard by a party failing to file a brief unless the court directs otherwise.

(4) Attorneys other than those listed on the briefs who intend to appear and argue, shall enter an appearance on the record no later than seven days prior to oral argument.

DATED: Honolulu, Hawai'i, 12-JUN-2024

/s/ Appellate Clerk

