

# **HAWAI'I CIVIL RIGHTS COMMISSION**

## **2013-2014 Annual Report**

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## **Mission Statement**

The mission of the Hawai'i Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

## **Overview**

### **The State of Hawai'i's Constitutional Civil Rights Mandate**

Article I, Section 5 of the Hawai'i Constitution is the foundation of our state civil rights laws. It provides that: "No person shall ... be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." There is no counterpart to this civil rights mandate in the U.S. Constitution.

### **Looking Forward and Addressing the Challenges Facing the HCRC: Restoring Lost Civil Rights Law Enforcement Capacity and Improving the HCRC Process**

Since 2008, the Hawai'i Civil Rights Commission (HCRC) has lost 8 of 30 permanent positions. The loss of 3 of 11 (27%) permanent investigator positions has had a devastating impact on the HCRC's capacity to timely and effectively investigate discrimination, from intake through investigation and disposition of complaints. This lost capacity has not been restored; none of the 8 permanent positions lost due to the recession, budget cuts, and reduction in force (RIF) has been restored.

A comparison of the HCRC's investigation caseload data from 2007 (before the recession and the resulting reduction in force) and current caseload data reflects a direct and continuing impact on the efficacy of the HCRC as the state law enforcement agency responsible for investigation of complaints of discrimination in employment, housing, public accommodations, and state-funded services. The loss of experienced permanent staff due to RIF and abolishment of positions, hiring freezes and delays in hiring for remaining positions, compounded by loss of productivity due to furloughs and supplemental time off, has had a crippling impact on the HCRC's capacity to carry out its statutory mandate.

In July of 2007, the HCRC's investigation caseload was 247 cases. Of those, 2.6% were over 2 years old, from date of filing.

In September 2013, the investigation caseload was 436 cases, a 77% increase. Of those, 17% were over 2 years old, from date of filing.

In September 2014, as a result of concerted efforts to reduce investigation case inventory, the investigation caseload was 375 cases, still 52% more than the July 2007 level. Of those, 21.6% were over 2 years old, from date of filing.

The growth and aging of the investigation caseload, with fewer investigators, makes timely investigation difficult. Older cases are more difficult to investigate, conciliate, and litigate.

During FY 2015, the HCRC will continue to seek restoration of capacity, which would allow a re-focusing of efforts on strong enforcement, with a strategic emphasis on dedicating resources to priority cases. With or without a restoration of capacity and enforcement positions, the HCRC enforcement section will review its process and procedures, in order to explore and implement improvements that will allow better use of finite resources for effective and efficient investigation, conciliation, and litigation of discrimination complaints.

### **Fair and Effective Enforcement – History and Structure of the HCRC**

The HCRC was organized in 1990 and officially opened its doors in January 1991. For twenty-four years the HCRC has enforced state laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. §368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC has five (5) uncompensated volunteer Commissioners. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals. The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes.

### **An Effective and Uniform Enforcement Scheme**

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State prosecution of discrimination complaints was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims. As a result, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law.

The intent of the legislature in creating the HCRC was “...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State’s commitment to preserving the civil rights of all individuals.”<sup>1</sup>

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<sup>1</sup> 1989 House Journal, Standing Committee Report 372.

The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure "...designed to provide a forum which is accessible to anyone who suffers an act of discrimination."<sup>2</sup>

### **A Fair Administrative Process**

The HCRC is committed to, and its procedural safeguards are structured to ensure fairness to both complainants and respondents. The HCRC is divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section which conducts hearings, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners have authority to adjudicate and render final decisions based on the recommendations of their Hearings Examiner, and oversee the adjudication section through their Chief Counsel.

The Commissioners, Chief Counsel, and Hearings Examiner are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate *ex parte* with the Commissioners, Chief Counsel or Hearings Examiner about any case.

The HCRC investigates complaints of discrimination as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC in most (but not all) cases before filing a discrimination lawsuit in state court.<sup>3</sup> Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majorities of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

### **Civil Rights Law Enforcement: State & Federal Law**

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing

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<sup>2</sup> Id.

<sup>3</sup> Pursuant to HRS § 378-3(10) an employee may file a direct civil action for sexual harassment. Similarly, pursuant to HRS § 515-9(b), an aggrieved person may file a direct civil action for fair housing complaints. While the statutes allow these direct civil actions in these cases, only a small number are filed; the great majority still file complaints with the HCRC.

and Urban Development (HUD), respectively. Pursuant to work share and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints.

While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against pregnancy discrimination and sexual harassment in employment.

The greater protections in Hawai‘i law are attributable to the strong civil rights mandate contained in the Hawai‘i State Constitution, HCRC statutes, HCRC rules, HCRC Commission decisions, and state court interpretations. In contrast, federal court interpretations of federal civil rights laws have historically resulted in narrower protections against discrimination. The issue of state versus federal standards is an important one, particularly in states like Hawai‘i that have a strong commitment to equal opportunity and non-discrimination.

## **Mediation Program**

The HCRC's voluntary mediation program completed its fifteenth full year on June 30, 2014. The program enjoyed a productive year, despite operating without a permanent Mediation Coordinator to oversee the program. During FY 2014, the HCRC was able to temporarily fill the position on a limited basis through an 89 day appointment. The position has been re-described and the HCRC will seek to fill the newly re-described Civil Rights Program Specialist position on a permanent basis. Looking forward, this should allow and foster growth of the mediation program.

Complainants, respondents and the HCRC, with the strong support of the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third persons (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify and settle complaints.

The HCRC voluntary mediation program uses trained community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and

resources. It also eliminates the stress of litigation and allows the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawai'i (MCH), a statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators receive training on civil rights laws and settling disputes by HCRC and MCH staff on a regular basis. The HCRC mediation coordinator facilitates the process by explaining, encouraging, referring, and reviewing mediation and its benefits to the parties. There are mediation centers on O'ahu (Mediation Center of the Pacific), Maui (Mediation Services of Maui), east Hawai'i (Ku'ikahi Mediation Center in Hilo), the West Hawai'i Mediation Center in Kailua-Kona, and Kaua'i (Kaua'i Economic Opportunity, Inc. Mediation Program). The centers charge fees on a sliding scale for the sessions, which can be waived or reduced if there is financial hardship.

Private mediation is also available if the parties choose. Private mediations generally utilize an evaluative approach, in which the law and possible damages are emphasized. Private mediation is an important part of the HCRC mediation program. Parties are free to select commercial private mediators who charge market rates or private mediators from the Access ADR program, a reduced fee program of the MCP.

Mediation can occur at any stage of the intake, investigation, conciliation, or hearing process. Mediation is first offered when the complaint is accepted. At this early stage disputes are often easier to resolve because the facts are fresh, damages may not have accumulated, and the positions of the parties may still be fluid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, conciliation or hearing process.

During FY 2014, 32 cases were referred into mediation, and 29 mediations were completed (dispositions). Of the 29 dispositions, 17 resulted in mediated settlements (58.6%), and 12 cases resulted in no agreement (41.4%). All 17 of the mediated settlements were in employment cases.

The total disclosed monetary value of mediated agreements was \$130,500 with a wide variety of affirmative relief as well. (In 6 cases, the monetary consideration was subject to a confidentiality clause and not disclosed.) Mediation Center of the Pacific had 7 settlements; Kauai Economic Opportunity, Inc. had 2 settlements; Ku'ikahi Mediation Services (Hilo) and Mediation Services of Maui each had 1 settlement; and there were 6 settlements with private mediators.

The primary bases of discrimination of the 17 settlements were as follows: Disability -- 5; Sex -- 5 (including 2 pregnancy and 1 sexual harassment); Ancestry -- 3; Age -- 2; National Origin -- 1; Race -- 1. Many of the completed mediations also included charges on other protected bases. 15 mediated settlements were cases dual-filed with the EEOC.

Although monetary settlements were achieved in most agreements, almost all mediated agreements also involved some form of non-monetary affirmative relief. Examples of non-monetary relief include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) reinstatement and/or restoration of employee benefits;
- 3) formal or informal apologies (by either or both sides);
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) provision of reasonable accommodations;
- 8) changing shifts when practicable;
- 9) policy revisions and postings; and
- 10) clarification of communications between employer and employee, leading to more productive working environments.

## **Public Education & Outreach**

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

The HCRC conducted its annual training in October 2013 at the Blaisdell Exhibition Hall, for several hundred attendees. The theme of the training was "EEO Updates and Non-discriminatory Recruitment and Hiring in a Recovering Economy" and included an address on civil rights by former HCRC Commission Chair Amy Agbayani. The training featured panels on EEO basics, legal updates, and non-discriminatory recruitment and hiring. In addition, the winners of the E`Ola Pono Art & Video Competition, a statewide student contest co-sponsored by the HCRC, the UH Center on Disability Studies, Hawaiian Telcom, Helping Hands, the Hawai`i Convention Center, and the Jack Johnson Ohana Foundation, were presented by former Commissioner Sara Banks.

In Spring 2014, the HCRC engaged in two important public education efforts:

The HCRC and the Disability and Communication Access Board ("DCAB") launched a joint public education effort to inform both health care providers and their patients who are deaf, hard of hearing, and deaf blind and use sign language, of their legal rights and responsibilities. Under state and federal law, health care providers have an obligation to provide auxiliary aids and services for patients who have disabilities, including qualified sign language interpreters when needed to provide effective communication. The HCRC and DCAB developed



and disseminated educational materials for health care providers and patients, highlighting legal rights and responsibilities and the consequences of unlawful denial of requests for sign language interpreters.

The HCRC and the state Department of Labor and Industrial Relations Wage Standards Division joined the state Office of Community Services, the Hawai'i State Commission on the Status of Women, and other service providers and community advocates in a community education campaign around the theme, "Domestic Workers Have Rights." In 2013, Hawai'i became the second state, after New York, to enact legislation protecting the rights of domestic workers. Prior to the enactment of Act 248 in 2013, domestic workers were excluded from the protections of our state fair employment law, as well as from basic minimum wage and overtime protections.

During FY 2014 the U.S. Department of Housing and Urban Development ("HUD") Office of Fair Housing and Equal Opportunity approved a HUD Partnership Initiative ("PI") proposal submitted by the HCRC. The HUD PI grant will fund a continuation of an earlier 2011-2013 HCRC partnership with the Medical-Legal Partnership for Children in Hawai'i ("MLPCH") which provided outreach and civil rights education for Compact of Free Association ("COFA") migrants, targeting Micronesian and Marshallese communities. During FY 2012 and 2013 that partnership produced nine workshops held on O'ahu and Maui, featuring MLPCH staff, HCRC staff, leaders in the Micronesian and Marshallese community, and representatives from state and federal civil rights agencies and legal services organizations. In addition to the civil rights education workshops, MLPCH produced a civil rights component into a newcomer rights video production. The partnership also produced the translation of outreach materials and vital documents from English to Chuukese. The HUD PI proposal approved in 2013 will build on the work under the earlier HUD PI grant to provide follow-up outreach to COFA migrant communities and facilitate the filing of complaints to address discrimination against the COFA community. This HUD PI project work is scheduled to be completed by the end of calendar year 2015.

During FY 2014 the HCRC continued to be an active participant in the fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Legal Aid Society of Hawai'i, Fair Housing Enforcement Program, Hawai'i Disability Rights Center, Hawaiian Homelands, and other housing-related private and public entities. The committee met to learn and discuss the latest fair housing cases, legal issues, and recent developments in Fair Housing from a Federal, State and local perspective, to corroborate on local fair housing issues and concerns, and to work together to promote fair housing throughout the islands. The committee continued to corroborate on an annual joint private-public awareness fair housing campaign involving public service announcements on television, radio and print media.

The HCRC also worked with HUD, state and county housing agencies, community fair housing organizations, non-profit and for-profit organizations, and

businesses to co-sponsor fair housing trainings on the Islands of Maui, Moloka`i, Kaula`i, Hawai`i, and O`ahu. Representative trainees in the housing area included the Board of Realtors, Property Managers Association, National Association of Residential Property Managers, Community Associations Institute (CAI) Hawai`i, Hawai`i Center for Independent Living (HCIL), landlords, tenants, homeless veterans, emergency shelter and transitional housing management/staff, case management staff, housing assistance/referral management/staff, and various property management companies and community associations. An estimated 900+ people took advantage of these informative and free trainings.

During FY 2014 the HCRC also conducted outreach and/or participated in the following:

- Joint outreach events with the U.S. Equal Employment Opportunity Commission
- Joint informal exchanges of information between HCRC and EEOC staffs
- William S. Richardson School of Law, University of Hawai`i, various classes, panels and programs
- ALU LIKE, Inc.
- Outreach training for the Society of Human Resource Management – Hawai`i Chapter
- Outreach training for the Business Leadership Network – East Hawai`i Chapter
- Outreach training and flyers on assistance animals as a reasonable accommodation in housing
- Hawai`i Paralegal Association
- Hawai`i Foodbank
- Aloha United Way
- March of Dimes
- Mediation Centers of Hawai`i
- Honolulu Pride Parade and Celebration
- Annual Martin Luther King, Jr. Holiday Parade and Festival
- Hawai`i Friends of Civil Rights Annual Dinner
- Statewide Fair Housing Month events
- Oahu WorkLinks Job Quest Job Fair
- Television appearances taped at the `Olelo and Think Tech TV studios

The HCRC website is part of a consolidated website that includes all divisions of the Department of Labor & Industrial Relations. The HCRC relies on the DLIR webmaster for maintenance and updating of the HCRC website, as well as ongoing efforts to improve user-friendliness of the site. The webmaster's detailed monthly index indicates that the site continues to attract broad public interest, particularly to those pages on administrative rules, case decisions, and the mediation program.

## Caseload Statistics

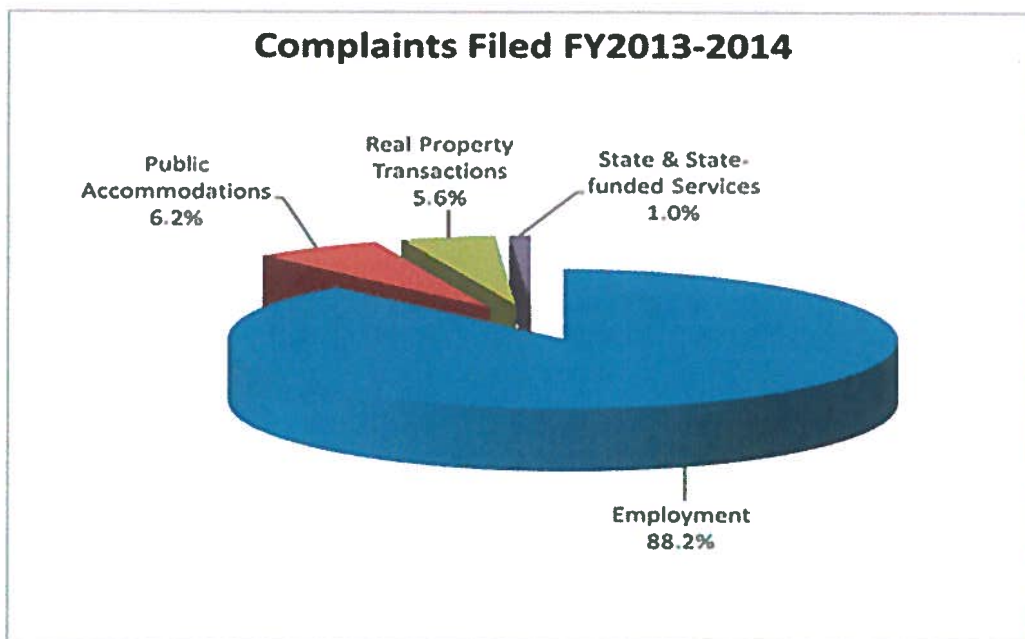
During FY 2014, the HCRC continued its emphasis on maintaining efficiency without sacrificing effective law enforcement.

### Intake

During FY 2014, the HCRC received 3,518 telephone and walk-in inquiries. HCRC investigators completed 650 intakes, and 593 discrimination complaints were filed with the HCRC, an average of 49.4 complaints a month.

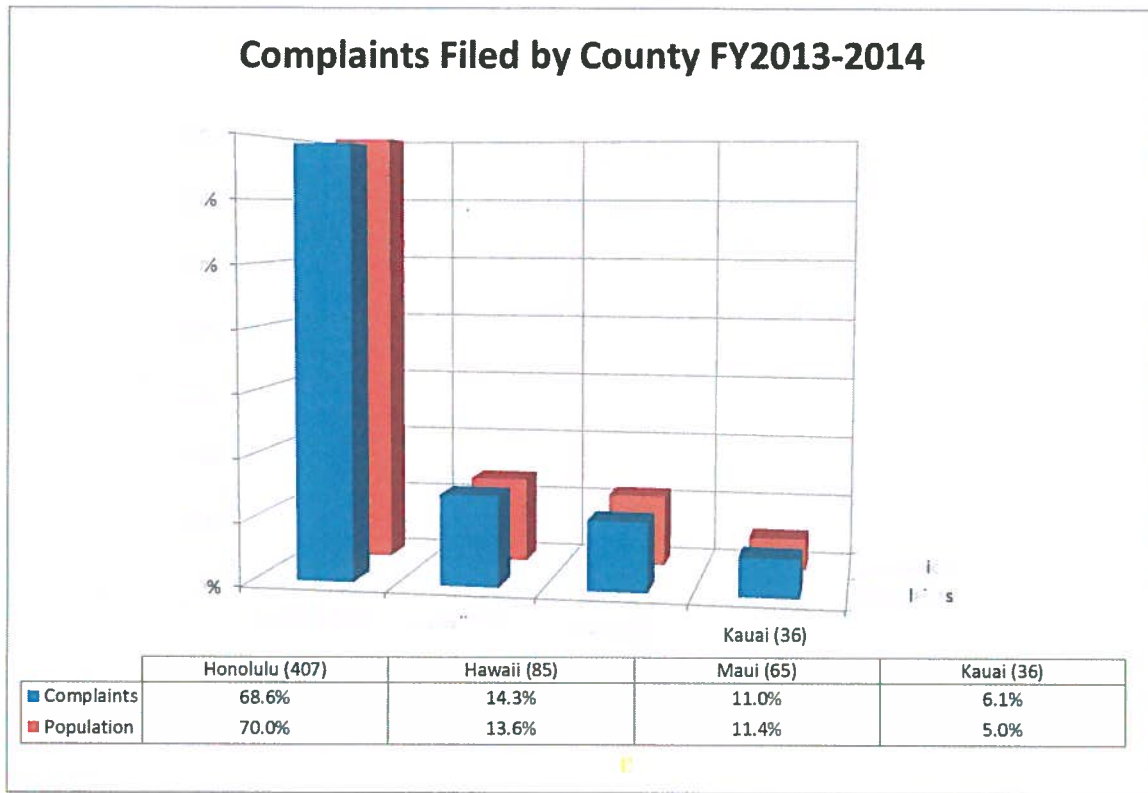
Of the 593 complaints that were filed with the HCRC, 303 complaints originated with HCRC investigators (averaging 25.3 per month), and another 290 cases originated with the federal EEOC or HUD. These 290 cases were dual-filed under state law with the HCRC.

The 593 cases included 523 employment cases, 37 public accommodations cases, 27 real property transactions (housing) cases, and 6 access to state and state-funded services complaints. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.



The 593 charges accepted by the HCRC consisted of 407 Honolulu County complaints, 85 Hawai'i County complaints, 65 Maui County complaints, and 36 Kauai County complaints. The number of complaints filed from each county was

consistent with its proportion of resident population in the state (Honolulu County 70.0%; Hawai'i County 13.6%; Maui County 11.4%; and Kauai County 5.0%).



## Closures<sup>4</sup>

HCRC investigators and attorneys closed 370 cases during FY 2014 (an increase of 15 cases from FY 2013), for an average closure rate of 30.8 cases per month, up from 29.6 cases per month in FY 2013. HCRC investigations

### YSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations that result in cause nations. Generally, the reason for this distinction is that cases are not closed upon issuance of of cause, but are conciliated, and, if conciliation fails, are docketed for hearing.

Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions constitute between 15-25% of the total of those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties.

During FY 2014, HCRC investigations resulted in 12 cause determinations, and 49 cases were closed on the basis of pre-determination settlement or resolution between parties. 238 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (61) to those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties (299) for this fiscal year is 20.4%.







































