



# HAWAI'I CIVIL RIGHTS COMMISSION

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## MINUTES

Hawai'i Civil Rights Commission Office

August 22, 2013

3:30 p.m.

Present: Linda Krieger, Raymund Liongson, Kim Coco Iwamoto, Wally Fukunaga, and Artemio Baxa, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff.

Dan Purcell, Public/Guest.

Chair Linda Krieger called the meeting to order.

### Agenda Amendment

**A motion was approved to amend the agenda by adding an agenda item to address a possible special legislative session and marriage equality legislation.** The motion to amend was based on the unforeseen likelihood of the convening of a special session which had just been reported in the media. **(m/s/p Iwamoto/Baxa; all in favor).**

### Approval of Minutes

The minutes of the June 12, 2013, meeting were approved. On review of the draft minutes, Commissioner Kim Coco Iwamoto asked for the minutes to more completely reflect her question regarding a request for extension of time to investigate open cases, noting that she asked what would happen if the requested extension were not approved, *or if only a portion or percentage were approved.* **The minutes were approved with that revision. (m/s/p Fukunaga/ Iwamoto; 3-0 in favor, Liongson and Baxa abstain).**

### Special Session on Marriage Equality Legislation

Executive Director (ED) Bill Hoshijo and Chief Counsel (CC) Livia Wang discussed reports of a possible special session to consider marriage equality legislation. While Governor Abercrombie had not yet called the legislature into special session, they suggested that the HCRC should be prepared to testify and offer information and assistance on any proposed legislation.

A motion was initially offered by Commissioner Wally Fukunaga, to reaffirm the position taken on H.B. No. 1109 and S.B. No. 1369 during the 2013 regular session, and to take a consistent position on marriage equality legislation going forward. **The position taken in the motion was clarified by Chair Krieger as: support for same-sex marriage; and, support for express statutory provision that if a religious organization operates a place of public accommodation, it is not exempt from HRS Chapter 489.**

**Commissioner Iwamoto made a friendly amendment to the motion, to expressly authorize staff to issue a press release or other public statement of the Commission position if deemed appropriate.**

There was discussion regarding the motion. Commissioner Fukunaga asked what makes a facility a “public accommodation”. Chair Krieger referred to the HRS Chapter 489 statutory definition. Commissioner Iwamoto added that entering the “stream of commerce” triggered public accommodations coverage.

Chair Krieger commented that the religious exemption language in the 2013 regular session bills regarding clergy and religious facilities, with respect to public accommodations law, was similar to that found in the civil unions law.

Commissioner Fukunaga commented that churches will have to consider whether they want the income from facility rental if that makes their facility a place of public accommodation.

Chair Krieger recognized a member of the public who introduced himself as Dan Purcell. Mr. Purcell asked if it was the appropriate time for public comment on this agenda item, pursuant to the open meetings law. After some discussion, Chair Krieger invited Mr. Purcell to offer his comments. Mr. Purcell suggested that the issues were similar to historical treatment of African Americans, suggesting you could substitute “Black” for “Gay”.

**The Commissioners approved the motion w/ the amendment offered by Commissioner Iwamoto. (m/s/p Fukunaga/Iwamoto; all in favor).**

#### **Chief Counsel’s Report**

Chief Counsel (CC) Livia Wang discussed and responded to the testimony presented at the July 16, 2013, public hearing on the proposed housing rule amendments regarding filing civil actions, assistance animals, and tight living exemptions.

1. definition of “assistance animal” in HAR § 12-46-302

Testimony: The definition of “assistance animal” is vague because it refers to “service animals”, “therapy animals”, “comfort animals” and “emotional support animals” without defining those terms. In addition, the definition does not require the animal to be trained, certified or necessary to ameliorate the effects of a disability, and does not limit the breed, size or number of animals that can be permitted.

Response: The definition tracks the definition and examples used in the recent HUD guidelines, the HUD Handbook regarding Occupancy Requirements of Subsidized Multifamily Housing Programs, and the preamble to the HUD regulations on Pet Ownership for the Elderly and Persons With Disabilities. Assistance animals are not required to be trained, and there is no existing state or national certification system for assistance animals. The definition does state that the animal must be needed to perform disability related work, services, tasks or emotional support for the benefit of a person with a disability. In addition, while there is no limit on the breed, size or number of the animals permitted, proposed rule 12-46-306(a)(1) allows housing providers to impose reasonable restrictions on the assistance animal(s).

**The Commissioners approved the response. (m/s/p Iwamoto/Liongson; all in favor).**

2. definition of “direct threat” in HAR § 12-46-302

Testimony: The definition of “direct threat” does not include substantial physical damage to property. It also contains the phrase “that cannot be eliminated or *reduced* by reasonable accommodation”, which suggests that merely reducing the threat in any way precludes a landlord from removing the threat.

Response: The defense of “direct threat to the health and safety of others” is a separate defense from the defense of “causing substantial physical damage to the property of others” (see proposed rule 12-46-318(c)(1) and (2)). Therefore the definition of “direct threat” does not include “causing substantial physical damage to the property of others”.

The HUD guidelines refer both to “mitigating” and “reducing” a direct threat by reasonable accommodation. Because the direct threat defense in proposed rule 12-36-318(c) (1) refers to mitigated threats, the language in the definition of “direct threat” has been revised to use the term “mitigated” instead of “reduced” to be consistent with that section.

**The Commissioners approved the response. (m/s/p Iwamoto/Fukunaga; all in favor).**

3. interactive process and verifying information:

Testimony: The proposed amendments to HAR § 12-46-306 prohibit inquiries as to the diagnosis, nature or severity of a person’s disability. This hinders the interactive process because it prevents a housing provider from determining whether the accommodation is necessary. Housing providers should be permitted to request information from a health care provider identifying the diagnosis or the disability, the symptoms or effects of that disability, and how the animal alleviates those symptoms or effects. The proposed rule forces housing providers to allow all animals as long as the occupant can secure a doctor’s note.

Response: Again, the section tracks the HUD guidelines which state that a housing provider may not ask an applicant or tenant to provide access to medical records or medical providers, or provide detailed or extensive information or documentation of a person’s physical or mental impairments. Unlike employment situations where an employer usually provides the reasonable accommodation and needs to know the diagnosis, nature and severity of the disability, it is not necessary for a housing provider to have this information in granting a request for an assistance animal that is owned by a person with a disability for use primarily in his or her housing unit. The person’s health care provider is in the best position to determine whether the person has a disability and whether there is a disability-related need for the assistance animal. Under the proposed rule amendments, the housing provider can ask for information verifying the disability and identifying the work, tasks, assistance or service the animal performs for the benefit of the person with a disability, or the emotional support the animal provides to alleviate one or more identified symptoms of the person’s disability. This is reflected more clearly in the revisions to the proposed rule amendments.

The proposed rules do not force housing providers to allow all assistance animals pursuant to doctors’ notes. Pursuant to proposed rule 12-46-318(c), the assistance animal can be denied or excluded if it: 1) poses a direct threat a direct threat to the health or safety of others; 2) causes substantial property damage that cannot be mitigated by a reasonable accommodation; 3) poses undue financial or administrative burdens; or 4) fundamentally alters the nature of the operations of the housing provider. In addition, housing providers may impose reasonable restrictions on the use of the assistance animal.

Discussion: The Commissioners expressed concerns over the language in the proposed amendments to HAR §12-46-306, specifically a concern that a housing provider should not be able to obtain protected health information; if the rule prohibits requests for medical records and inquiries into diagnoses, nature or severity of a person's disability, they felt that it should also not allow identification of symptoms of the disability, but should only allow verification that the person has a disability and an assistance animal is needed to alleviate one or more symptoms of the person's disability.

The Commissioners asked CC Wang if the HCRC rule could differ from the HUD guidelines in this regard, and CC Wang confirmed that HCRC rules could be more protective than HUD guidelines.

The Commissioners noted that both HAR 12-46-306(A)(1) and the immediately following example should be revised in order to effect the suggested change, as follows:

**"§12-46-306 Discrimination on the basis of disability.** (a) It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson:

- (1) To refuse to engage in a real estate transaction or to deny equal opportunity to use and enjoy a housing accommodation with a person with a disability because the person uses ~~[the services of a guide dog, or signal dog, or service animal, provided that]~~ an assistance animal. If the disability is not readily apparent, an owner or other person engaging in a real estate transaction may request information that verifies that the person has a disability, defined as a physical or mental impairment that substantially limits a major life activity. However, an owner or other person engaging in a real estate transaction may not request medical records or access to health care providers, and may not inquire as to the diagnosis, nature or severity of the person's disability. If the disability-related need for an assistance animal is not readily apparent, an owner or other person engaging in a real estate transaction may request [information that that verifies] verification that the assistance animal is needed to alleviate one or more [identified] symptoms of the person's disability. [Verifying information] Verification may be provided by a letter or other communication from the person's treating health care professional, mental health professional, or social worker. [r]Reasonable restrictions or prohibitions may be imposed upon the person with a disability regarding excessive noise or other problems caused by those animals including, but not limited to:
  - (A) Observing applicable laws, including leash laws and pick-up laws;
  - (B) Assuming responsibility for damage caused by the [dog-or] animal;
  - (C) Cleaning the housing unit upon vacating, by fumigation, deodorizing, professional carpet cleaning, or other appropriate methods; [or]
  - (D) Cleaning the animal's waste;
  - (E) Having the animal licensed with the county, if licensing is required by the county;
  - (F) Having the animal vaccinated with documentation of the vaccination;
  - (G) Having the animal under the control of the animal's owner or handler by use of harness, leash, tether, cage, carrier, or other physical control in common areas. If the nature of the person's disability makes physical control impracticable, or if physical control would interfere with the assistance that the animal provides, the owner or other person engaging in a real estate transaction may require that the animal be otherwise under the control of the animal's owner or handler by voice



control, signals, or other effective means; or  
[(D)] (H) Any other reasonable restriction that would leave the housing accommodation in the condition it was in prior to the occupancy of the tenant with a disability, except for reasonable wear and tear;

Example:

Sarah, a condominium owner with an anxiety disorder, asks for an exception to her condominium association's "no pets" rule in order to keep an emotional support rabbit in her unit. Because Sarah's disability and need for an emotional support animal are not readily apparent, the condominium association may ask Sarah to provide [information verifying] verification of her disability and the disability-related need for the rabbit. Sarah provides a letter from her treating psychologist stating that Sarah has an impairment that substantially limits a major life activity and that the rabbit is needed to prevent or reduce [her panic attacks] the symptoms of that impairment. The accommodation is therefore needed to afford Sarah an equal opportunity to use and enjoy her condominium and is reasonable. The association must allow the rabbit as an accommodation but may impose reasonable restrictions on its use."

**With these revisions to HAR 12-46-306, the Commissioners approved the response. (m/s/p Krieger/Iwamoto; all in favor).**

4. direct threat defense:

Testimony: The example used to illustrate a "direct threat" involves an assistance animal that bites a guide dog. This is not a good example because it implicates other statutes and county ordinances, as well as liability insurance issues.

Response: The example illustrates a probable common example of how an assistance animal would pose a direct threat to the health and safety of others. If Spot was leashed and Michael did not recklessly allow Spot to bite the guide dog, and the bite does not cause serious injury to the guide dog, there is no violation of the cited statutes and ordinances, and the direct threat can possibly be mitigated. If the bite results serious injury to the guide dog and Spot is seized and impounded, then the direct threat cannot be mitigated and the apartment manager could deny the use of Spot. In addition, if continuing to allow Spot on the premises would result in the loss of the apartment's liability insurance, then Spot's presence would pose an undue financial and/or administrative burden under 12-46-318(c)(3) and the apartment manager could deny the use of Spot on that basis. This last clarification is reflected in the revisions to the proposed rule amendments.

**The Commissioners approved the response. (m/s/p Fukunaga/Baxa; all in favor).**

CC Wang reported that there was no word on the *Lales* case pending before the Hawai'i Supreme Court.

She also reported that program for the October 29, 2013, annual HCRC public training had been finalized. Commissioner Liongson agreed to do the welcome and opening remarks, and Commissioner Iwamoto agreed to do the closing remarks.

**Executive Director's Report**

Deputy Executive Director (DED) Marcus Kawatachi presented an FY 2013 HCRC Mediation Program Year-End Summary.

**Summary & Details (FY 2013)**

Referrals:	59
Dispositions:	59
Settlements:	41
Non-agreements:	18
Settlement Rate:	69.5 %
Employment cases settled:	34
Non-employment cases settled:	7 (Public Accommodations)
Dual-filed (EEOC/HCRC) settlements:	28
State-only settlements:	13

**Primary Bases for Complaints Settled in Mediation**

Sex	14 (incl. 3 pregnancy and 4 sexual harassment cases)
Disability	9
Retaliation	4
Arrest & Court Record	3
Sexual Orientation	3
Age	3
Marital Status	2
Ancestry	1
Color	1
National Origin	1

**Dispositions by Mediation Center**

Mediation Center of the Pacific	23/32	(settlement rate 71.9 %)
Private Mediators	10/11	(settlement rate 90.9 %)
Mediation Services of Maui	4/7	(settlement rate 57.1 %)
West Hawaii Mediation Center	3/5	(settlement rate 60%)
Ku'ikahi Mediation Services (Hilo)	1/2	(settlement rate 50 %)
Kauai Economic Opportunity, Inc.	0/2	(settlement rate 0%)
<b>OVERALL</b>	<b>41/59</b>	<b>(settlement rate 69.5%)</b>

DED Kawatachi presented a data and production report showing caseload data through August 22, 2013.

As of August 22, 2013, the report showed 426 open cases, an decrease of 51 cases from the number reported as of June 11, 2013. Of those, 22 (5.2%) were filed in 2009, 48 (11.3%) filed in 2010, 50 (11.7%) filed in 2011, 134 (31.4%) in 2012, and 172 (40.4%) in 2013.

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

	2009	2010	2011	2012	2013	Total
Housing Cases	0	0	1	14	14	29
Intake Stage	0	2	4	42	136	184
Pending Assignment	14	39	35	63	17	168
Active Investigation	8	7	10	15	5	45
<b>TOTAL</b>	<b>22</b>	<b>48</b>	<b>50</b>	<b>134</b>	<b>172</b>	<b>426</b>

It was reported that: 24.2% of all investigation cases were 2 years old or older (from date of filing); 5.9% were over 18 months but less than 2 years old; 10.8% were over 12 months but less than 18 months old; 27.9% were over 6 months but less than 12 months old, and 31.2% were 6 months old or less.

ED Hoshijo suggested that the discussion of HCRC process be deferred until staff had time to meet with Chair Krieger as planned. Chair Krieger agreed, emphasizing the need to look at “choke points” in the process, mentioning the time cases spent pending investigation and in intake.

### **Legislation -2014 Session**

ED Hoshijo reported that staff was exploring the introduction of an administration bill to expressly allow the HCRC to hire a part-time hearings examiner or contract for hearing examiners. The Commissioners agreed that staff should go ahead and explore this further.

ED Hoshijo went over the HCRC’s FY 2015 supplemental budget request priorities. In the FB 2013-2015 biennium budget, the HCRC was successful in addressing a critical over-reliance on federal funding, shifting the means of funding for seven permanent positions that were partially or wholly federal funded to 100% state general funding. In its FY 2015 supplemental budget request, the HCRC’s highest priority would be to restore at least two of three permanent investigator positions that were abolished since 2008, restoring lost capacity.

Commissioner Iwamoto suggested that the HCRC should ask for what we need, not just for what we think we can get.

Commissioner Artemio Baxa agreed, adding that if there is a need for additional funding, prioritization is not the answer. He made the point that it bothers him that complaints filed in 2009 are still pending, stressing that “justice delayed is justice denied.”

ED Hoshijo agreed that loss of capacity has directly resulted in substantial increase in investigation case inventory and resulted in lengthy delays in investigation.

Commissioner Baxa said the ED needs help, cannot handle this alone, and that the Commissioners should play a role in going to the Governor and legislature. He suggested that they should be told that the HCRC cannot continue and would have to “nolle prosequere” cases if the problem is not addressed.

### **Old Business**

ED Hoshijo reported on the status *Cervelli v. Aloha Bed & Breakfast*. In this case, the HCRC had intervened as a plaintiff-intervenor. A plaintiff’s motion for summary judgment was granted. Defendant took an interlocutory appeal to the Intermediate Court of Appeals, and its opening brief was due on August 21, 2013.

### **Next Meeting**

The next meeting was scheduled for September 16, 2013, subject to polling of and confirmation by the Commissioners.

### **Adjournment**