



2004 – 2005

ANNUAL REPORT

HAWAII CIVIL RIGHTS COMMISSION

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TABLE OF CONTENTS

MISSION STATEMENT	3
OVERVIEW	3
• Fair and Effective Enforcement.....	3
• An Effective and Uniform Enforcement Scheme.....	3
• A Fair Administrative Process	3
• Civil Rights Law Enforcement: State & Federal Law	4
• The HCRC Today	4
• Objectives and Goals	5
MEDIATION PROGRAM	5
PUBLIC EDUCATION & OUTREACH	9
CASELOAD STATISTICS	9
• Intake	10
• Closures	11
• Employment Cases	13
• Housing Cases.....	14
• Public Accommodations Cases.....	15
• Access to State & State-Funded Services Cases	15
• Cause Cases	15
CASE SETTLEMENTS.....	17
CASE DECISIONS	18
• Contested Case Hearings	18
• Litigation and Court Rulings	18
LEGISLATION	18
APPENDIX.....	19
• Overview.....	19
• Administrative Procedure.....	19
• HCRC Commissioners	24
• HCRC Staff	26

MISSION STATEMENT

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

OVERVIEW

Fair and Effective Enforcement

The state of Hawaii has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawaii Constitution provides that “no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” The legislature gave meaning to this commitment by creating the Hawaii Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For fifteen 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. The HCRC has a staff of twenty-nine (29) persons who are divided into separate enforcement and adjudication sections.

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 litigation to enforce fair employment practices law was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. Few employment discrimination cases brought under state law were adjudicated, and there was little case law. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims.

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.”¹ 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.”²

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 a five-member Commission with jurisdiction to enforce state civil rights laws. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and the adjudication section which hears, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

The Commissioners have delegated the 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 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 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 before filing a discrimination lawsuit in state court. Otherwise, the circuit court will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement prevents overburdening the courts with non-jurisdictional and non-meritorious cases, as well as those cases that can be closed or settled in the administrative process. The great majority 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 and Urban Development (HUD), respectively. Pursuant to workshare cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law ("dual-filed" complaints).

While Hawaii and federal fair employment and fair housing laws are similar, they are not identical. Hawaii has protected bases that are not covered under federal law, and there are substantial differences in the definition of "employer" and the statute of limitations for filing a charge of employment discrimination. In addition to these jurisdictional differences, Hawaii law provides stronger protection against pregnancy discrimination, sexual harassment, and disability discrimination in employment.

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

There is a trend of limiting jurisdiction and process under civil rights statutes: sovereign immunity barring individual claims against the states under several federal civil rights statutes; free speech and free exercise of religion claims raised in defense of discrimination complaints; and equal protection and other constitutional claims raised to challenge enforcement processes. In this context, strong enforcement of state civil rights laws is more important than ever before.

The HCRC Today

During FY 2005, the HCRC reflected on its first fifteen years of enforcing Hawai'i's civil rights laws, and focused its efforts on planning for the future. HCRC staff and Commissioners continue to maintain and improve the HCRC's enforcement and public education activities:

Investigation and Charge Processing. During FY 2005 the HCRC adopted plans to improve efficiency without sacrificing effective law enforcement. There are two targets: 1) completing the investigation of all cases filed before 2003 by June 30, 2005; and 2) completing the investigation of all cases filed before 2004 by December 31, 2005. These targets are an incremental approach towards a practice of completing all investigations within three years of the filing of a complaint.

Mediation. The HCRC's voluntary mediation program completed its sixth year of operation, working with the Mediation Centers of Hawaii and community mediation centers on Oahu, Hawaii, Maui, and Kauai. Twenty-three cases were settled in mediation for monetary total relief exceeding \$480,000. Settlements in 58.9% of the cases were disposed of by mediation.

Public Education. The HCRC continued to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, professional organization, civil rights advocacy, and other community organization audiences. Public education included fair housing training on Kauai, Maui, Hawai'i, and Oahu. The HCRC plans and holds training on at least an annual basis in Honolulu. The HCRC website was incorporated into the

Department of Labor and Industrial Relations website, recording nearly 500,000 hits during the last three quarters of FY 2005.

Litigation. During FY 2005, HCRC enforcement attorneys continued to conciliate and litigate cause cases, in which a determination was made that there is reasonable cause to believe that unlawful discrimination has occurred. In addition, the HCRC Chief Counsel filed amicus briefs in two cases before the U.S. Ninth Circuit Court of Appeals.

The HCRC Commissioners and staff continue their unwavering commitment to the HCRC mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education. We renew our pledge to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawaii law.

Objectives and Goals for 2005-2006

Case Inventory and Processing: The HCRC will continue plans implemented during FY 2005 designed to reduce older case inventory and the length of time it takes to complete investigation of complaints. Progress has been made through the implementation of several performance targets, working incrementally toward a goal of completing all investigations within 18 months.

Voluntary Mediation Program: The HCRC will continue to improve and expand its voluntary mediation program to encourage and offer mediation in more cases.

Public Awareness: Continued focus on HCRC public education activities is planned for the upcoming year. The HCRC will continue to work with federal, state, business, labor, and community partners to expand outreach and public education statewide, especially on the neighbor islands, and will explore more public-private partnerships to develop user-friendly public education resources. In addition to its introductory training for the public on civil rights laws, the HCRC will offer an advanced training in the Spring of 2006.

The accompanying report is submitted pursuant to H.R.S. §§ 368-4 and 515-9.

¹1989 House Journal, Standing Committee Report 372.

² Id

³ Aged case reduction is a priority for the HCRC, as well as for the U.S. Department of Housing and Urban Development (HUD) and the U.S. Equal Employment Opportunity Commission (EEOC), the federal agencies that contract with the HCRC to process complaints dual-filed under state and federal law.

MEDIATION PROGRAM

The HCRC's voluntary mediation program successfully completed its sixth full fiscal year on June 30, 2005. 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 parties (usually a team of two co-mediators) help the involved individuals discuss, clarify, and settle complaints.

Mediators are unbiased and do not rule on the merits of the complaint. Rather, the HCRC provides them with the basic facts of each case needed to understand the dispute. The mediators then assist parties in reaching agreements such as simple apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources, and reduces stress by allowing the parties to explain their side of the case and to control the process of resolving their dispute in a non-adversarial manner.

HCRC works with trained, senior mediators from the Mediation Centers of Hawaii (MCH), a statewide network of community non-profit mediation centers. MCH mediators are trained and updated in civil rights laws by HCRC staff on a regular basis. An HCRC mediation coordinator facilitates the process by explaining mediation and its benefits to the parties. There are mediation centers on Oahu, Maui, Hawaii, and Kauai. The centers charge nominal fees for the sessions, which can be waived or reduced

where there is a situation of financial hardship. Private mediation is also available, at a higher cost, if the parties choose.

Mediation can occur at any stage of the complaint process. Mediation is first offered when the complaint is accepted, because disputes are often easier to resolve while the facts are fresh and before potential damages accumulate and the positions of the parties become rigid.

During FY 2004-2005, 52 cases were referred into mediation; 39 were disposed of (completed) during the year, with 23 of those cases resulting in mediated settlements. This represented a 58.9% overall settlement rate. The total monetary value of mediated agreements was up by 48.8% from last year to \$480,750 *. Most of the completed mediations (66.7%) were by the Mediation Center of the Pacific in Honolulu; followed by private mediation (25.6%); Mediation Services of Maui (5.1%); and the Ku'ikahi Mediation Center in Hilo (2.6%).

The primary protected bases of mediation case referrals were sex (23); disability (10); retaliation (10); religion (2); arrest & court record (2); race (2); ancestry (1); national origin (1); and age (1). The primary protected bases of mediated settlements were: sex (14); disability (5); retaliation (2); age (1) and race (1). Employment cases accounted for 51 referrals and there was 1 public accommodations referral.

The following are some examples of cases settled in mediation:

- A complainant, who was a cashier at a restaurant, alleged she was subjected to verbal and physical sexual harassment by her manager. A settlement was reached for \$22,500 with the employer in a case mediated at the Mediation Center of the Pacific (MCP).
- A complainant who was an Outside Sales Representative for a retailer, alleged she was required to work more hours than her physician allowed due to her pregnancy. Although the employer reduced her hours, she was still expected to maintain her sales quotas. The complainant was forced to resign. The company agreed to a settlement of \$25,000 at the MCP.
- A housekeeper/maintenance worker, who had worked for 9 years at a condominium, alleged that he was told by his supervisor that he should quit because of his medical problems and perceived disability from a heart bypass operation. He reached a settlement at MCP with the employer for a severance package of \$7,500, exclusive of a pending workers' compensation claim.
- A pregnant sales associate at a large retailer alleged that she was terminated because she was unable to meet a requirement to lift up to 40 pounds. After she provided a doctor's note limiting her lifting to 15 pounds, the employer terminated her, but said she could reapply after her delivery. When she was not rehired, she filed a complaint with the HCRC. A settlement was reached at MCP for \$14,500 and neutral references.
- An event staffer earning \$12/hour for a travel industry company, was harassed and teased by his co-workers regarding his disability. When he complained about the behavior, he was terminated. He subsequently filed a complaint. In private mediation, the complainant agreed to a settlement of \$30,000.
- A secretary for an employee association alleged that her employer denied her reasonable leave accommodations for her disability and that she was improperly terminated. In an MCP mediation, she settled her charge for a letter of recommendation and a monetary settlement of \$10,500.
- A female cashier/counter person in a food industry company alleged that she suffered from physical and other kinds of sexual harassment by a high-level manager. She had been hired three months earlier and alleged a constructive discharge due to the hostile, offensive, and intimidating working environment. She settled in mediation at the MCP for \$47,000.

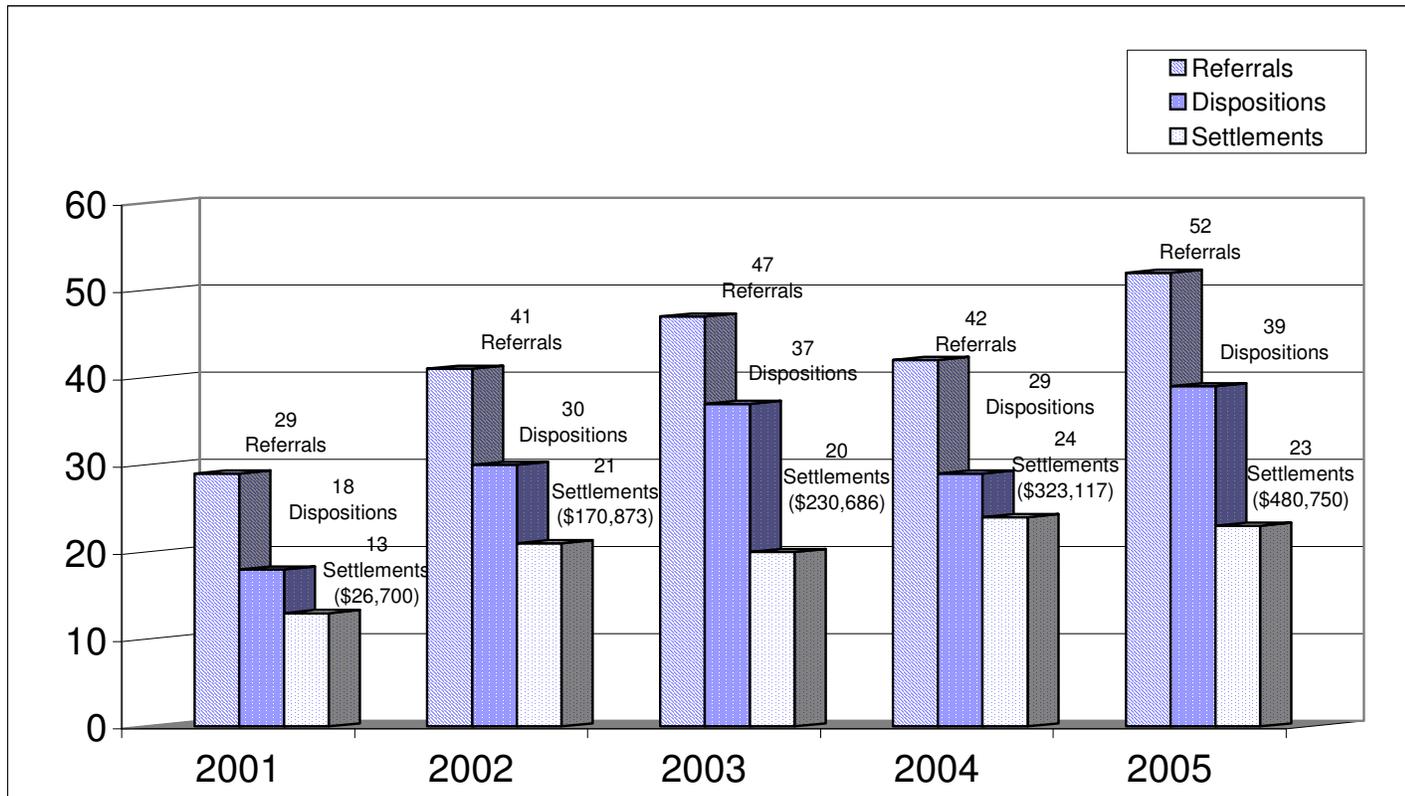
- A female operations manager alleged that her employer, a finance company, had discriminated against her after she informed the owner of her pregnancy. As a result, her files and referrals were given to another employee and a promised job description for her position was eliminated. The owner terminated the complainant on the basis that she was not strong enough to do her work. This charge was settled for \$30,000 at the Mediation Services of Maui.

Although monetary settlements were achieved in most agreements, all mediated agreements involved some form of non-monetary affirmative relief. Typical examples of non-monetary relief in this year and prior years include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) restoration of employee benefits;
- 3) a formal or informal apology (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) clarifications of communications between employer and employee, leading to more productive working environments.

* This total does not reflect two cases settled in private mediation in which terms were not disclosed. Accordingly, the figure reflects settlements in 18 of the 20 early-stage mediations. An additional 3 mediated settlements were reached in cause cases and are explained more fully in the 'Case Settlements' section.

Mediation History 2001 - 2005



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 have engaged in a number of public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

On October 28, 2004, the HCRC conducted its annual general public training at the Hawaii Convention Center. A diverse crowd of approximately 250 persons attended, including human resources personnel, attorneys, the general public, labor, business, and non-profit organizations. Evaluations indicated both a satisfaction with the training and a desire for a more advanced component.

The public is encouraged to reserve seats for future annual trainings by contacting the HCRC office and completing a "Request for Speaking Engagement" form, which includes a reservation section. HCRC is planning more advanced trainings in addition to its basic training.

On the nomination of the HCRC, long-time HCRC volunteer webmaster and consultant, Dr. William Puette, director of the Center for Labor Education & Research (CLEAR) at UH-West Oahu, was awarded a 2005 Hung Wo and Elizabeth Lau Ching Foundation Award for his significant work in strengthening ties between the University of Hawaii and the community.

HCRC staff conducted presentations and outreach activities for the following organizations and events:

- Joint EEOC-HCRC outreach in Hilo and Kauai
- Japanese American Citizens League Convention
- U.S. Naval Reserve Officers
- U.S. Veterans Administration
- Native Hawaiian Legal Corporation annual event
- UH-East West Center panels
- Community Homebuyers Fairs
- Annual Martin Luther King, Jr. Holiday Parade
- Dr. Martin Luther King, Jr. Gala Dinner Dance
- William S. Richardson School of Law
- Pride Festival
- Society of Human Resource Managers Hawaii State Conference
- The Center
- "Voice of Labor" radio show (Stuart McKinley)
- "Equal Time" radio show (Senators Fred Hemming & Donna Mercado Kim)
- Annual training & update for mediators in civil rights law

The HCRC independent website was incorporated into the DLIR website. As a result, the website is reaching more members of the public than ever. According to DLIR statistics, the HCRC website generated almost 500,000 hits in the 9-month period from September 2004 through May 2005.

CASELOAD STATISTICS

During FY 2005 the HCRC adopted plans intended to improve efficiency without sacrificing effective law enforcement, with two initial targets:

1) completing the investigation of all cases filed before 2003 by June 30, 2005; and 2) completing the investigation of all cases filed before 2004 by December 31, 2005. These targets were designed to use an incremental approach towards a standard/principle of having all investigations completed within three years of complaint filing.

Implementation of these planned improvements were expected to yield several results: 1) During the first year, with an emphasis on completing investigation of oldest cases, the average length of time to investigate closed complaints would be substantially longer than in past years, but would stabilize and decrease in future years; 2) An initial increase in the number of cases in which the investigation results in a cause recommendation since a large number of these older complaints involved complex

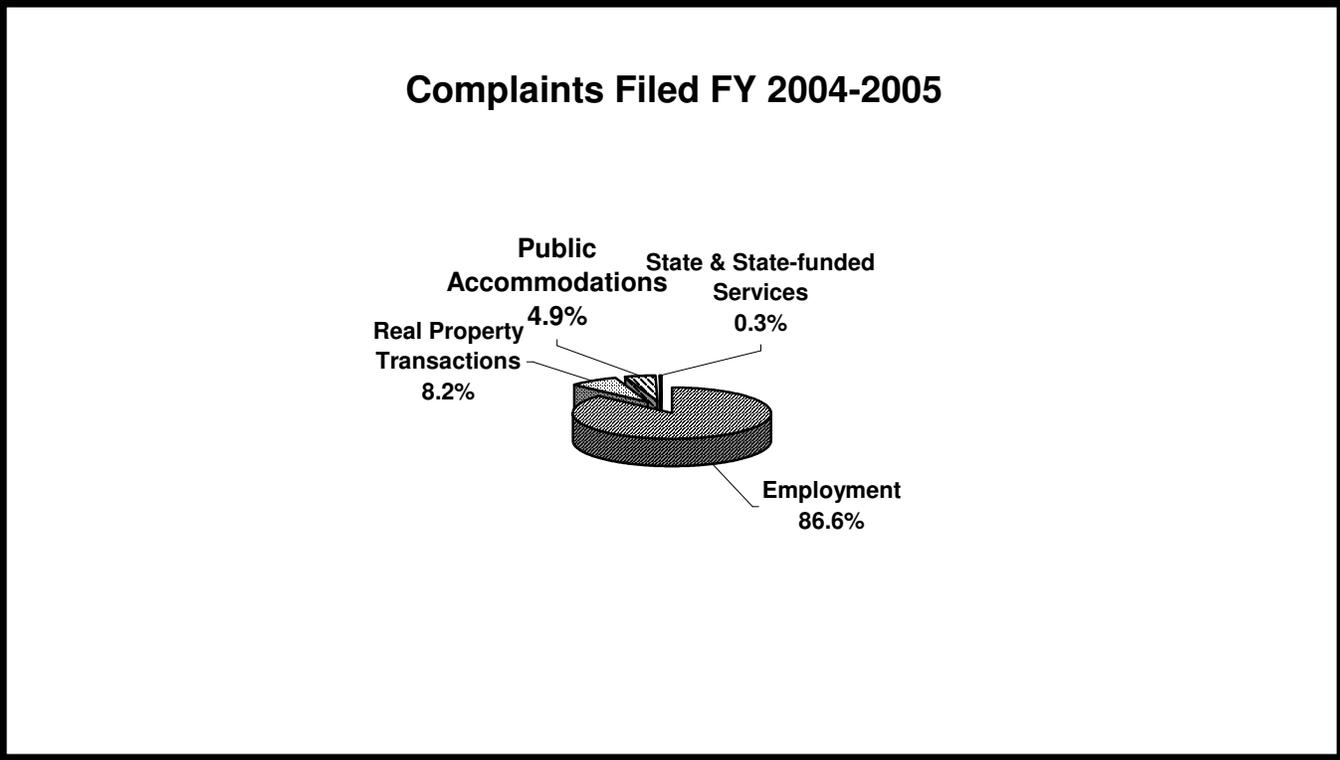
investigations and likely cause cases; and 3) the overall size of the investigation caseload inventory would be reduced as the older cases reached disposition.

The FY 2005 caseload statistics are consistent with these expectations.

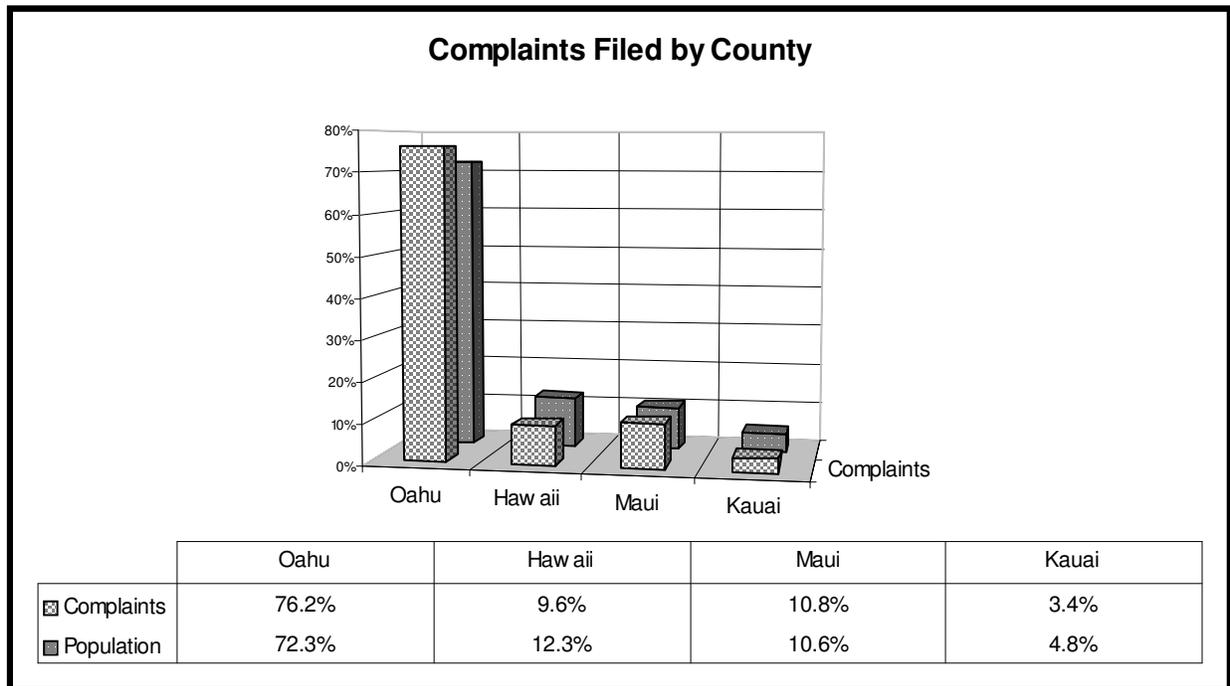
Intake

During FY 2004-2005, the HCRC received over 6500 telephone and walk-in inquiries (6649). 784 intakes were completed by the HCRC investigators during FY 2004-2005. 612 complaints of discrimination were filed with the HCRC, or an average of 51 cases a month.

Of the 612 complaints that were filed with the HCRC, 362 complaints originated with the HCRC investigators (averaging 30 per month), and another 250 cases originated with the federal Equal Employment Opportunity Commission ("EEOC"). These 250 cases are dual-filed under state law with the HCRC. The 612 cases included 530 employment cases, 30 public accommodations cases, 50 housing cases, and 2 cases involving state and state-funded services. 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 basis or bases; or c) a complainant's decision not to pursue the complaint.



The 612 charges accepted by the HCRC consisted of 466 Oahu complaints, 59 Hawai'i County complaints, 66 Maui County complaints, and 21 Kauai County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state.



Closures⁴

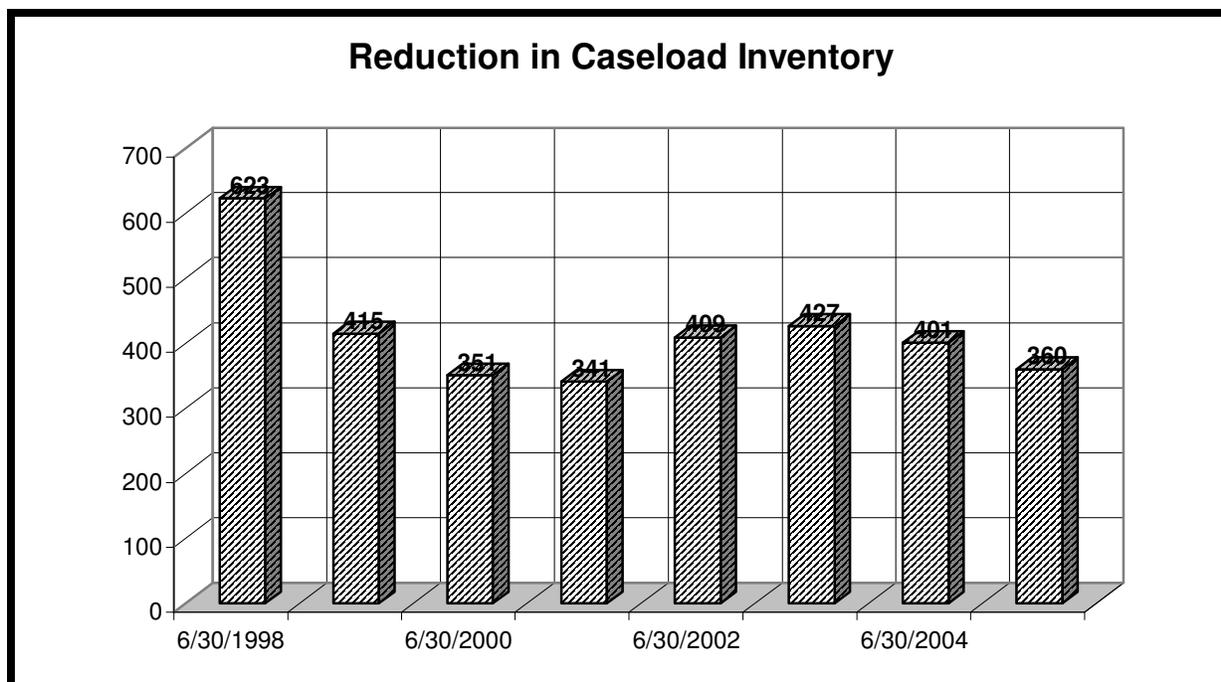
HCRC investigators and attorneys closed 385 cases during FY 2004-2005, down from 442 cases in FY 2003-2004. The average closure rate was 32.08 cases per month in FY 2004-2005, down from 36.83 cases per month in FY 2003-2004. In addition to the 385 closures during the fiscal year, HCRC investigations resulted in cause determinations in another 38 cases. As of June 30, 2005, there were 360 cases pending with HCRC investigators.

⁴ ANALYSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations that result in cause recommendations and determinations. Generally, the reason for this distinction is that cases are not closed upon issuance of a notice of cause, but are then 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 recommendations 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 2004-2005, HCRC investigations resulted in 38 cause recommendations, and 51 cases were closed on the basis of pre-determination settlement or resolution between parties. 367 cases were closed on the basis of no cause determinations upon completion of investigation. The ratio of cause cases and predetermination settlement/resolution (89) to no cause cases (367) for this fiscal year is 24%.



The average period for case closure by investigators was 514 days, as compared to 348 days for FY 2003-2004 and 342 days for FY 2002-2003. A review of this fiscal year shows the following reasons for closures:

	No. of Cases	% of Subtotal	% of Total Closures
Merit Closures			
Resolved by Parties	34	10.62%	8.83%
Pre-Determination Settlements	17	5.31%	4.42%
Cases Settled or Otherwise Resolved After a Cause Determination	18	5.63%	4.68%
No Cause Determinations	<u>251</u>	<u>78.44%</u>	<u>65.19%</u>
Subtotal	320	100.0%	83.12%
Non-merit Closures			
Complainant Elected Court Action	22	33.85%	5.71%
No Jurisdiction	0	0.00%	0.00%
Complaint Withdrawn	10	15.38%	2.60%
Complainant Not Available	7	10.77%	1.82%
Complainant Failed to Cooperate	24	36.92%	6.23%
Other Agency Investigated	1	1.54%	0.26%
Administratively Closed	1	1.54%	0.26%
No Significant Relief Available	<u>0</u>	<u>0.00%</u>	<u>0.00%</u>
Subtotal	65	100.0%	16.88%

Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

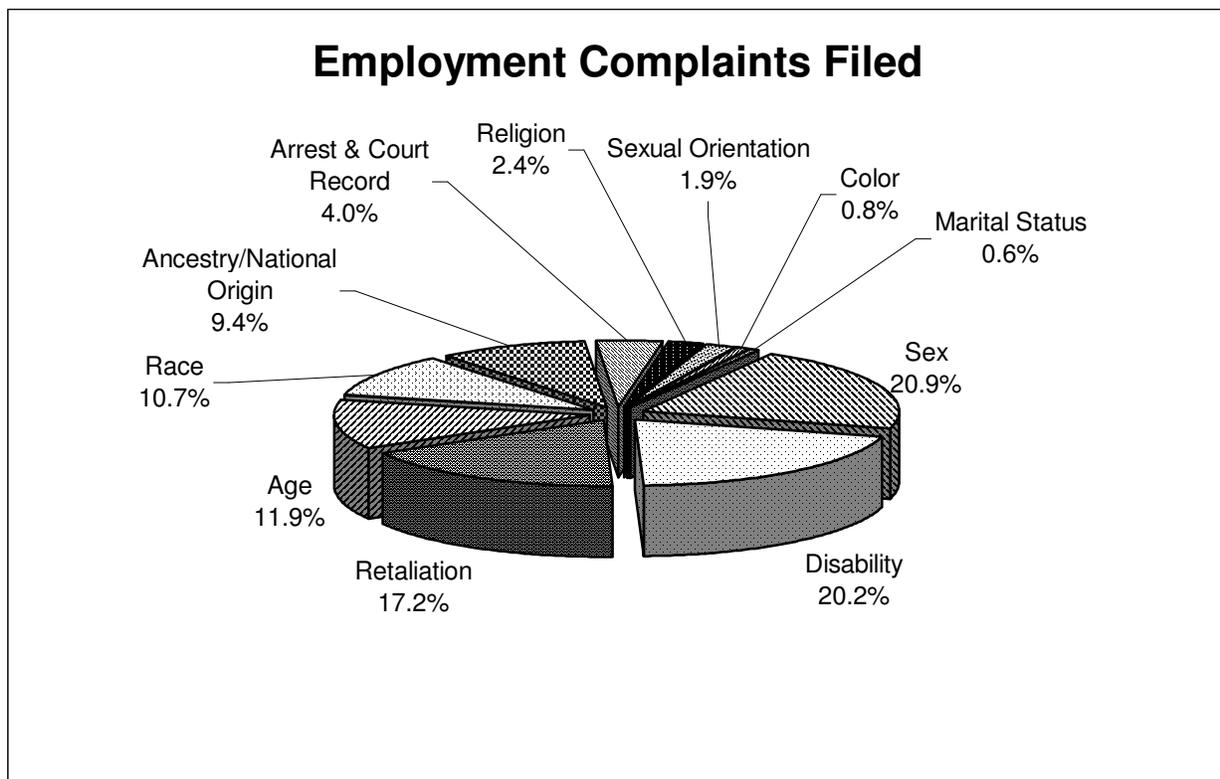
The HCRC has a work-share agreement with EEOC. Where there is concurrent jurisdiction, a case is filed with both agencies, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 530 employment cases were accepted by the HCRC. HCRC was the intake agency for 280 of these cases, and dual-filed another 250 cases originating with EEOC. Of the HCRC-originated cases, 80.3% were also filed with EEOC.

Of the 530 employment cases accepted in FY 2004-2005, sex was the basis cited most often, with 111 cases, accounting for 20.9% of all employment discrimination cases. Within the sex category, 41 cases alleged sexual harassment (36.9% of all sex cases) and 23 cases were based on pregnancy (20.7% of all sex cases).

Disability was the second most common basis with 107 cases, representing 20.2% of all employment cases. Retaliatory conduct was next with 91 cases, representing 17.2% of accepted employment cases, followed by age discrimination with 63 cases (11.9%), and race discrimination with 57 cases (10.7%).

There were 50 cases based on ancestry/national origin discrimination (9.4%); 21 cases based on arrest & court record (4.0%); 13 cases based on religion (2.4%); 10 cases based on sexual orientation (1.9%); 4 cases based on color (.8%); and 3 cases based on marital status (.6%). There were no cases based on National Guard participation and there were no cases based on child support obligations.

The case closure period averaged 545 days for the 341 employment cases that were closed (or caused) by HCRC investigators during FY 2004-2005.

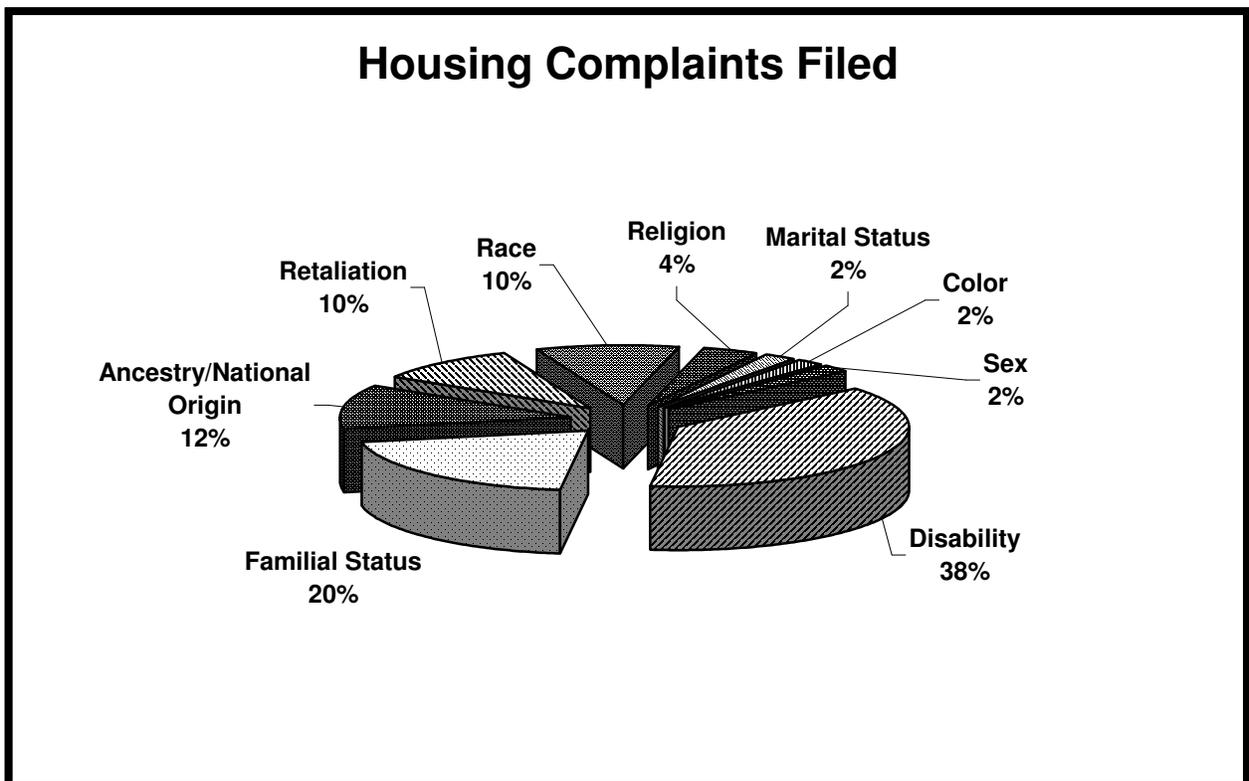


Housing Cases

H.R.S. Chapter 515 is Hawai'i's fair housing law. It prohibits discriminatory housing practices based on race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

The HCRC has a work-share agreement with the U.S. Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives regarding unlawful discrimination in real estate transactions in Hawai'i to the HCRC for investigation.

During FY 2004-2005, the HCRC accepted 50 cases of housing discrimination. There were 19 cases based on disability status (38%); followed by 10 cases based on familial status (20%); 6 cases based on ancestry/national origin (12%); 5 cases alleging retaliatory conduct (10%); 5 cases based on race (10%); 2 cases based on religion (4%); 1 case based on sex (2%); 1 case based on marital status (2%); 1 case based on color (2%). Housing case closures averaged 228 days for the 46 cases closed (or caused) during FY 2004-2005.

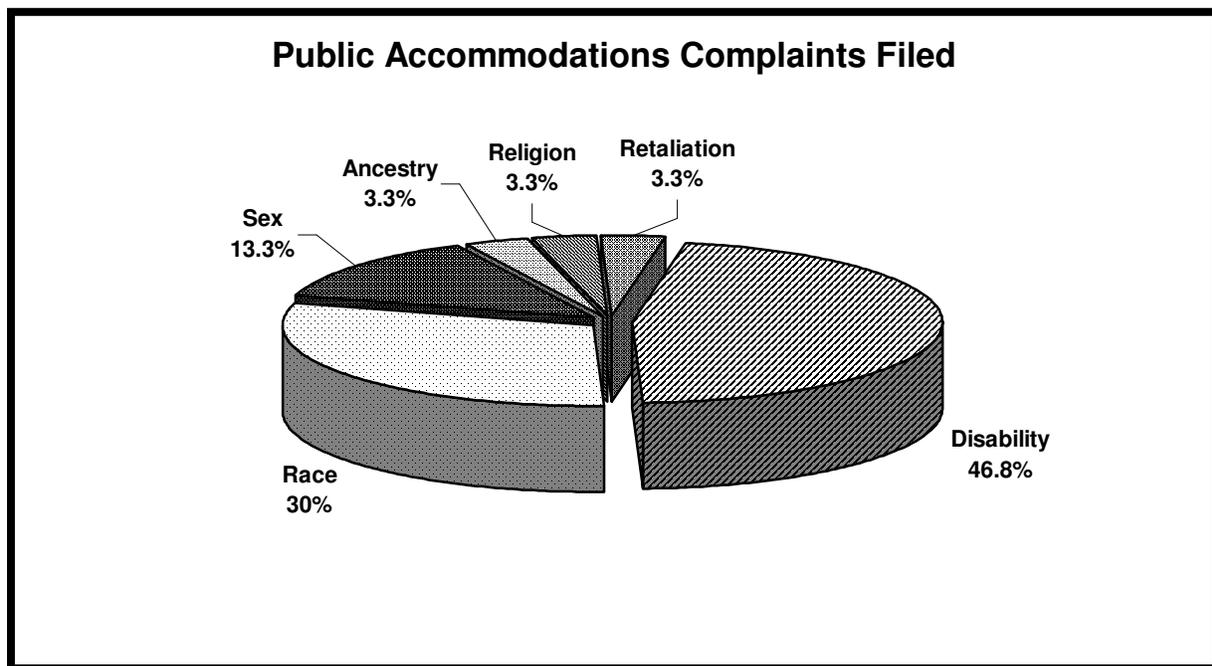


Public Accommodations Cases

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny, or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 30 new cases of public accommodations discrimination were accepted. There were 14 cases based on disability discrimination, accounting for 46.8% of all accommodations cases; 9 cases alleging race discrimination (30%); 4 cases based on sex discrimination (13.3%); 1 case based on ancestry (3.3%); 1 case based on religion (3.3%); and 1 case based on retaliation (3.3%). There were no cases based on color.

Public accommodations case closures averaged 657 days for the 16 cases closed (or caused) during FY 2004-2005.



Access to State & State-Funded Services Cases

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance, from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

During the fiscal year, there were 2 cases filed under § 368-1.5. 2 cases were closed during FY 2004-2005. Access to state and state-funded services case closures averaged 577 days for the 2 cases closed (or caused) during FY 2004-2005.

Cause Cases

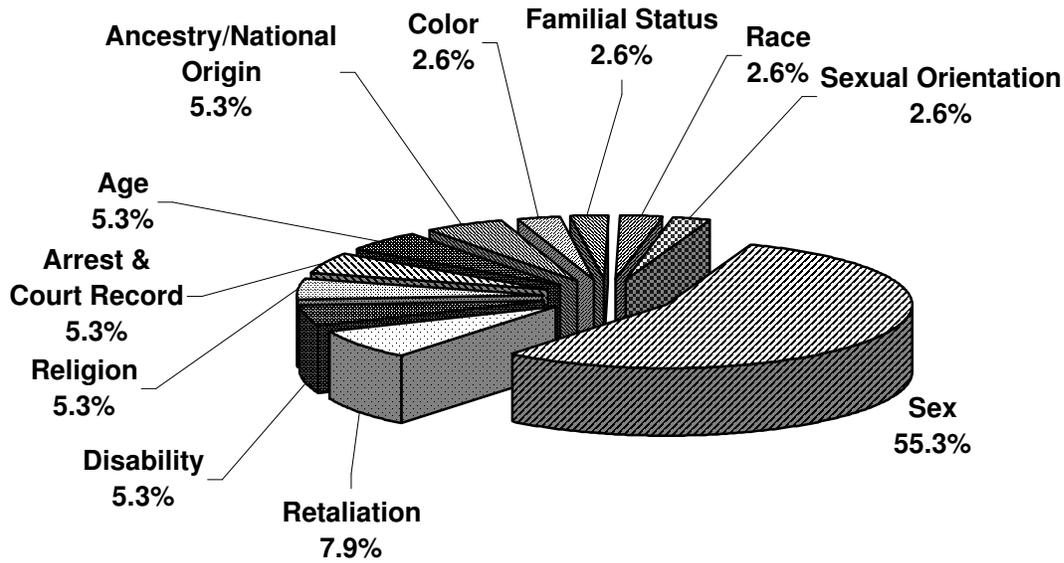
When the investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2004-2005, 38 recommendations for cause determinations were brought forward for legal action. Of these cases, 32 (84.2%) were employment cases, 4 (10.5%) were housing cases, and 2 (5.3%) were public accommodations cases.

Of the 38 investigations where the result was a cause recommendation, 21 involved discrimination on

the basis of sex (55.2%), 3 involved retaliation (7.9%), 2 involved discrimination due to arrest and court record (5.3%), 2 investigations involved age (5.3%), 2 investigations involved discrimination due to disability (5.3%), 2 investigations involved ancestry/national origin (5.3%), 2 investigations involved religion (5.3%), 1 investigations involved familial status (2.6%), 1 investigation involved race (2.6%), 1 investigation involved color (2.6%), 1 investigation involved sexual orientation (2.6%).

During FY 2004-2005, enforcement attorneys closed 18 cases, and 16 of these cases (88.9%) were negotiated settlements.

Cause Determinations



CASE SETTLEMENTS

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2004-2005 the total monetary relief obtained through settlements reached new highs. In the 18 settlements obtained by HCRC attorneys in cases with a finding of reasonable cause, the monetary relief obtained for parties through conciliation, including cases resolved through mediation, totaled \$308,725. In the 51 cases settled prior to an investigative finding, monetary relief exceeded \$300,000. This figure includes both pre-determination settlements obtained through HCRC investigators (\$22,500) and investigative settlements obtained through the HCRC Mediation program (\$313,750).

In addition to monetary relief, significant affirmative relief was also obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely include various types of affirmative relief, including developing and implementing anti-discrimination policies, employee and supervisor training on anti-discrimination policies, posting policies, and publishing notices informing the public of HCRC's role in enforcing state anti-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2004-2005, there were complainants who received letters of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases are resolved when an employer, housing provider, or public accommodation corrects an unlawful discriminatory policy or practice after notice of the violation. During FY 2004-2005, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following descriptions are illustrative of the HCRC cases that were resolved through conciliation or mediation and the relief that was obtained during FY 2004-2005:

- In separate complaints involving sexual harassment against a common employer, the complaints were settled for payment of \$80,000 to each complainant and affirmative relief, including training for the employer's staff in compliance with non-discrimination policies.
- A complainant alleged she was terminated because she pregnant. The settlement included payment of \$35,000 to the Complainant, adoption of anti-discrimination employment policies in compliance with Chapter 378, and training for the employer's staff in compliance with such non-discrimination policies.
- In a case alleging sexual harassment, settlement included payment in the sum of \$12,000, adoption of anti-discrimination employment policies in compliance with Chapter 378, and training for the employer's staff in compliance with such non-discrimination policies.
- In a public accommodations case alleging sexual harassment against a customer, a settlement resulted in the Complainant receiving \$8,000. The employer also adopted a written non-discrimination policy and training.
- A housing case alleging refusal to rent resulted in a settlement of \$4,000 to the complainants.

HCRC Warning Letters

In an effort to prevent future or recurring problems, the HCRC provides respondents with "warning letters" advising them of unlawful or potentially unlawful practices that the HCRC discovers during the course of its investigation of other claims against the respondent. In instances where the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed but the HCRC investigator finds evidence of other unlawful practices, the investigator will advise the respondent of the potential violations and provide information on how they can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

CASE DECISIONS

Contested Case Hearings

During FY 2004-2005, four cases (three involving sex/pregnancy discrimination and one involving arrest and court record) were docketed for hearing and all were settled.

Litigation and Court Rulings

Native Hawaiian Rights

In Doe v. Kamehameha Schools, Civ. No. 03-00316-ACK, the HCRC filed an amicus brief supporting the Kamehameha Schools' petition for rehearing en banc before the Ninth Circuit Court of Appeals. The petition was filed after a three judge panel ruled that its admissions policy violated 42 U.S.C. §1981, a federal law against racial discrimination in making contracts.

The HCRC brief argued that the case should be reheard because Native Hawaiians are an indigenous sovereign people and thus the admissions policy favoring native Hawaiians is a political classification rather than a racial classification. The unlawful overthrow of the Hawaiian Kingdom, with the support of the United States government, took away the sovereignty of Native Hawaiians. To make amends, Congress has recognized the special political status of Native Hawaiians in the Apology Resolution of 1993 and passed numerous laws to specifically help Native Hawaiians in homesteading, education, and health care. This shows that Native Hawaiians constitute a distinct political classification, not a racial one. Because the Kamehameha Schools admissions policy is designed to rehabilitate a sovereign people, it does not violate federal law.

The HCRC brief also argued that civil rights laws designed to address the legacy of slavery should not be used to overturn educational programs designed to help an indigenous sovereign people. In 1991 and 1993, the HCRC held public hearings on civil rights and issued a statement that Native Hawaiian rights were based on a political classification rather than a racial one. Consistent with this policy statement, the HCRC submitted its amicus brief to help the Ninth Circuit resolve this complex issue.

Sex-differentiated Dress Codes

The HCRC filed an amicus brief in support of an employee in a rehearing en banc challenging the Ninth Circuit's decision in Jespersen v. Harrah's Operating Company, Inc., 392 F.3d 1076 (9th Cir. 2004), which allowed an employer to fire a female bartender for not wearing makeup. Despite the fact that the employee received good performance reviews and many customer compliments, the Court said she was not discriminated against on the basis of sex when only women had to wear make up in order to keep their jobs.

The HCRC brief argued that an employer's policy requiring only women to wear make up was a form of sexual stereotyping that constituted sex discrimination. Terminating a person because of non-conformity with an employer's stereotypes about the proper behavior or dress of that person's sex or gender is a form of sex discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that a female candidate for partnership was subject to sex discrimination when the partners rejected her because they felt she did not act femininely, did not wear make up, and needed to take a charm school course. The logic of Price Waterhouse should be applied to the Jespersen case to determine if sex discrimination in the form of sexual stereotyping occurred when she was fired for not wearing make up.

LEGISLATION

The 2005 Legislature passed several bills related to civil rights. HB No. 1305, HD 1 amended the employment discrimination law to prohibit employers from discriminating on the basis of gender by paying lower wages to an employee of the opposite sex for equal work. It contains exceptions for compensation based on a seniority system, merit system, a system that measures earnings by quantity or quality of production, a bona fide occupational qualification, or a differential based on any other permissible factor

other than sex. The bill also establishes a pay equity task force to review relevant information and make recommendations for funds or actions to correct gender-based pay inequities for public employees. The bill became law as Act 35 without the Governor's signature.

HB 1715, SD1 amended the housing discrimination law to prohibit discrimination on the basis of sexual orientation and gender identity or expression, and to prohibit blockbusting on the basis of gender identity or expression, sexual orientation and familial status. The bill became law as Act 214 when it was signed by the Governor.

APPENDIX

Overview

The Hawaii Civil Rights Commission (HCRC) was established under Act 219, L. 1988, and Acts 386 and 387, L. 1989.

The HCRC's enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex, sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. Certain bases are not protected under all laws under HCRC jurisdiction.

The HCRC exercises jurisdiction over Hawaii's 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). Under its statutory mandate, the HCRC receives, investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state's discrimination laws.

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. The HCRC has a staff of twenty-nine (29) persons who are divided into separate enforcement and adjudication sections.

Administrative Procedure

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination¹ because of a "protected basis,"² and,
- 2) The unlawful discrimination occurred within the previous 180 days.³

After a complaint is filed with HCRC, in appropriate cases, the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. HCRC investigators favor neither party, and gather evidence to allow the Executive Director to make a determination in each case. As appropriate, the HCRC investigator collects, reviews, and analyzes documents, and contacts and interviews witnesses. Some witnesses questioned may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.⁴ If conciliation is

unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complainant before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present its case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.⁵

The HCRC enforcement and administrative process is more cost effective than litigation in court. It provides for the investigation of complaints and access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-jurisdictional or non-meritorious complaints, or with complaints that can be closed or settled in HCRC's administrative process. In fact, the great majority of complaints filed with HCRC are resolved or disposed of without resort to the courts.⁶

Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents – in Hawai'i and across the United States -- provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under by civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

¹ "Unlawful discrimination" may occur in any of the following ways:

- a. Disparate Treatment – This is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a "protected basis." Examples of disparate (unequal) treatment include: firing an employee because of their race, or age, or because a female is pregnant; refusing to serve a person because of race or disability; refusing to rent to a person because of race; or refusing to rent to a family because they have young children.
- b. Reasonable Accommodation – This is the second most common way that discrimination appears; it occurs when an individual is denied a "reasonable accommodation" designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing impaired customer into a taxicab because they are accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
- c. Disparate Impact -- This is the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test has a "disparate impact" on persons with a particular "protected basis." Examples of disparate impact include: a pre-employment test that includes a number of questions that are not job related but have the effect of disqualifying a large number women, or men, or any other protected basis.

² "Protected basis" is the criteria that it is unlawful for a respondent to discriminate upon. Protected basis vary depending on the statute involved:

- a. State Funded Services (Chapter 368, H.R.S.) The only protected basis is disability.

- b. Employment (Chapter 378, Part I, H.R.S.) The protected basis that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.
- c. Public Accommodations (Chapter 489, H.R.S.) The protected basis that a public accommodation may not discriminate on are: race, sex, color, religion, ancestry, or disability.
- d. Housing (Chapter 515, H.R.S.) The protected basis that an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate on are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

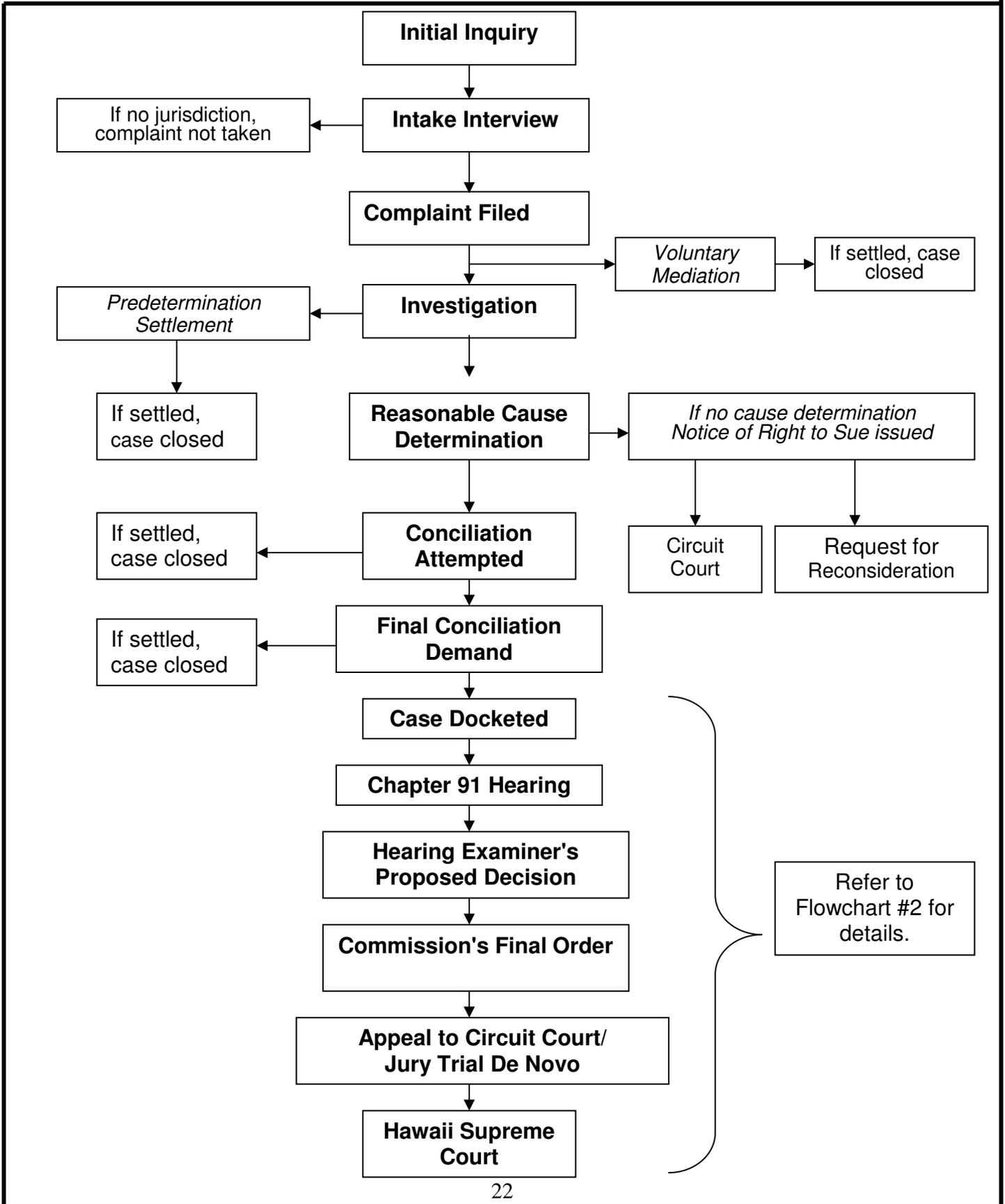
³ Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

⁴ During FY 2004-2005, of all complaints closed (385), 16.88% (65) were closed on the basis of the complainant electing court action or other administrative closure. The remaining cases (320) were closed on the basis of a completed investigation or a pre-determination settlement: in 78.44% (251) the Executive Director found no cause and dismissed the complaint; in 5.63% (18) the case was resolved through settlement or litigation by HCRC enforcement attorney after the issuance of a notice of cause; and 15.9% (51) were settled prior to a cause determination.

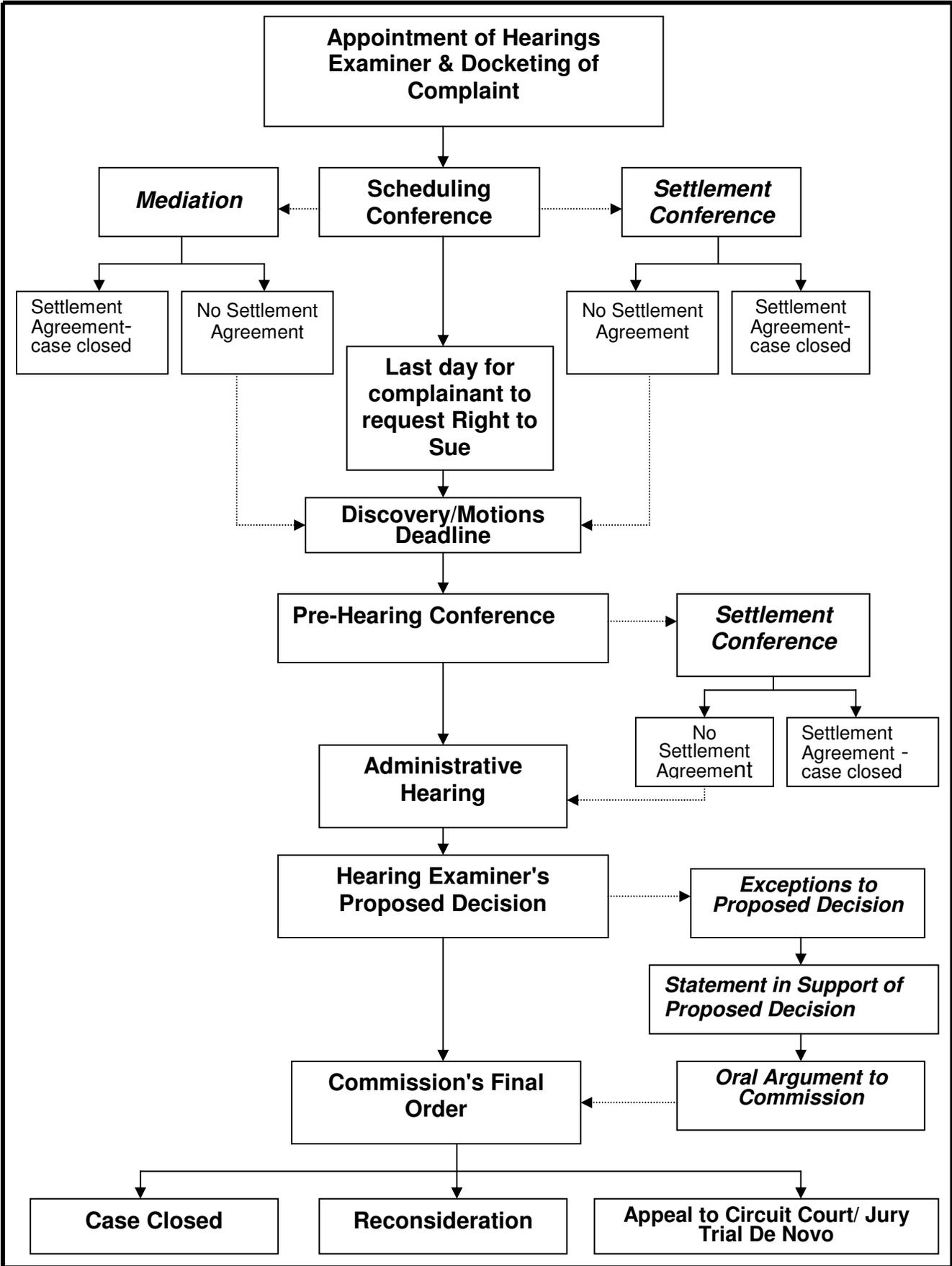
⁵ The HCRC administrative procedure and circuit court appeal is illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllynn Sims, et. al.*, No. 24485, June 18, 2003, the Hawai`i Supreme Court held that “a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC.”

⁶ HCRC case dispositions are illustrated in Flowchart # 2.

**HCRC Procedural
Flowchart #1**



**HCRC Contested
Case Flowchart #2**



HCRC COMMISSIONERS

Coral Wong Pietsch Chair, (Term 2003-2007)

Coral Wong Pietsch is the Senior Civilian Attorney for the U.S. Army Pacific. In this position Ms. Pietsch oversees the personnel and labor law practice at Headquarters, U.S. Army Pacific Command, as well as the ethics program and the environmental law program. She is also responsible for providing advice and guidance on international law issues in the U.S. Army Pacific Command. Ms. Pietsch is a member of the U.S. Army Reserves. She is the first female general in the 226-year history of the U.S. Army Judge Advocate General Corps, and first Asian American female to reach the rank of Brigadier General in the Army. From 1986 to 1991, she served as Labor Counselor for the U.S. Army Support Command Hawai'i, and was responsible for providing training to managers and supervisors on Title VII, the Rehabilitation Act, and sexual harassment.

Lisa A. Wong Commissioner, (Term 2003-2007)

Lisa Wong was born in Honolulu, Hawai'i and received her Bachelor of Business Administration, Personnel and Industrial Relations, from the University of Hawai'i. Ms. Wong founded the University of Hawai'i Society of Human Resources Student Chapter. She has been a human resources professional for 34 years, responsible for employee relations, equal employment opportunity programs, affirmative action programs, management and supervisory training, and diversity and compliance programs. Ms. Wong is currently the Human Resources Manager for the Hawai'i Convention Center. She previously served as human resources manager for the Hawaii division of Affiliated Computer Services, Inc.

Ms. Wong is also Chair of the Society of Human Resources Management Annual State Conference, which provides training to human resources professionals, executives, managers, supervisors and entrepreneurs in such areas as discrimination, sexual harassment, diversity, and dispute resolution. She has been active in numerous organizations and volunteer projects, including the Associated Chinese University Women, Honolulu Chinese Jaycees, Aloha United Way, Junior Achievement, Hawaii Medical Fellowship Foundation, Hawaii Bone Marrow Registry, and the Chinese Chamber of Commerce.

Roger Daniel Rizzo Commissioner, (Term 2003-2009)

Roger Rizzo attended 10 years of college and university and obtained three different degrees: a Bachelor's Degree in International Relations, a Master's Degree in Business Administration specializing in Finance, and a Doctorate in Jurisprudence. He worked extensively as a civil trial attorney and successfully tried over 25 lengthy cases to verdict.

Currently, he does almost exclusively volunteer work. Previously, he worked with the Maui Health Department Director and authored a bill for the Hawai'i Senate and House of Representatives to regulate tobacco. Other organizations which he has done or is doing volunteer work for include: the Maui Health Department, the Community Clinic of Maui, the Teach Me To Live Organization, the Self Help Housing Corporation of Hawaii, the Lahaina Salvation Army, the Maria Lanakila Catholic Church, the Lahaina Holy Innocents Church, the Lahaina Church of Jesus Christ of Latter Day Saints, and S.C.O.R.E.

Sara Banks Commissioner, (Term 2004-2008)

Raised on the island of O'ahu, Sara Banks is a graduate of Kailua High school. She has an undergraduate degree in broadcast communication from San Francisco State University. Ms. Banks remained in the Bay area working in educational media before achieving a Masters of Fine Arts in Film at UCLA. After returning to Hawai'i, Ms. Banks lived on Kaua'i and managed a restaurant at the Kauai Hilton. She transferred to the Hilton Hawaiian Village and was in charge of the training department,

overseeing the training for 1800 union employees and more than 300 managers. She then worked for three years as a volunteer coordinator for the Life Foundation, the AIDS service organization for O'ahu. She left the Life Foundation to become part owner of Wahine Builders, working both in the construction and personnel aspects of this company. Ms. Banks designed and implemented a pre-apprentice construction training program for incarcerated women.

Throughout her management and personnel career Ms. Banks has pursued her passion for film and video. Since the early seventies she has produced news magazine shows for public access, documentaries, PSA's and training videos for Hawaii's businesses. She currently works for the Center on Disability Studies under the College of Education at the University of Hawai'i producing a series of videos for a state-wide sixth grade science curriculum which weaves hard science with Native Hawaiian values, culture and accomplishments.

Leslie Alan Ueoka
Commissioner, (Term 2005-2008)

Les Ueoka is Assistant General Counsel for Hawaiian Telcom. Prior to that, he was in private practice. He is a trustee for the 442nd Regimental Combat Team Foundation and a member of the Sons and Daughters Chapter of the 442nd Veterans Club. He also serves on the Metro and Community Boards of the American Heart Association of Hawaii and is a member of the Association's Oahu Heart Walk Executive Committee.

Born and raised in Honolulu, Hawaii, Mr. Ueoka graduated from Iolani School and received his BA degree from Northwestern University in Evanston, Illinois, and his Doctorate in Jurisprudence degree from Washington University in St. Louis, Missouri.

HCRC STAFF

The HCRC staff consists of 29 individuals in the following positions:

- Executive Director
- Enforcement Staff:
 - Deputy Executive Director
 - Enforcement Attorneys (4)
 - Administrative Services Assistant
 - Investigator-Supervisors V-VI (3)
 - Investigator III-IV (10)
 - Secretary III
 - Legal Stenographer I
 - Clerk Typists (4)
- Adjudication Staff:
 - Chief Counsel
 - Hearings Examiner
 - Secretary II