



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office

May 27, 2015

1:30 p.m.

Present: Linda Hamilton Krieger, Raymund Liongson, Kim Coco Iwamoto, and Wally Fukunaga, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff; Francine Wai, Executive Director of the Disability and Communication Access Board, Dan Purcell and Peter Fritz, were also in attendance.

Artemio Baxa, Commissioner, excused.

Chair Linda Hamilton Krieger called the meeting to order.

Approval of Minutes

The minutes of the April 29, 2015, meeting were approved, with one correction. On page three of the draft minutes, Commissioner Kim Coco Iwamoto asked that the minutes be corrected to show that she had discussed Department of Education website posting of information on capital improvement projects, and which legislative districts those projects were located in. (m/s/p Fukunaga/Iwamoto; 3-0, Krieger, Iwamoto, and Fukunaga in favor).

Commissioner Raymund Liongson joined the meeting after the approval of the minutes.

Member of the public Dan Purcell suggested that under the state open meetings law, the agenda item for approval of minutes should include the designation of the date of the meeting.

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi's reported on FY 2015 HCRC Mediation Program Year-to-Date progress, noting that no additional cases had been referred to mediation and two cases had been successfully mediated since the last report on April 29, 2015.

Summary & Details (7/1/14 through 5/27/15)

Referrals:	34	
Dispositions:	26	
Settlements:	14	
Non-agreements:	12	
Settlement Rate:	53.8 %	
Employment cases settled:		14
Non-employment cases settled:		0
Dual-filed (EEOC/HCRC) settlements:		12
State-only settlements:		2

Primary Bases for Complaints Settled in Mediation

Sex	9	(including 4 pregnancy and 4 sexual harassment)
Disability	2	
Race	2	
Ancestry/National Origin	1	

Dispositions by Mediation Center

Mediation Center of the Pacific	7/13	(settlement rate 53.8 %)
Kauai Economic Opportunity, Inc.	2/3	(settlement rate 66.7%)
West Hawaii Mediation Center	2/3	(settlement rate 66.7 %)
Private Mediators	3/3	(settlement rate 100 %)
Ku'ikahi Mediation Services (Hilo)	0/3	(settlement rate 0 %)
Mediation Services of Maui	0/1	(settlement rate 0%)
OVERALL	14/26	(settlement rate 53.8%)

Executive Director (ED) reported that DHRD had an open recruitment for the Program Specialist V position, the HCRC mediation coordinator.

Commissioner Wally Fukunaga asked why mediations by private mediators are more successful, with a higher settlement rate, than those conducted by the community mediation centers.

DED Kawatachi responded that the community mediation centers have had good settlement rates, especially the Mediation Center of the Pacific, but that higher settlement rates in private mediation may be attributable to the investment of money that the parties make in the private mediation, with high mediator fees, and also because both parties are represented by counsel in the majority of cases mediated by private mediators. ED Hoshijo noted that many private mediators, some of whom are retired judges, use some form of evaluative mediation to urge settlement, while the community mediation centers primarily use facilitative mediation. DED Kawatachi added that the community mediation centers have used experienced mediators to mediate cases referred by the HCRC, with co-mediation conducted by a pair of mediators, one attorney and one non-attorney.

Chair Krieger asked how the community mediation centers' mediators are trained. ED Hoshijo said that over the years the HCRC has provided civil rights and fair employment basic training for mediators, in coordination with MCP. These trainings have been in Honolulu, and Neighbor Island centers have sent mediators to participate. He said that it has been a while since the last of these mediator trainings, and that planning a training would be the responsibility of the new mediation coordinator.

DED Kawatachi presented a data and production report showing caseload data through May 27, 2015.

As of May 27, 2015, the report showed 393 open cases, a decrease of 3 cases from the number reported as of April 29, 2015. Of those, (0.5%) were filed in 2009, 3 (0.8%) filed in 2010, 19 (4.8%) filed in 2011, 41 (10.4%) in 2012, 67 (17.1%) in 2013, 123 (31.3%) in 2014, and 138 (35.1%) in 2015.

The report also showed a breakdown of the status of the open cases by investigation stage.

	2009	2010	2011	2012	2013	2014	2015	Total
Housing Cases	0	0	1	3	1	8	11	24
Intake Stage	0	0	2	0	18	67	98	185
Mediation	0	0	0	2	4	18	17	41
Pending Assignment	0	0	9	32	29	10	1	81
Active Investigation	2	3	7	4	15	20	11	62
TOTAL	2	3	19	41	67	123	138	393

Chair Krieger asked how many investigators were dedicated exclusively to fair housing cases. DED Kawatachi responded that there were 2 (of 8) permanent investigators and 1 (of 2) investigator supervisors dedicated to housing.

DED Kawatachi explained that there was an increase in the number of cases that were pending assignment, attributable to a reorganization and shift in staffing and caseloads, and that the increase would be temporary. ED Hoshijo added that the reorganization was designed to shift away from specialized dedication of investigators to intake, shifting more resources into investigation.

Chair Krieger asked if there were particular issues that kept the oldest cases from disposition. DED Kawatachi said he would look into that and report back. ED Hoshijo added that he was sure that one case involved an arrest and court record issue that had to be reassessed post-*Shimose*.

It was reported that: 22.1% of all investigation cases were 2 years old or older (from date of filing); 8.2% were over 18 months but less than 2 years old; 12.2 % were over 12 months but less than 18 months old; 18.3% were over 6 months but less than 12 months old, and 39.2% were 6 months old or less.

DED Kawatachi reported that no administrative subpoenas were issued, and that 2 cases were going to subpoena enforcement.

Chair Krieger asked if there was a statutory mandate to keep the parties confidential in subpoena enforcement actions. ED Hoshijo said it has been the ED's practice to move the court to keep the parties confidential, as the cases are still in the investigation stage. Chair Krieger suggested that there might be a benefit to publicizing enforcement of subpoenas.

Chair Kreiger asked what happens when parties call to ask about the status of their case. Executive Director Bill Hoshijo said that whether it is the assigned investigator, a supervisor, or the DED, enforcement staff try to respond to inquiries in a timely manner. DED Kawatachi added that the ED has sent letters to attorneys explaining the length of time it takes to investigate cases, including the loss of enforcement capacity.

DED Kawatachi reported that 11 notices of cause had been issued to date during FY 2015, a higher number than in recent years.

Legislation -2015 Session

There was nothing new to report on the FB 2015-2017 budget.

The Commissioners reviewed Legislative Summary 6, presented by Chief Counsel (CC) Livia Wang.

[HB-795] Medical Marijuana; Employment Protections SB 1291 SD1

Amends both HRS § 329-125 and adds a new part to HRS Ch. 378 to prohibit an employer from disciplining, suspending, discharging or discriminating against an employee solely because the employee tested positive for marijuana if the employee is a qualifying patient/user of medical marijuana, the marijuana is not used in the workplace. Prohibition does not supersede any statute, rule, employment contract, collective bargaining agreement, or workplace regulation or policy prohibiting an employee from being under the influence of marijuana while working in the workplace.

Status: HB 795 ref. to HLT, JUD; hrg. before HLT on 2/7; decision making on 2/11; deferred.

SB 1291 ref. to HTH, JDL; hrg. before HTH on 2/18, passed w/amendments changing effective date only; hrg. before JDL on 2/26; passed w/ requested amendments to take provision out of HRS 378 part I and changing protections for marijuana patients and caregivers from discrimination by schools, landlords and Courts; crossed on 3/12, ref. to HLT, JUD; hrg. before HLT on 3/25, passed w/ amendments, hrg. before JUD on 4/2, decision making on 4/7, passed w/ amendments; conf. com. mtg. 4/29; passed w/ amendments taking our employment protections w/ provision that planned community associations still must make reasonable accommodations under HRS § 515-3; transmitted to Governor on 5/8.

HCRC position: Support and state that section 2 of bill should be deleted – protections should only be in HRS Ch. 329 and not repeated in HRS Ch. 378.

[HB-944] Background checks on employees, applicants and operators of SB 1113 SD1 healthcare facilities and the state Dept. of Health

Expands authority of DOH to conduct background checks to include criminal history record checks, adult abuse perpetrator and child abuse record checks, and certified nurse aid registry record checks for people seeking employment with the state or its contractors where the work involves direct client care in healthcare facilities.

Status: HB 944 ref. to HLT, JUD.

SB 1113 ref. to HTH/HSH, JDL; hrg. before HTH/HSH on 2/10, deferred to 2/11, passed w/ amendments; decision making before JDL on 2/27, passed w/ amendments; crossed on 3/10, ref. to HLT, LAB, JUD; hrg. before HLT on 3/18, passed w/ amendments; hrg. before LAB on 3/24, passed unamended; hrg. before JUD on 3/31, passed unamended; conf. com. mtg. 4/29; passed w/ amendments; transmitted to Governor on 5/8.

HCRC position: Monitor and comment that HCRC does not oppose criminal history record checks for positions that involve work with vulnerable populations.

HB 1272 HD1

Open Movie Captioning and Descriptive Narration in Motion Picture Theaters

Amends HRS § 347 to require motion picture theaters that have 2 or more facilities to provide closed movie captioning and descriptive narration for at least 2 showings per week of a motion picture.

Status: ref. to EPB, CPC/JUD; hrg. before EPB on 2/10, passed w/ amendments requiring open captioning and descriptive narration in theaters having 2 or more facilities during at least 2 showings a week, making a violation of the statute a discriminatory practice, placing enforcement under HRS Chapter 489 and directing the DLIR director to adopt rules to this effect; hrg. before CPC/JUD on 3/3, passed w. requested amendments; crossed on 3/12; ref. to CPN, JDL; hrg. before CPN on 3/17; passed w/ amendments; decision making before JDL on 3/31, passed w/ requested amendments but with sunset provision in January 2018 ; House agrees w/ SD2; transmitted to Governor on 4/21; signed into law as Act 39 on 5/6/15.

HCRC position: Support, with request to amend by deletion of the provision requiring the Director of Labor and Industrial Relations to adopt rules, because any rules would be adopted by the HCRC, and rulemaking would not be necessary where the statute is so specific; also, with suggestion that “motion picture theater” and “facility” be clearly defined.

CC Wang and ED Hoshijo reported on inquiries received from proponents of open captioning requirements in other states, asking about how the Hawai‘i legislature was convinced to become the first state to legislate such a requirement, in the face of film industry opposition.

DCAB Executive Director Francine Wai commented that the difference was the organization and perseverance of the deaf community.

Chair Krieger asked if there was a need to promulgate administrative rules, noting that there was no statutory designation of which film showings had to be shown with open captioning.

Ms. Wai noted that the statute was drafted in a way that would not require rules, because the HCRC did not have public accommodations rules generally. ED Hoshijo added that the proponents of the bill were aware that it did not provide specific requirements regarding which showings had to be presented with open captioning, but decided not to amend the bill, in order to win passage.

Chair Krieger asked if there was any reason not to make rules, not just for the movie theater law, but for public accommodations generally. She asked staff to report back on what steps and resources would be required for the HCRC to engage in this rulemaking.

**HCR 141 HD1
HR 84**

Requesting DLNR and Counties to Provide Reasonable Access for Disabled Persons to Access Beaches

Asks DLNR and counties that maintain beach transit corridors to provide reasonable accommodation for access to shoreline for persons with disabilities at any beach that has a public restroom facility and is within an ocean recreation management area by July 1, 2016

Status: Ref. to OMH/WAL, FIN; hrg. before OMH/WAL on 3/27, passed w/ amendments changing reference from “reasonable accommodation” to “access”; decision making before FIN on 4/7, passed unamended; transmitted to Senate on 4/9; hrg. before WTL on 4/20, passed w/ amendments requesting DLNR and counties to “improve” (vs. “provide”) access and report to leg only; referral to JDL waived on 4/24; sent back to House; House agrees w/ SD1, resolution adopted.

HCRC position: Support with amendments, based on HCRC support for H.B. No. 721, with reference to HCRC jurisdiction over state-funded beach programs and activities under HRS § 368-1.5.

HB 631 HD1 New Birth Certificate; Gender Designation

Amends HRS §338-17.7 to change gender designation on birth certificate when statement from a licensed medical or social service provider attests that current birth certificate does not align with birth registrant’s gender identity and provides cause of action if DOH refuses to issue new birth certificate

Status: ref. to HLT, JUD; hrg. before HLT on 2/13, deferred to 2/18, passed w/ amendments requiring an affidavit from medical or social service provider and changes effective date to 2050; hrg. before JUD on 2/24, passed w/ amendments to allow registrant to request disclosure of original birth certificate; crossed on 3/12, ref. to HTH, JDL; hrg. before HTH on 3/18, passed unamended; decision making before JDL on 4/6, passed w/ amendments adding requirement for court order that affidavit from licensed medical provider or licensed mental health provider is legitimately issued ; conf. com. mtg. on 4/30; passed w/ amendments requiring affidavit from licensed physician w/ bona fide physician-patient relationship that applicant has received appropriate clinical treatment resulting in complete gender transition and deleting court order requirement; transmitted to Governor on 5/6/15.

HCRC position: Strongly support. Related to HRS Ch. 378 prohibitions against discrimination based on gender identity and expression in that employers are to address and treat employees based on their gender identity and not their ID records; this bill enables employees to more easily change their IDs. Current law creates 2 classes of people who have to go through 2 different processes to change their birth certificates; bill would create one standard and one process.

Commissioner Iwamoto commented that the final conference draft leaves two issues to be addressed in the future, provision for correction of mistaken gender designation and definition of what constitutes “complete transition.”

HB 1007 HD1 SD2 Relating to Motor Vehicle Driver Licensing [~~SB-683 SD2~~]

Authorizes the issuance of limited purpose driver’s licenses, provisional licenses and instruction permits for individuals who are otherwise eligible for a license or permit but do not present proof of authorized presence in the U.S.

Status: HB 1007 ref. to TRN, JUD; hrg. before TRN on 2/11, passed unamended; decision making before JUD on 2/26, passed w/ amendments; crossed on 3/12; ref. to TRA, JDL; hrg. before TRA on 3/17, passed w/ amendments; hrg. before JDL on 3/27; passed w/ amendments changing effective date to January 2016; 4/28 House agrees w/ Senate amendments; transmitted to Governor on 4/28.

SB 683 ref. to TRA, JDL; hrg. before TRA on 2/5, passed w/ amendments; hrg. before JDL on 2/27, passed w/ amendments; crossed on 3/10; ref. to TRN, JUD; no hearings held.

HCRC position: **Strongly support** with suggestion that this process be available at all satellite city halls where driver's licenses are issued.

~~[HCR 71]~~ **Urging Congress and the President to Support Passage of Legislation to**
~~[HR 37]~~ **Expedite Family Reunification for Certain Filipino Veterans of WWII**

~~[SCR 91]~~

SR 44 SD1

While certain aspects of the 1946 Rescission Act (which denied WWII Filipino veterans many rights given to other veterans from other countries that were inducted into the US military), immigration and naturalization benefits for the children of veterans was still not extended to them. Therefore, many elderly Filipino veterans living in the U.S. have still not been able to be reunited with their families.

Status: HCR71/HR 37 ref. to VMI, FIN; no hearings held

SCR91/SR44 ref. to PSM; hrg. before PSM on 4/7, passed w/ amendments; SCR 91 transmitted to House on 4/9; ref. to VMI, FIN; no hearings held. SR 44 adopted on 4/9.

HCRC position: **Support.**

BILLS AND RESOLUTIONS THAT DIED

HB 683 **HCRC – ED Authority to Dismiss Complaints**
SB 362

Amends HRS §368-13 to authorize ED to dismiss a complaint and issue a notice to sue if cause is found and conciliation fails

Status: HB 683 ref. to LAB, JUD; hrg. before LAB on 2/17, passed unamended

SB 362 ref. to JDL; ; hrg. before JDL on 4/6, passed 2/ amendments; conf. com. mtg. on 4/30; deferred.

SB 362 ref. to JDL; no hearing held.

HCRC position: **Support.** This is the bill originally submitted as part of the admin. package; emphasize how this will save staff time and costs.

NOTE: HUD requires housing cases exempted from this authority.

Chair Krieger asked what the basis for deferral was. ED Hoshijo said there was an impasse over the

distinction between reconsideration of the issuance of a final demand, which is based on a request to engage in further conciliation rather than trigger docketing, and a decision to dismiss and issue a notice of right to sue.

Commissioner Iwamoto asked if the bill was still sitting in conference. ED Hoshijo said it would be sitting there in the conference committee when the 2016 session begins, but that the HCRC would likely be better served by doing interim work to get the bill reintroduced and try to address the differences that led to the impasse in conference.

HB 561 HD1 Personal Social Media Account; Privacy, Employment
[SB-1269]

Amends HRS Ch. 378 Part I to prohibit employers from requiring or requesting employees and applicants to grant access to personal social media account user names and passwords

Status: HB 561 ref. to LAB, JUD; hrg. on 2/3 before LAB, passed w/ requested amendments deleting (e) but still keeping provision in HRS 378 Part I; decision making before JUD on 2/26, passed unamended; crossed on 3/6, ref. to JDL; hrg. before JDL on 3/23, decision making deferred to 3/30, passed w/ amendments putting provision in new part of HRS Chapter 378; conf. com. mtg. on 5/1; deferred.

SB 1269 ref. to JDL, no hearings held.

HCRC position: Support intent with amendment to delete section (e) and urge placement in a new part of HRS Ch. 378 and provide direct cause of action in court with injunctive relief and attorneys' fees. In pre-employment and employment context, information related to protected bases gained from social media accounts is already prohibited by HRS § 378-2.

HB 819 HD1 Bullying; Safe Schools for All Students
{SB-845}

Requires certain state entities and grantee to adopt bullying prevention policies, Establishes a task force to assist the Governor with bullying prevention policies in the state, amends HRS § 302D-34 to include gender identity or expression as a basis for protection against discrimination by a public charter school.

Status: HB 819 ref. to EDN, JUD; hrg. before EDN on 2/4, deferred to 2/11, passed w/ amendments adding county agencies and contractors who work with youth, deleting references to age in definition of youth, requiring bullying prevention programs to align with health education standards and adding an unspecified appropriation for the task force; hrg. before JUD on 3/3, passed w/ requested amendments; crossed on 3/12; ref. to EDU, JDL/WAM; hrg. before EDU on 3/16, passed w/ amendments; decision making before JDL/WAM on 4/8, passed w/ amendments deleting §5 (prohibiting charter schools from discriminating based on gender identity or expression); conf. com. mtg. on 5/1; deferred.

SB 845 ref. to EDU/HSB, JDL/WAM; hrg. before EDN/HSB on 2/4, deferred to 2/5, deferred.

HCRC position: Strongly support but suggest that part III section 6 be amended to state "sex,

including gender identity or expression.”

Old Business

ED Hoshijo said there was nothing new to report on *Cervelli v. Aloha Bed & Breakfast*, which remained pending before the Intermediate Court of Appeals.

On the issue of discriminatory exclusions in health plan coverage, Commissioner Iwamoto reported that a meeting was held with staff of the State Employer-Union Health Benefits Trust Fund (EUTF) to discuss the possibility of making a presentation to the EUTF board to urge EUTF to present a consumer perspective to HMSA, but with a less than positive reception.

Chair Krieger suggested that the next meetings should be held with University of Hawai'i Equal Opportunity Office and Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Student Services Office, to explore how to seek change in UH health plan coverage.

Chair Krieger also mentioned a recent U.S. District Court case decided on the issue of gender-based health plan exclusions under the Affordable Care Act.

ED Hoshijo added that there was some interest in discussing this issue among the EEOC and its state and local agency partners, but the discussion was still in a preliminary stage.

CC Wang discussed the letter from the Hawaii State Ethics Commission, dated April 28, 2015, in response to the request from the HCRC for advice regarding possible conflicts of interest. In that letter, an Ethics Commission attorney advises that the State Ethics Code prohibits an HCRC Commissioner from taking any official state action directly affecting a business or undertaking in which the Commission has a financial interest, including both an ownership interest in a business or an ownership interest in real or personal property. The letter advises that Commissioner action that affects a business or organization in which the Commissioner has a financial interest would raise concerns under the State Ethics Code, whether or not the Commissioner is aware of the potential conflict. Regarding the question of whether HCRC staff should inform an affected Commissioner of potential conflicts where there is otherwise no actual knowledge on the part of the Commissioner, the letter leaves it to the HCRC to decide whether it wishes to develop policies to address the situation.

Commissioner Iwamoto indicated that compliance would require a check on holdings.

Member of the public Dan Purcell suggested that those who are in public service should restructure their holdings for transparency.

Commissioner Iwamoto said she will continue to serve, and recuse herself when necessary.

DED Kawatachi indicated that he saw no pending complaints against the AOA that Chair Krieger had identified as a potential party to a pending complaint. Chair Krieger asked for a letter confirming the absence of that potential conflict.

New Business

As first discussed at the April 29, 2015, meeting of the Commission, the subject of “Underutilization of Women in the Construction Trades on Public Works Projects” was taken up as new business.

Chair Krieger and ED Hoshijo reported on an initial May 11, 2015, meeting on the subject with EEOC Honolulu Local Office Director Glory Gervacio Saure and OFCCP Honolulu Area Director Brian Mikel. That initial discussion would be the basis for additional information gathering, with the next meeting to be scheduled in June.

Commissioners Wally Fukunaga and Raymund Liongson expressed a strong interest in developing a public education component of the Commission's efforts on this important issue.

Announcements

ED Hoshijo reminded the Commissioners that the HCRC would again have a contingent in the 2015 Pride Parade, scheduled for June 6, 2015. He noted that staff was collecting contributions towards fees and costs, and that participation in the parade was voluntary.

Member of the public Dan Purcell asked if the HCRC's Maui Commission member could participate in the Commission meeting by teleconference, allowing for Neighbor Island public participation. There was discussion of whether the State Information Practices law and the ADA required both audio and video for remote participation. Mr. Purcell said he was sure that remote participation by teleconference with audio only and no video was allowed.

Next Meeting

The next meeting of the Commission was scheduled, for June 18, 2015, at 1:30 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment