

HAWAI'I CIVIL RIGHTS COMMISSION HEARINGS PROCEDURES FOR A RESPONDENT WITHOUT AN ATTORNEY REPRESENTATIVE

You have indicated that you will not be represented by an attorney during these proceedings. In order to help you understand and participate in the Hawai'i Civil Rights Commission's hearings process, the following is an overview of the hearing procedures and a brief explanation of your procedural rights and responsibilities.

NOTE: This document explains, but does not have the force or effect of Hawai'i statutes or rules. If there are any inconsistencies, the statutes and Hawai'i Administrative Rules (H.A.R.) will control.

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INTRODUCTION

As background information regarding the structure of the Hawai'i Civil Rights Commission's (HCRC) operations, the HCRC is divided into two separate and distinct sections: the **Enforcement Section**, overseen by the Executive Director, which receives, investigates, and prosecutes discrimination complaints; and the quasi-judicial **Adjudication Section**, which conducts administrative hearings in front of a hearings examiner, who conducts the hearing and issues proposed decisions that is submitted to the Commission at the conclusion of the contested case hearing. The Commission, made up of five (5) uncompensated volunteer commissioners, reviews the hearings examiner's proposed decision and the hearing record, and has the authority to render final orders and decisions, pursuant to Hawai'i Revised Statutes (H.R.S.) § 368-14. Final decisions issued by the Commission can then be appealed to circuit court under Hawai'i Administrative Rules (H.A.R.) § 12-46-39.

IMPORTANT -- Please make sure that all documents that you intend to file in a contested case are addressed to "**Hawai'i Civil Rights Commission - Adjudications**" or "**Hawai'i Civil Rights Commission - Hearings**" to ensure proper and timely filing. Sending documents addressed to the HCRC Enforcement Attorney will NOT result in the filing of the documents for the record of the case, as the Enforcement Attorney is NOT a part of the Adjudications Section that holds hearings for the Hawai'i Civil Rights Commission.

1. Right to Representation by an Attorney (H.A.R. § 12-46-22)

First, and most important, you have the right to be represented by your own attorney or a non-attorney representative. You will be responsible for paying your attorney. Although the hearings procedures are designed to allow non-attorneys to participate, a non-attorney may be at a disadvantage in regards to legal matters.

Additionally, the Executive Director of the Civil Rights Commission, who is responsible by law to present the case against you, will be represented by an Enforcement Attorney at the hearing. You are the "Respondent." Neither the Enforcement Attorney nor the Hearings Examiner can offer or provide legal advice to you during the course of the hearing.

However, the Hearings Examiner and Adjudications staff will try to answer any procedural questions you may have. If you choose not to retain an attorney, you will be responsible for presenting your own case.

2. Substantive and Procedural Rules of the Commission

In addition to the statutes which the Commission must follow, the Commission has issued procedural and substantive rules, in the Hawai'i Administrative Rules (H.A.R.). The procedural rules set forth the general duties and powers of the Commission and the hearings procedures. The procedural rules are Title 12, Chapter 46, subchapters 1-3. The substantive rules are Hawai'i Administrative Rules, Title 12, Chapter 46, subchapters 4-9, 20. Relevant statutes and administrative rules can be found in any state library or online here:

<https://labor.hawaii.gov/hcrc/find-a-law/>

You are required to abide by all rules, including service (H.A.R. § 12-46-28), and format of pleadings (H.A.R. § 12-46-27) (see also APPENDIX A for a sample caption), regardless of whether you are represented. Failure to follow the relevant rules may result in presumptions against you.

For example, you must mail a copy of everything you file with the Hearings Examiner to the Enforcement Attorney representing the Executive Director of the Hawai'i Civil Rights Commission, and to any additional party. You must attach a certificate of service to any document you file with the Hearing Examiner. See APPENDIX B for a sample certificate of service. Documents which are not served on all other parties to the proceedings may not be accepted by the Hearing Examiner.

All filings must be in person, or by mail. Facsimile filings will not be accepted. **We are experimenting with electronic filing of documents via email**, and this can be discussed at the scheduling conference. See APPENDIX C and the flyer, "Electronic Filing Guidelines". If electronic filing is agreed upon, then it must be consistent.

PRE-HEARING PROCEDURES

1. Scheduling Conference (H.A.R. § 12-46-19)

Within 30 days after the appointment of a Hearings Examiner, you will receive a Notice of a scheduling conference, which will include the date, time, and place of the conference. The purpose of the scheduling conference is to define issues and discuss: 1) the hearing procedures; 2) anticipated motions and filing deadlines; 3) anticipated discovery and deadlines; 4) setting dates for the pre-hearing conference and hearing; 5) prospects for settlement; and 6) any other matters. The Notice will also state the requirements for the scheduling conference statement you will be required to submit to the Hearings Examiner and all other parties. The scheduling conference may be held in-person or via remote video conference (Zoom), and parties will be notified of the location in the Notice of scheduling conference.

If you cannot attend the scheduling conference or any other conference or hearing, contact the Hearings Examiner as soon as possible, as well as opposing counsel (the Executive Director's Enforcement Attorney). These dates can be changed only when there is enough advance notice so that the change of dates will not be unfair to the other parties. If you do request a change in date, please be prepared to explain why the change is needed.

2. Discovery (H.A.R. § 12-46-32(4))

Both parties are allowed to conduct "discovery" before a hearing. Discovery is a process by which the parties obtain relevant factual information and evidence from each other. Discovery may pertain to any matter which is relevant to the subject matter in the pending action, whether it relates to the claims against you or to your defenses. Discovery is done primarily through: 1) a demand for disclosure; 2) depositions; 3) interrogatories; 4) request for production of documents; or 5) requests for admissions. Discovery is explained more fully in the Hawai'i Rules of Civil Procedure (hereinafter "H.R.C.P.").

a. Demand for Disclosure (H.A.R. § Rule 12-46-41(a))

You can make a demand for disclosure on any other party, asking them to disclose: 1) the identity of all witnesses to be called by the party (including their addresses and phone numbers, if known); 2) the identity of all persons known by the party to have material knowledge relevant to the case; and 3) all documents to be introduced at the hearing.

Demands for disclosure are filed with the Hearings Examiner, with a copy served on the other party. Demands for disclosure are ongoing, and the party who receives a demand must disclose the information as soon as it is available. Information requested must be disclosed at least seven (7) days prior to the hearing. Otherwise, such evidence may not be permitted to be introduced at the hearing. However, all disclosure is subject to the dates set forth by the Hearings Examiner regarding scheduling.

b. Depositions (H.R.C.P. Rule 30)

Depositions are a process in which the parties question witnesses before a hearing. After the case has been docketed by the Hearings Examiner, any party may take the testimony of any person by deposition.

The party seeking to depose a person must give notice in writing to all the parties in the case. The notice must state the time and place for the deposition, and the name and address of each person to be examined, if known. If you want a party to bring documents, the notice of deposition must be accompanied by a request for production of documents. The attendance of non-party witnesses may be compelled by subpoena as described in subsection 4 of “Hearing Procedures”, below. See also APPENDIX D for a sample subpoena.

At the deposition, examination and cross-examination of witnesses may proceed as permitted at a court trial. Testimony shall be under oath, electronically recorded, or taken by a stenographer, and transcribed if requested by a party. If transcribed, a transcript of the deposition will be submitted to the person for review and changes. The deposition shall then be signed by the person.

c. Interrogatories to Parties (H.R.C.P. Rule 33)

Interrogatories are written questions you can ask other parties regarding any matter relevant to the case. You are also required to answer any written interrogatories served on you. Each party will be limited to sixty questions, pursuant to H.R.C.P. 33(a) unless leave for additional interrogatories is requested.

d. Request for Production of Documents (H.R.C.P. Rule 34)

A request for production of documents is a request to produce and to inspect and copy any documents, including writings, electronically stored information, drawings, graphs, charts, photographs, data compilations, or tangible things regarding any factual matter relevant to the case.

A request for production of documents may be served upon any party after docketing of the case by the Hearings Examiner. The request shall set forth the items to be inspected, describing each item with reasonable particularity. The request shall also specify a reasonable date, time, place, and manner of making the inspection, copying, testing, or sampling. Parties shall have 30 days to respond.

e. Request for Admissions (H.R.C.P. Rule 36)

A request for admissions is a set of written statements regarding facts, the application of law to fact, or the genuineness of any document to which a party must admit or deny. The party may admit or deny a statement or may admit only a part of the statement, specifying the part which is true and qualifying or denying the remainder. Answers to requests for admissions must be served on the other party within thirty days after receipt of the request, or the statement will be considered admitted.

f. Protective Orders; Motions to Compel (H.A.R. §§ 12-46-31, 12-46-32(9))

If you feel that any discovery request to you is unduly annoying, embarrassing, oppressive, or would be unduly burdensome or expensive to answer, you may request that the Hearings Examiner issue an order protecting you from the need to answer such questions or produce such documents.

In addition, if any party fails to answer your requested discovery, you may ask the Hearings Examiner for an order to compel compliance. The type and amount of discovery

anticipated by parties, and the deadlines for completing discovery, will be discussed at the scheduling conference.

3. Mediation or Settlement after Docketing

Parties may decide to resolve the dispute between themselves at any time during the process. After a case is docketed, parties are encouraged to continue settlement discussions. Parties may choose to seek out a private mediator who is paid for by one or both parties, or may decide to use the HCRC's in-house mediator, free of charge. If the parties would like the Adjudications section to secure a settlement judge after docketing (at no cost to the parties), please contact the Adjudications section for more information: (808) 586-8659.

4. Pre-Hearing Conference (H.A.R. § 12-46-42)

At least fifteen days before the hearing, you will receive a notice of hearing giving the date, time, and place of your hearing, and a notice of pre-hearing conference and order. The purpose of the pre-hearing conference is to: 1) clarify and/or simplify the issues; 2) reach agreement on facts, matters, or procedures, to the extent possible, which will help facilitate the hearing or resolve the issues in controversy; 3) exchange exhibit lists; and 4) explore the possibilities of settlement. The pre-hearing conference notice will also set forth the requirements for a pre-hearing conference statement you may be required to submit.

HEARING PROCEDURES

1. The Burden and Standard of Proof (H.A.R. § 12-46-36(b))

The Executive Director has the burden of proving the case against you by a preponderance of the evidence. This means that more than fifty percent (50%) of the reliable evidence presented at the hearing must support the Executive Director's position. If the Executive Director is not able to prove the case by a preponderance of the evidence, the case may be dismissed at the end of the Executive Director's presentation, or a decision and order will be made in your favor after all of the evidence is presented.

2. Evidence at the Hearing (H.A.R. § 12-46-36)

Evidence is the information which you want to have considered as part of your case to support your position. Evidence can be presented through the testimony of witnesses and/or through the introduction of documents or other exhibits. The rules for the introduction of evidence for an administrative hearing are more relaxed than the rules for the introduction of evidence in courts. You should be aware that even though various types of evidence may be admitted, the Hearings Examiner must consider how much weight to give such evidence. For example, the Hearings Examiner may give more weight to the testimony of a witness testifying about observing an event, as compared to a note written by the same person, since the witness can be questioned face-to-face. Therefore, you should try to present the best and most direct evidence possible to support your case.

3. Objections to Evidence (H.A.R. §12-46-36(a); 12-46-32(7))

During the course of the hearing, any party may make objections to exclude evidence which may be: a) irrelevant, b) immaterial, or c) unduly repetitious. Evidence is irrelevant if it has nothing to do with the issues of the hearing. Evidence is immaterial if it has very little relevance, compared to the amount of time and effort needed to present such evidence.

Evidence is unduly repetitious if the same issue has already been covered enough by the witness, or by a prior witness or evidence.

If you wish to make an objection, just say "Objection", even if you may be interrupting the testimony of a witness. The Hearings Examiner may ask why you are objecting and then will then make a ruling on the objection. If the Objection is sustained, the question or evidence will not be permitted. If the objection is overruled, the question or evidence will be permitted.

4. Witnesses and Subpoenas (H.A.R. § 12-46-33)

You are entitled to compel the attendance of non-party witnesses or the production of documents during discovery or at the hearing. You may do this by asking the Hearing Examiner to issue a subpoena. Subpoena samples are attached in APPENDIX D. You will have to fill out the subpoena. The Hearings Examiner may require that any request for the issuance of a subpoena identify with particularity the person to be subpoenaed or the documents desired. The Hearings Examiner will not grant the subpoena if it is unreasonable or oppressive.

You will have to make arrangements to "serve" or give the subpoena to the witnesses. Witnesses subpoenaed for the hearing may have to be paid a fee and for mileage at a rate equal to that fee paid in state court.

5. An Overview of the Stages of the Hearing (H.A.R. § 12-46-47)

The following is a brief description of the actual stages of the hearing:

a. Opening Statements

An opening statement is an outline of what the parties believe the issues are and what facts the parties expect to prove during the hearing. These statements are not considered evidence. Any statements which you may want to be considered as evidence must be made through witnesses or documents presented during your case.

b. Executive Director's Case

After the opening statements are completed, the Executive Director will have an opportunity to present his case. You have the right to cross-examine any witness. You may also

make objections to any evidence that the Executive Director offers. At the end of the Executive Director's presentation of evidence, the Executive Director will rest his case, meaning that all of the evidence in support of the allegations has been presented.

c. Motion to Dismiss (H.A.R. § 12-46-48)

If you believe that the Executive Director has not proved his case after he has rested, you may ask the Hearings Examiner to dismiss the case. At that point, the Executive Director will be given an opportunity to explain why he believes that sufficient evidence has been presented to prove his case. After both sides have presented their arguments, the Hearings Examiner may make a ruling on the motion to dismiss or delay ruling until a later point.

d. Respondent's Case

You will be given an opportunity to present your case through witness testimony and/or documents, and the Executive Director will be given the opportunity to cross-examine any witnesses and to object to any evidence. You may testify on your own behalf.

e. Rebuttal Evidence

After you have rested, the parties will be given an opportunity to present rebuttal evidence. Rebuttal evidence should be limited to specific issues of fact which contradict a prior witness' testimony or shed light on a witness' credibility. The opportunity to present rebuttal evidence is not an opportunity to reopen the evidence.

f. Closing Arguments

After the presentation of rebuttal evidence, the parties will be given an opportunity to present their closing arguments. A closing argument summarizes the evidence and discusses how the evidence supports a party's position.

POST-HEARING PROCEDURES

(H.A.R. §12-46-50 to §12-46-56)

The Hearings Examiner may request that parties submit “proposed findings of fact, conclusions of law, and order” or, in the alternative, a hearing brief. These are both written documents in which the parties discuss the evidence presented by both sides at the hearing, and explain whether or not the evidence and facts show that you violated the law in the manner alleged by the Executive Director. (See H.A.R. § 12-46-50)

1. The Hearings Examiner’s Proposed Decision

The Hearings Examiner will issue a proposed decision within 60 days after the hearing (which may be extended by the Commission) and forward the proposed decision to the five-member Commission. You and the other parties will receive a copy of the proposed decision. (See H.A.R. §§ 12-46-51 and 12-46-52)

If you disagree with the proposed decision, you can file **written exceptions** explaining your disagreement with the proposed decision. Exceptions must be filed with the Hearings Examiner within fifteen days after receipt of the proposed decision and with copies served on all other parties. (See H.A.R. § 12-46-53). If you agree with the proposed decision, you may file a statement of support for the proposed decision with the Hearings Examiner within fifteen days after receipt of any exceptions filed by another party. (See H.A.R. §12-46- 54).

The Hearings Examiner will forward the entire hearings record, written exceptions, and support statements to the five-member Commission. (See H.A.R. § 12-46-55).

At the discretion of the Commission, oral arguments may be held in front of the Commission on the exceptions filed with the Hearings Examiner.

2. The Commission’s Final Decision and Order

Within a reasonable time after the proposed decision is filed by the Hearings Examiner, the Commission will issue a Final Decision and Order, which may adopt, modify, or reject the

Hearings Examiner's proposed decision. A certified copy of the final decision and order will be sent to you. Within 10 days, any party may move the Commission to reconsider its final decision and order. Filing of a motion for reconsideration does not operate as a stay of the Commission's final decision and order, and it is at the discretion of the Commission whether or not to hear argument on the motion.

3. Appeals and Judicial Review of the Commission's Final Decision and Order

Procedures regarding judicial review and appeals are outlined in H.R.S. § 368-16 and § 91-14. An aggrieved party may appeal the Commission's decision in the circuit court not more than thirty (30) days after receipt of the final decision and order of the Hawai'i Civil Rights Commission. An appeal is initiated by filing a petition in the Circuit Court.

APPENDIX A- Sample Caption

[Name of Respondent
Business
Address
Telephone
Facsimile
E-mail]

HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

MARCUS L. KAWATACHI, as Executive	)	DOCKET NO. [XX-XXX]
Director for the Hawai'i Civil Rights	)	
Commission, on behalf of [COMPLAINANT'S	)	
NAME]	)	[TITLE OF PLEADING
	)	Such as Motion for _____ ;
vs.	)	Certificate of Service]
	)	
[RESPONDENT'S NAME],	)	HEARING DATE:
	)	HEARINGS EXAMINER:
Respondent.	)	

APPENDIX B – Sample Certificate of Service

HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

MARCUS L. KAWATACHI, as Executive	)	DOCKET NO. [XX-XXX]
Director for the Hawai'i Civil Rights	)	
Commission, on behalf of [COMPLAINANT'S	)	
NAME]	)	Certificate of Service
	)	
vs.	)	
	)	
[RESPONDENT'S NAME],	)	HEARING DATE:
	)	HEARINGS EXAMINER:
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing MOTION TO _____ will be duly served upon the Hawai'i Civil Rights Commission, by mailing a copy via U.S. Mail, first class, postage prepaid at the following address:

[ENFORCEMENT ATTORNEY'S NAME]
Hawai'i Civil Rights Commission
830 Punchbowl Street, Room 411
Honolulu, HI 96813

Dated: Honolulu, Hawai'i, _____, 20____.

Name of person signing

APPENDIX C – SAMPLE MOTION FOR LEAVE TO FILE ELECTRONICALLY

HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

MARCUS L. KAWATACHI, as Executive	)	DOCKET NO. [XX-XXX]
Director for the Hawai'i Civil Rights	)	
Commission, on behalf of	)	
[COMPLAINANT'S NAME]	)	<i>EX PARTE</i> MOTION FOR LEAVE TO FILE AND
	)	RECEIVE DOCUMENTS ELECTRONICALLY
vs.	)	
	)	
[RESPONDENT'S NAME],	)	
	)	
<u>Respondent.</u>	)	

EX PARTE MOTION FOR LEAVE TO FILE AND RECEIVE DOCUMENTS ELECTRONICALLY

The undersigned applicant hereby respectfully requests leave to file documents electronically with, and to receive documents electronically from, the Adjudications Section of the Hawai'i Civil Rights Commission ("HCRC"), State of Hawai'i, with regards to the above-captioned matter.

In support of this request, I make the following declarations:

1. I will be electronically filing documents with HCRC via e-mail from the following e-mail address(es), and I accept responsibility for the authenticity of electronic submittals purporting to be from me, originating from the following email address(es):

- a.
- b.

2. I authorize HCRC to transmit correspondence to me and serve documents on me via e-mail at the following email address(es):

- a.
- b.

3. I will serve hard copies of all documents and pleadings on all other parties unless otherwise directed by the Hearings Examiner.

4. I will electronically file documents with HCRC no later than 4:00 p.m. on the day that the documents are due, and that any documents that I might electronically file with HCRC after 4:00 p.m. will be deemed to have been filed at 7:45 a.m. the next business day, or subject to being rejected for being untimely filed.

5. I acknowledge that this Order shall be effective upon the date of issuance, and shall continue in effect until terminated by the HCRC, or upon written motion filed by me.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, _____ .

Signature

Print Name

ORDER

[] The Ex Parte Motion For Leave To File And Receive Documents Electronically is hereby granted.

[] The Ex Parte Motion For Leave To File And Receive Documents Electronically is hereby denied.

DATED: Honolulu, Hawai'i, _____ .

Hearings Examiner

APPENDIX D – SAMPLE SUBPOENA

HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

MARCUS L. KAWATACHI, as Executive	)	DOCKET NO. [XX-XXX]
Director for the Hawai'i Civil Rights	)	
Commission, on behalf of	)	_____ ADMINISTRATIVE SUBPOENA
[COMPLAINANT'S NAME]	)	<i>Ad Testificandum</i> (Notice to Appear & Testify)
	)	
vs.	)	_____ ADMINISTRATIVE SUBPOENA
	)	<i>Duces Tecum</i> (Production of Documents)
[RESPONDENT'S NAME],	)	
	)	Hearings Examiner: _____
Respondent.	)	

TO:

[Subpoenaed witness' name
Subpoenaed witness' address]

[For Witness Subpoenas to Testify at the hearing] YOU ARE COMMANDED to testify as a witness on behalf of the [Executive Director OR Respondent--] on [Month] [Day] [Year] at _____ o'clock at [Location] in the above titled matter.

[For Subpoena for the production of documents/evidence] YOU ARE COMMANDED to bring with you the books, papers, records, and other documents in your possession or under your control, described as follows:

[describe subpoenaed documents]

This subpoena is issued pursuant to Hawai'i Revised Statutes §§ 92-16, 368-3 and Hawai'i Administrative Rule § 12-46-33. Failure to obey this subpoena may result in

enforcement proceedings in the circuit court.

DATED: _____, Honolulu, Hawai'i

HAWAI'I CIVIL RIGHTS COMMISSION
STATE OF HAWAI'I

By:
Its Hearings Examiner

RETURN OF SERVICE OF SUBPOENA

Received this subpoena on _____ at _____
(Date) (Time)

and on _____ at _____, I served it
(Date) (Time)

upon the within named _____

by delivering a copy to her/him and tendering her/him the fee for one day's attendance and

mileage as allowed by law.

Dated:

Signature

Printed name