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DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
OFFICE OF EMPLOYMENT AND TRAINING ADMINISTRATION
STATE OF HAWAII

IN THE MATTER OF DECLARATORY RULING JOSEPH R. FEIND, Petitioner	ORDER ADOPTING PROPOSED DECLARATORY RULING

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On August 16, 1990, the Hearings Officer filed her Proposed Declaratory Ruling. The parties were afforded thirty days from the filing date of the Proposed Declaratory Ruling to file exceptions and request a review by the Director of Labor and Industrial Relations (hereinafter "Director"). Upon request by Petitioner for extension of time to file exceptions, the Director partially granted his request and extended the time to file exceptions to September 24, 1990, at 4:30 p.m. The time for filing exceptions and requesting a review has passed and neither party has filed exceptions or requested a review within this time period.

Having reviewed and considered the whole record, the Director hereby adopts the Proposed Declaratory Ruling in toto.

DATED: Honolulu, Hawaii, September 26, 1990.

Mario R. Ramil, Director of
Labor & Industrial Relations

RIGHT TO JUDICIAL REVIEW

Any party aggrieved by this final declaratory ruling of the Director of Labor and Industrial Relations, State of Hawaii, shall be entitled to judicial review as provided by Section 91-14 of the Hawaii Revised Statutes.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

STATE OF HAWAII

IN THE MATTER OF DECLARATORY RULING JOSEPH R. FEIND, Petitioner	PROPOSED DECLARATORY RULING

PROPOSED DECLARATORY RULING

This request for a declaratory ruling comes before the Director of Labor and Industrial Relations (hereinafter "Director") on petition by JOSEPH R. FEIND (hereinafter "Petitioner"). The petition was filed with the Director on January 30, 1989 pursuant to Sec. 91-8, Hawaii Revised Statutes (hereinafter "HRS") and Secs. 12-506-9 and 12-1-5, Hawaii Administrative Rules (hereinafter "HAR"). As stated by Petitioner, the controversy presented is:

> whether or not the administrative rules pertaining to Plant Closing Notification and Dislocated Worker Allowance were applicable to my previous employer PRI Energy Systems, Inc. when all positions were terminated December 31, 1988. Petition, p. 1

A hearing was held on November 27 and 30, 1989 and on February 1 and 8, 1990 before the Director's appointed representative, JENNIFER A. MINAMI, hearings officer.

Present at the four days of hearings were the hearings officer; WAYNE A. MATSUURA, Deputy Attorney General; DANNY J. VASCONCELLOS, attorney for Petitioner; and TERRY N. YOSHINAGA, attorney for PRI Energy Systems, Inc. (hereinafter "PRIES"). Also present on November 27, 1989 were Petitioner; EDWARD LUI, General Manager of PRIES; and ROBERT WATADA and MERVIN WEE, Office of Employment and Training Administration, State Department of Labor. Also present on November 30, 1989 were Petitioner; and EDWARD LUI, General Manager of PRIES. Also present on

February 1, 1990 were KENGO UDA, Director of Industrial Relations of Pacific Resources, Inc. (hereinafter "PRI"); and KENNETH T. YAMAMOTO, Employment Manager of PRI. Also present on February 8, 1990 were RONALD G. FOSS, Vice-President of Marketing for the Gas Company (hereinafter "GASCO"); and JAMES M. SEVERSON, Vice-President of Financial and Regulatory Affairs of GASCO.

ISSUES PRESENTED

The controversy before the Director is whether or not Petitioner is entitled to notice and compensation under Chapter 394B, HRS and Chapter 12-506, HAR, entitled Plant Closing Notification and Dislocated Worker Allowance.

Specifically, the issues presented for decision are:

1. Was there a "partial closing" under Sec. 394B-2, HRS and Sec. 12-506-5, HAR?

2. If there was a "partial closing":

a. Did employer provide Petitioner and the Director with proper notice in accordance with Sec. 394B-9, HRS and Sec. 12-506-7, HAR?

b. Is Petitioner entitled to dislocated worker allowance under Sec. 394B-10, HRS and Sec. 12-506-8, HAR? If so, how much dislocated worker allowance is Petitioner entitled to?

c. Is Petitioner entitled to the prompt payment of all wages, benefits, and other forms of compensation under Sec. 394B-11, HRS? If so, how much is Petitioner entitled to?

d. Does the Director have the authority to award civil penalties under Sec. 394B-12, HRS? If he does, and if employer has failed to conform to the provisions of Chapter 394B, HRS and of HAR, how much in civil penalties is Petitioner entitled to?

e. Does the Director have the authority to award costs of action, including reasonable attorney fees, under Sec. 394B-13, HRS? If he does, and if employer has failed to conform to the provisions of Chapter 394B, HRS and of HAR, how much is Petitioner entitled to for costs of action?

FINDINGS OF FACT

1. PRIES was a wholly owned subsidiary of PRI, its parent corporation. PRIES was in the business of selling and installing five alternate energy saving products: (1) Cogeneration systems, (2) Submetering systems, (3) Solar systems, (4) Room Controllers, and (5) Power systems. Between December, 1987 and December, 1988* PRIES employed four workers whose salaries were paid with PRIES' funds. Within the accounting system set up for PRI and its subsidiaries, PRIES was set up as its own profit and loss center, a designation used to measure the financial results of the particular entity. PRIES was also given a designated cost center, Cost Center 38, in order to monitor PRIES' costs.

2. PRI was a holding company in the energy business, employing more than fifty employees. PRI owned three major subsidiaries, all of which conducted energy-related businesses: (1) GASCO, which manufactured and distributed synthetic natural gas; (2) The Hawaiian Independent Refinery, Inc. (hereinafter "HIRI"), a petroleum business, which purchased and refined crude oil into petroleum products; and (3) PRIES, which sold energy conserving products.

3. Petitioner worked as an Energy Systems engineer with PRIES from March 9, 1988 to December 31, 1988. His principle duties included designing and installing cogeneration systems, specifically high efficiency gas water heaters. PRIES' day to day operations were run by its General Manager, Edward Lui. In June, 1988, Ron Foss, Vice-President of Marketing for GASCO, was assigned to manage PRIES and to analyze the subsidiary to rejustify its existence. Based on Foss's findings of PRIES' financial problems, PRI's Strategic Planning Committee on July 21, 1988 voted to eliminate PRIES as a profit and loss center. Lui began making extensive plans to close the

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*Unless otherwise indicated, all findings of fact apply to the twelve-month period preceding PRIES' elimination in December, 1988, i.e., from December, 1987 to December, 1988.

subsidiary and, with the help of PRI's employment manager, Kenneth Yamamoto, to find alternate employment for its four employees. On October 17, 1988, Lui verbally informed Petitioner that PRIES would be closed by the end of the year. On November 4, 1988, Petitioner received a letter dated October 31, 1988, which informed him that: (1) PRIES would be restructured due to business losses sustained by PRIES over the past years; (2) Petitioner could seek employment within PRI or outside as soon was was practicable; and (3) Petitioner would be entitled to an incentive bonus, amounting to two weeks of salary for each month Petitioner worked with PRIES past October 31, 1988. However, in the event that Petitioner continued his employment with PRI or one of its subsidiaries, he would no longer be eligible for the bonus. Petitioner interviewed for, and was subsequently offered, a project engineer's position with HIRI which would require no loss in grade level or in salary or benefits for Petitioner. Petitioner declined the offer because of the 1½ hour commute time and because Petitioner did not consider it an ideal job. Petitioner's employment with PRIES terminated on December 31, 1988.

4. Petitioner received $2,770 in incentive bonus at the time of his termination for the two months he worked with PRIES past October 31, 1988. This bonus did not constitute dislocated worker allowance under Sec. 394B-10, HRS. In January, 1989 Petitioner applied for and was found eligible for unemployment compensation benefits by the Department of Labor and Industrial Relations Unemployment Insurance Division.

5. Petitioner went through the same interviewing and hiring procedures used by PRI's centralized employment division for new employees of PRI and its subsidiaries. Upon being hired, he was sent several standard letters of employment sent to new hires from Kenneth Yamamoto, PRI's employment manager. Petitioner initially attended orientation training classes with other GASCO employees at PRI's and GASCO's offices. In performing his job responsibilities, he frequently depended

on personnel of PRI and GASCO for needed information and supplies. He contacted employees of GASCO to obtain supplies from GASCO's warehouses or when handling billing responsibilities. Petitioner looked to PRI personnel at the parent corporation's offices when he needed corporate expenditure authorization or account numbering. Petitioner, along with all personnel of PRI and its subsidiaries, shared the same telephone system, intracompany directory, and telephone numbers with the same three-digit prefix.

6. Petitioner was instructed to follow a standard set of personnel policies which applied to all employees of PRI and its subsidiaries. The standard policies were found in the PRI Corporate Policy Manual, and covered all employment matters such as severance pay, vacation, sick leave, retirement savings plans, and the like. Most of the policies were drafted and coordinated by Ken Uda, PRI's director of Industrial Relations. While any officer, department head, or supervisor could recommend policy changes or propose a new policy, all changes and additions required the review and approval of the PRI Management Committee. Whenever questions concerning these matters arose, Petitioner would contact Kenneth Yamamoto or other personnel at PRI's offices.

7. PRI and its subsidiaries had a policy of open job posting, whereby a job listing with PRI or any of its subsidiaries was posted and made available to all employees of the companies. These employees were free to transfer job positions within PRI or its subsidiaries without loss of benefits or seniority, since the employee's original date of hire remained unchanged.

8. PRIES operated under the management responsibility of Gas Services, a business group which managed some of the operations owned by PRI. As far as reporting relationships went, PRIES' General Manager Ed Lui reported to GASCO President, Howard Lee, until June, 1988 when he began reporting to GASCO Vice-President, Ron Foss. All the accounting and financial matters of PRI, PRIES, and other subsidiaries were handled by the GASCO accounting department, headed by GASCO Vice-President of Financial and Regulatory Affairs, James Severson. Severson's department

handled PRIES' billing and collections, expense reports, financial reports, inventory and PRIES' accounting books. PRIES also leased its offices from GASCO and stored its inventory in GASCO's warehouses. GASCO and PRIES frequently exchanged work services when the needed service fell within each other's areas of expertise. For example, GASCO employees would sometimes correct deficiencies in solar systems still under warranty or answer questions from PRIES' customers regarding PRIES' products. GASCO billed PRIES for the services it rendered pursuant to a contract between the two subsidiaries. When PRIES' employees performed services for GASCO, it was done on an informal basis without formal billing or records kept.

9. Ed Lui, as General Manager of PRIES, did not exercise unilateral decision-making authority for PRIES. When it came to personnel matters, PRI's Kenneth Yamamoto had the exclusive authority to make an offer of hire to new employees, while Ken Uda promulgated and coordinated personnel policies followed by PRIES' employees. When making major decisions, Lui often sought the assistance and approval of others in higher management positions within PRI and GASCO. For example, PRIES' budgets routinely needed the approval of PRI President Robert Reed and of PRI's Management Committee composed of Loughridge, Roberti, Simpson, Dunlap, Mares, Lee, and Hall, all executives who reported directly to President Reed. Likewise, before offering Petitioner and other PRIES employees the incentive bonus in October, 1988, Lui had to obtain the approval of GASCO executives Lee, Severson, and Foss. Finally, while Lui and Foss analyzed and gathered much of the information used to make its decision, the ultimate decision to eliminate PRIES was made at a meeting on July 21, 1988, by the PRI Strategic Planning Committee composed of PRI and GASCO executives Reed, Loughridge, Roberti, Simpson, Dunlap, Lee, Mares, Hall, Pajela, McMullen, Lawrence, Reeves, Bates, Foss and Levy.

10. As of May 10, 1988, PRI and PRIES shared common corporate officers. PRI President, Chairman, and CEO Robert Reed, also served as Chairman and CEO of PRIES. Likewise, Slain,

Hoffman, Lee, and Roberti concurrently served as officers of PRIES and officers of PRI. Severson, while not a PRI officer, held the offices of Vice-President of PRIES as well as Vice-President of GASCO.

11. As a wholly owned subsidiary of PRI, PRIES' stock and assets were owned entirely by its parent corporation. At PRIES' startup, PRI provided the initial $1,000 for the company's capital stock and opened up an intercompany account for PRIES in order to enable PRI to fund PRIES' operations. PRIES' financial performance was measured individually, as well as in conjunction with the financial performance of PRI and Gas Services. PRIES' liabilities and assets were folded in and consolidated with those of PRI in an annual consolidated balance sheet. Likewise, PRIES' profits and losses were consolidated and measured with those of Gas Services.

12. For several years prior to the time it was eliminated in 1988, PRI, as PRIES' sole stockholder, incurred retained losses due to PRIES' poor financial performance. From 1985 to 1988, PRI carried a total negative stockholders' equity of $903,000, $1.9 million, $2.7 million, and $3.1 million respectively.* The last year that PRIES had made a profit was in 1985, when solar tax credits boosted sales of solar heaters. That profit, however, did not even show up as net retained earnings on PRIES' financial statements because of the losses PRIES had incurred in prior years.

13. Although PRI management had budgeted estimated losses for PRIES, in 1987 and 1988 the subsidiary lost more money than it had been budgeted to lose. In 1986, PRIES lost $1,167,000. In 1987, PRIES was budgeted to lose $311,000 but lost $800,000 instead. For 1988, management budgeted a smaller loss because some of PRIES' unprofitable lines of business had been discontinued. While a loss of $202,000 had been estimated for 1988, PRIES ended up losing $409,000 that year.

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*All figures are approximate.

14. When a financial summary of PRIES' five product segments was done in June, 1988 by Ron Foss, most of the segments were losing money and/or did not show enough growth potential to offset existing losses. In 1987, cogeneration lost $274,000, submetering lost $104,000, solar had made a $24,000 profit and other systems had lost $31,000, for a net loss of $386,000. During the first half of 1988, cogeneration lost $91,000, submetering lost $1,000, solar lost $10,000, and other systems had made a profit of $5,000, for a net loss of $97,000.

15. PRIES' sales were directly affected by the price of crude oil, since higher oil prices caused greater demand for energy saving products, resulting in increased PRIES' sales. Conversely, lower oil prices caused PRIES' sales to decline. In mid-1988, the price of crude oil was continuing on a downward trend. While in December, 1987, oil cost $17/barrel, by June, 1988, oil prices had dropped to $15.50/barrel. Lui and Foss predicted, and PRI's Strategic Planning Committee agreed, that the price of oil would continue to decrease, which would result in an even greater plummet in PRIES' sales. This forecast of declining oil prices was a determining factor in the Committee's decision to eliminate PRIES by the end of 1988.

16. In the process of closing the subsidiary, Lui attempted to sell or pass off PRIES' existing contracts and inventory. In the end, most of PRIES' inventory was sold, its contract obligations were subcontracted out or assigned to other PRI subsidiaries, and its product segments were either eliminated or transferred to other subsidiaries. Its room controller and submetering systems were completely eliminated. PRIES' solar program, Energy Service Agreements, and its cogeneration operating agreements were assigned to GASCO. Lui took the power system segment with him when he began his new job with PRI, International.

17. From January, 1989 to the present, PRIES has had no official employees paid by PRIES. Although Lui still retains the title of General Manager of PRIES, he draws his salary exclusively

from PRI, International. Since December, 1988, PRIES has been dissolved as a profit and loss center and continues to exist in name only. Its operations portion and all business sales activity have ceased as of December 31, 1988. The net income of $89,000 for 1989 as shown on PRIES' 1989 Income Statement reflects the revenues for systems put into operation prior to December 31, 1988.

CONCLUSIONS OF LAW

Generally, Hawaii's Plant Closing laws regarding "partial closings" require that an employer in a covered establishment provide its terminated employees with notice and dislocated worker allowance when their termination has been caused by a shutting down of a portion of the operations of the covered establishment due to a sale, transfer, merger, and other business takeover or transaction of business interests. Shut-downs which are due to business failure, bankruptcy, or loss of lease or contract are exceptions to the "partial closing" definition, and thus not subject to the notice and compensation requirements.

A "partial closing" is defined in Sec. 394B-2, HRS as:

> the permanent shutting down of a portion of operations within a covered establishment due to the sale, transfer, merger, and other business takeover or transaction of business interests and results or may result in the termination of a portion of the employees of a covered establishment by the employer.

Sec. 394B-9, HRS states:

> Notification. An employer in a covered establishment shall provide to each employee and the director written notification of a closing, partial closing, or relocation at least forty-five days prior to its occurrence.

Sec. 394B-10, HRS states:

> Dislocated worker allowance. (a) Whenever a closing, partial closing, or relocation occurs, the employer shall provide each

> affected employee who applies for and is found eligible for unemployment compensation benefits for a particular week under chapter 383 and based in whole or in part upon employment in the closed, partial closed, or relocated plant a payment, denominated a dislocated worker allowance as a supplement to any unemployment compensation benefit received for that week.

Exceptions to the "partial closing" definition are found in Sec. 12-506-5(b), HAR. It states:

> (b) Business shutdowns which occur as a direct result of or in connection with factors such as business failure, bankruptcy, or loss of lease or contract are not considered partial closings for the purposes of chapter 394B, HRS.

For the purposes of this declaratory ruling, and for the reasons which follow, I conclude that:

(1) PRI is the applicable "covered establishment" within the definition of a "partial closing" under Sec. 394B-2, HRS; and

(2) There was no "partial closing" in this case because PRIES' shutdown was not due to a "sale, transfer, merger, and other business takeover or transaction of business interests." Consequently, I do not reach issues 2a through 2e.

Based on the above conclusion, I find it unnecessary to rule on any other issues, including the business failure exception to the definition of a "partial closing" found in Sec. 12-506-5(b), HAR.

I. THE PARENT CORPORATION, PRI, IS THE APPLICABLE "COVERED ESTABLISHMENT" WITHIN THE DEFINITION OF A "PARTIAL CLOSING" UNDER SEC. 394B-2, HRS.

Sec. 394B-2, HRS defines a "covered establishment" as "any industrial, commercial, or other business entity which employs at any time in the preceding twelve-month period, fifty or more persons."

It is clear that while PRIES employed four employees, its parent corporation, PRI, employed more than fifty employees during the twelve-month period preceding PRIES' shutdown. However, Hawaii's laws are silent on whether, for purposes of our Plant Closing laws, a parent corporation should be considered the applicable "covered establishment" where a shutdown of its smaller subsidiary has occurred.

Guidance on that issue may be found in the federal Plant Closing law, the Worker Adjustment and Retraining Notification Act of 1988 (hereinafter "WARN") and its Rules and Regulations published on April 20, 1989. Instead of the term "covered establishment," the federal WARN law refers to an "employer" as any business enterprise employing 100 or more employees. Sec. 639(a)(2) of WARN's Rules and Regulations, which defines "employer," states:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations. (emphasis added)

Many of these same factors are also used in the "joint employer" or "single employer" tests employed in the National Labor Relations Act context and in employment law cases. Boire v. Greyhound Corp., 376 U.S. 473 (1964); Radio Union v. Broadcast Service, Inc., 380 U.S. 255, 256 (1965) and rearticulated by the NLRB in Parklane Hosiery Co., 203 N.L.R.B. 597, 612, aff'd 207 N.L.R.B. 991 (1973).

When these five factors are applied to Petitioner's case, it is clear that PRI should be considered the applicable "covered establishment" because of PRIES' extensive dependency on its

parent.

(1) Common Ownership

PRIES was a wholly owned subsidiary of PRI, with the parent company owning all of PRIES' stocks and assets. At PRIES' startup, PRI provided the $1,000 initial starting capital and opened up an intercompany account for PRIES in order to enable PRI to finance PRIES' operations.

(2) Common Directors and/or Officers

As of May 10, 1988, the officers for PRIES included Reed, Slain, Hoffman, Lee, Roberti and Severson. The record indicates that all of these officers, except James Severson, concurrently served as officers of PRI. Severson, while not a PRI officer, held the offices of Vice-President of PRIES as well as of GASCO.

(3) De Facto Exercise of Control

While Ed Lui had responsibility for the day to day operations of PRIES, it is clear from the record that he did not exercise unilateral decision-making authority for his company. Lui usually needed the approval of those higher in PRI's management hierarchy before implementing major decisions. For example, PRIES' budgets needed the approval of PRI President Robert Reed and of PRI's Management Committee, composed of executives who reported directly to President Reed. They included Loughridge, Roberti, Simpson, Dunlap, Mares, Lee and Hall. Likewise, while Lui and Foss gathered and analyzed much of the information used to make its decision, the ultimate decision to eliminate PRIES was made on July 21, 1988 by the PRI Strategic Planning Committee composed of Reed, Loughridge, Simpson, Roberti, Dunlap, Lee, Mares, Hall, Pajela, McMullen, Lawrence, Reeves, Bates, Foss and Levy. Neither Lui nor any other PRIES employee participated at that meeting.

Even when implementing less significant decisions, Lui looked to individuals outside of PRIES for approval and assistance. Approval for PRIES' incentive bonus offered to Petitioner in October, 1988 came from Lee, Severson, and Foss, all executives

of GASCO. All offers of hire made to new PRIES employees could only be made by PRI's employment manager, Kenneth Yamamoto. Similarly, personnel policies which applied to all PRIES employees were promulgated by Ken Uda, PRI's director of Industrial Relations.

(4) Unity of Personnel Policies Emanating from a Common Source

All employees of PRI, PRIES, and the other subsidiaries followed a standard set of personnel policies found in the PRI Corporate Policy Manual. The policies covered all employment matters such as vacation, severance pay, retirement savings plans, and the like. Most of the employee policies were drafted and coordinated by PRI's Ken Uda. While any officer, department head, or supervisor could recommend policy changes or propose a new policy, all changes and additions required the review and approval of the PRI Management Committee.

(5) Dependency of Operations

As discussed above, PRIES depended on PRI to finance its operations, beginning with its initial startup capital of $1,000 and extending to the funding of the subsidiary's operations via an intercompany account. PRI also suffered the financial effects of the huge losses PRIES incurred over the years. From 1985-88, the Consolidating Balance Sheets for PRIES shows that PRI, as PRIES' sole stockholder, was forced to carry a total negative stockholders' equity of $903,000, $1.9 million, $2.7 million, and $3.1 million respectively. PRIES' liabilities and assets were folded in and consolidated with those of PRI and Gas Services in annual financial reports.

More than just a financial dependency, the evidence indicates that there existed an overall dependency of operations by PRIES on its parent corporation and on GASCO, often involving an extensive sharing of labor and services. PRIES looked to PRI's centralized employment division to handle interviewing, hiring, and personnel rules and policies. When Petitioner was first hired, he attended special training classes with GASCO employees

at PRI's and GASCO's offices. When he had questions concerning employee policies, he contacted PRI's personnel division. Likewise, Petitioner depended on GASCO employees to obtain supplies from GASCO's warehouses or when handling billing responsibilities, and looked to PRI personnel when he needed corporate expenditure authorization or account numbering.

PRIES was also highly dependent on GASCO for administrative services, including financial and accounting services. All of PRIES' billing, collections, financial reports, and accounting books were handled by Jim Severson's accounting department. PRIES also leased its offices from GASCO and used its warehouses. In addition, PRIES and GASCO routinely exchanged services for work which fell within each other's areas of expertise. For example, GASCO employees would correct deficiencies in solar systems still under warranty or answer questions from PRIES' customers regarding PRIES' products. GASCO billed PRIES for the services it rendered pursuant to a contract between the two subsidiaries. When PRIES employees performed services for GASCO, however, it was done on an informal basis without formal billing or records kept.

Indicative of the networking of operations was PRI's policy of open job posting, whereby a job listing with PRI or any of its subsidiaries was posted and made available to all employees of the companies. These employees were free to transfer job positions within PRI or its subsidiaries without loss of benefits or seniority, since the employee's original date of hire remained unchanged. In addition, all employees of PRI and its subsidiaries shared the same telephone system, intracompany telephone directory, and phone numbers with the same three-digit prefix.

As discussed above, all major policy and decision-making by PRIES' General Manager, Ed Lui, required the review and approval of PRI executives higher in the corporate hierarchy.

These facts, taken collectively, indicate that PRIES' dependency on PRI and GASCO was extensive enough to warrant the subsidiary being treated as a part of the parent company for

purposes of determining the "covered establishment" in this case. Considering the evidence, PRI, not PRIES, should be considered the applicable "covered establishment" within the definition of a "partial closing" under Sec. 394B-2, HRS.

II. PRIES' SHUTDOWN WAS NOT DUE TO A "SALE, TRANSFER, MERGER, AND OTHER BUSINESS TAKEOVER OR TRANSACTION OF BUSINESS INTERESTS."

Chapter 394B-2, HRS requires that in order to find a "partial closing," the "shutdown of a portion of operations within a covered establishment" must be due to a "sale, transfer, merger, and other business takeover or transaction of business interests."

HAR and the legislative committee reports on Chapter 394B, HRS provide some clarification of the "sale, transfer, merger..." requirement. Sec. 12-506-2, HAR defines "sale, transfer, merger, and other business takeover or transaction of business interests" as:

> any of the various forms of business transactions where there is a (1) change in the controlling interest of a covered establishment, or (2) the sale, transfer, or merger of a portion of the operations of a covered establishment. (numerals and emphasis added)

HAR also attempts to further clarify the definition of the provision by citing three examples of a partial closing. All three examples involve a shutdown of a portion of operations due to either the sale of the covered establishment or the sale of a portion of the operations of the covered establishment. Significantly, all three examples involve a sale made to an outside interest or business.

In its discussion of the "sale, transfer, merger ...." provision of Chapter 394B-2, HRS our state legislature states:

> Any change in ownership which has the net effect of an actual or potential displacement of workers should come within the purview of this enactment. See Conference

Committee Report 122 on H.B. 445
(emphasis added)

Applying the clarification provided by HAR and our legislature to Petitioner's case, it is clear that PRIES' closure was not due to a "sale, transfer, merger, and other business takeover or transaction of business interests." Certainly, there was no evidence that PRIES' shutdown was caused by a sale, transfer, merger, or other transaction involving an outside interest or business. Nor did PRIES' closing involve a transaction which affected the ownership or the controlling interest of the covered establishment, PRI.

Likewise, there was no evidence presented of a "sale, transfer, or merger of a portion of operations of a covered establishment." (emphasis added) Sec. 12-506-2, HAR defines "portion of operations" as a "distinct part of the operations, such as a department, division, branch or outlet." As a vendor of energy-saving products, PRIES functioned as a distinct arm of PRI's energy business, similar to a division or branch of that business. As such, PRIES was a "portion of operations" of the covered establishment, PRI. Since the record is devoid of any evidence that the subsidiary was sold, transferred, or involved in a merger, PRIES' shutdown was not a result of a "sale, transfer, or merger, of a portion of operations of a covered establishment."

Petitioner argues that at the time of the subsidiary's shutdown, the assignment of some of PRIES' product segments to PRI and its subsidiaries constitutes a "transfer of business interest" within the definition of a "partial closing." He states, "....there was a permanent shutting down of the operation portion of PRIES as accomplished by the transfer of the Solar product segment and the Energy Source product segment to GASCO. The Co-generation Maintenance product segment was divested to PRI. The Sub-metering product segment and Room Controller product segment were both discontinued." See Petitioner's Opening Brief, p. 19. He also points out that "the Employer created a 'new PRI subsidiary' called Howard Engineers,

the effect of which transferred Petitioner's engineering duties to a 'new PRI subsidiary.'" See Petitioner's Reply Brief, p. 4.

I conclude that the reassignment of certain of PRIES' product segments in the process of closing down the subsidiary was not the kind of "transfer" which the statute meant to encompass. It involved neither a transaction by an outside interest or business, nor a transaction which altered the ownership or control of PRI. Nor should the reassignment of mere product segments or the transfer of an employee's job duties be considered a "transfer of a portion of operations of a covered establishment." (emphasis added) Thus PRIES' shutdown in December, 1988 was not due to a "sale, transfer, merger, and other business takeover or transaction of business interests."

PROPOSED DECLARATORY RULING

For the foregoing reasons, I rule that:

(1) PRI is the applicable "covered establishment" within the definition of a "partial closing" under Sec. 394B-2, HRS; and

(2) There was no "partial closing" in this case because PRIES' shutdown was not due to a "sale, transfer, merger, and other business takeover or transaction of business interests." Consequently, I do not reach issues 2a through 2e.

DATED: Honolulu, Hawaii, August 15, 1990.

Jennifer A. Minami

JENNIFER A. MINAMI
Hearings Officer

RIGHT TO FILE EXCEPTIONS WITH THE DIRECTOR

Any party adversely affected by this Proposed Declaratory Ruling (hereinafter "Proposed Ruling") may within thirty days after the filing date of this Proposed Ruling file with the Director exceptions to the Proposed Ruling or any part thereof and request a review by the Director. The party shall specify for each exception the portions of the record and the authorities relied on to sustain each point. Any exception not specifying the portions of the record or the authorities relied upon may be dismissed by the Director. The exceptions and request for review with two copies shall be filed by personal delivery or by certified mail, return receipt requested, addressed to the Director, 830 Punchbowl Street, Room 321, Honolulu, Hawaii, 96813. In addition, a copy of the exception and request for review shall be served by the party making the exception upon each of the other parties who were served with a copy of this Proposed Ruling.