

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendment and Compilation of Chapter 12-22
Hawaii Administrative Rules

(Date of adoption)

1. Chapter 12-22, Hawaii Administrative Rules, entitled "Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes", is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

CHAPTER 22

WAGE DETERMINATIONS AND THE ADMINISTRATION
AND ENFORCEMENT OF CHAPTER 104,
HAWAII REVISED STATUTES

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Historical Note: Chapter 22 of title 12 is based substantially upon Rule XVIII, Relating to Wage Determinations Under Chapter 104, Hawaii Revised Statutes, and the Administration and Enforcement of said Chapter of the Department of Labor and Industrial Relations. [Eff 8/15/55; am 4/16/56; am 9/1/59; R 7/27/81]

SUBCHAPTER 1

ADMINISTRATION AND ENFORCEMENT

§12-22-1 Definitions. As used in this chapter:
"Apprentice" shall ~~[be as defined]~~ have the same meaning as in section 372-2, [Hawaii Revised Statutes.] HRS.

~~["Average rate" means the rate obtained by adding the hourly rates of wages paid to each worker in a designated class of laborers or mechanics and dividing the sum by the total number of workers in the class.]~~

"Basic hourly rate" shall ~~[be as defined]~~ have the same meaning as in section 104-1, ~~[Hawaii Revised Statutes.]~~ HRS.

"Construction of public work" includes without limitation new construction, reconstruction, development, improvement, alteration, repair, renovation, painting, decorating, dredging, shoring, simultaneous sewer inspection and repair, and any other activity performed by a laborer or mechanic employed at the site of a public work or at any property used by the contractor, dedicated for the performance of the contract, such as batch plants, borrow pits, fabrication plants, mobile factories, job headquarters, and tool yards. As used in this ~~[section,]~~ definition, "other activity performed by a laborer or mechanic employed at the site" includes the following if the activity is an integral part of or is in conjunction with a construction contract, or if there is substantial construction activity involved in a supply, service, or other type of non-construction contract:

- (1) Manufacturing or furnishing of materials, articles, supplies, or equipment on the job site;
- (2) Warranty work ~~[except when done by the manufacturer on defective products or equipment];~~
- (3) Demolition or excavation;
- (4) Landscaping;
- (5) Termite treatment; and
- (6) Installation at the construction site of items or articles fabricated off-site, such as shelving, drapery, and communications equipment.

"Contract" means any type of agreement over \$2,000 for construction of a public work, regardless of what the agreement may be called, including purchase orders and vouchers.

"Contractor" ~~[means]~~ shall have the same meaning as in section 104-1, HRS, including but not limited to the general contractor or any subcontractor, [including] any individual, partnership, firm, corporation, joint venture, or other legal entity, acting directly or through an agent, employee, consultant, corporate officer or corporate director, undertaking the execution of a construction contract over \$2,000 with a governmental contracting agency.

"Cost of fringe benefit" means the rate of contribution irrevocably made by a contractor to a trustee or to a third person pursuant to a fund, plan, or program in providing benefits to a laborer or mechanic for:

- (1) Health and welfare such as medical or hospital care, ~~[compensation for injuries or illness resulting from occupational activity,]~~ or insurance to provide for any of the foregoing;
- (2) Unemployment, life insurance, sickness or disability insurance, or accident insurance;
- (3) Vacation and holiday pay;
- (4) Pensions on retirement or death;
- (5) Defraying costs of apprenticeship or other similar programs; or
- (6) Other bona fide fringe benefits as determined by the director;

~~[provided that]~~ except for chapter 393, HRS, where a contractor is required by either federal or state law to provide these benefits the rate of contribution or other costs for these benefits shall not be included.

"Department" means the department of labor and industrial relations.

"Director" shall ~~[be as defined]~~ have the same meaning as in section 104-1, [Hawaii Revised Statutes.] HRS.

"Employed" includes every person paid in any manner for working in the construction of a work under a contract with a governmental contracting agency, regardless of any contractual relationship alleged to exist.

"Falsification of records" means the submission or filing of inaccurate, misleading, or incorrect payment information on certified payrolls, fringe benefit reporting forms, or other documentation required by this chapter for construction work performed on a public works construction project when the form submitted has been attested to or certified to be true and correct by the contractor or the contractor's designated representative.

"Governmental contracting agency" shall [be as defined] have the same meaning as in [section] sections 104-1 and 104-2, [Hawaii Revised Statutes.] HRS.

"Hawaii Revised Statutes" or "HRS" means laws enacted by the Hawaii state legislature.

"Prevailing area practice" means the labor classifications of the work performed by the laborers or mechanics of the group used by the contractors whose wage rates were determined to be prevailing in the locality and are incorporated into and represented in the applicable wage rate schedule issued by the department.

"Public work" shall [be as defined] have the same meaning as in section [104-2(a),] 104-1, [Hawaii Revised Statutes,] HRS, and includes without limitation:

- (1) Any building, structure, road, or real property, the construction of which is undertaken:
 - (A) By authority of; and
 - (B) Through the use of funds, grants, loans, bonds, land, or other resources of the State or any county, board, bureau, authority, commission, or other agency or instrumentality thereof, to serve the interest of the ~~[general]~~ public, regardless of whether title thereof is held by a state or county agency. However, subsequent construction to fixtures or appurtenances attached to the assigned space of an individual occupant,

lessee, or tenant of the building or structure, contracted by other than a state or county agency or instrumentality thereof, shall not be subject to chapter 104, [~~Hawaii Revised Statutes.~~] HRS; or

(2) [~~Any building or structure constructed under private contract under the following conditions:~~

(A) ~~The property is privately owned, but the entire building or structure is leased to the State or a political subdivision;~~

(B) ~~The lease agreement between the lessor and the State or political subdivision, as lessee, was entered into prior to the construction contract; and~~

(C) ~~The construction work is performed according to plans, specifications, or criteria of the State or political subdivision.]~~

A construction contract between private persons in accordance with section 104-2.5, HRS.

~~["Trainee" means a person participating, through employment, in a schedule of work experience and who is a party to a trainee agreement approved by and registered with the department.]~~

"USDOL" means the United States Department of Labor.

"Wages", "minimum wages", "prevailing wages", "rate of wages", and "wage rates" shall [~~be as defined~~] have the same meaning as in section 104-1, [Hawaii Revised Statutes.] HRS. [Eff 7/27/81; am and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-29)

§12-22-1.1 Transporting of materials, supplies, or equipment. (a) Chapter 104, [~~Hawaii Revised Statutes,~~] HRS, and [~~these rules~~] this chapter are

applicable, but not limited to, ~~[transporting of]~~ a laborer or mechanic who is employed and performs work at a public work site and transports materials, supplies, or equipment:

- (1) To or from a public work site; or
- (2) Between a public work site and either another public work site or a dedicated site[+]

~~when performed by a laborer or mechanic employed at the public work site].~~

(b) The following illustrate situations in which chapter 104, ~~[Hawaii Revised Statutes,]~~ HRS, and ~~[these rules]~~ this chapter are not applicable:

- (1) Delivery of materials, supplies, or equipment to a public work site if the delivery persons only drop off the items and perform no construction work at the public work site;
- (2) Hauling of excavated material away from a public work site for disposal or recycling, where the drivers are on the site only ~~[for [the purpose of having]~~ to have their trucks filled;
- (3) Continuous hauling of material to and from a public work site, and the drivers perform no construction work at the public work site; or
- (4) Delivery or removal of equipment to or from a public work site, and the delivery persons operate no equipment or perform no other work as a laborer or mechanic on the public work site. [Eff and comp 4/1/96; am and comp _____] (Auth: HRS §104-29)
(Imp: HRS §104-29)

§12-22-2 Method to determine prevailing wage rates. ~~[(a) In making prevailing wage determinations under chapter 104, Hawaii Revised Statutes, the director shall make separate findings of:~~

- ~~(1) The basic hourly rate; and~~

~~(2) The rate of contribution or cost of fringe benefits paid by the employer when the payment of the fringe benefits by the employer constitutes a prevailing practice. The cost of fringe benefits shall be reflected in the wage rate schedule as an hourly rate.~~

~~(b)] (a) The rates of wages which the director shall regard as prevailing in each corresponding classification of laborers and mechanics shall be[+] as defined in section 104-2(b)(1)(A) and (B), HRS.~~

~~[(1) The rate of wages paid to the majority of those employed in the State in the corresponding classes of laborers or mechanics on projects that are similar to the contract work; or~~

~~(2) In the event that there is not a majority paid at the same rate, then the rate paid to the greater number, provided the greater number constitutes thirty per cent of those so employed; or~~

~~(3)] (b) [In the event less than thirty per cent of those so employed receive the same rate,] If there is no modal rate, then the average [rate.] of the rates that occur with the highest frequency.~~

~~[Eff 7/27/81; am and comp 4/1/96; am and comp~~

~~] (Auth: HRS §104-29) (Imp: HRS~~

~~§104-2)~~

§12-22-3 Procedure for wage rate schedules. (a)

All schedules of wage rates for laborers and mechanics and any changes thereto shall be based on:

- (1) Surveys or methods which the director may deem necessary to obtain data for wage determinations; ~~[or]~~
- (2) Wage determinations made by the Secretary of Labor, USDOL, under the Davis-Bacon Act (40 U.S.C. §§276a-276a-7); or
- (3) Both paragraphs (1) and (2).

(b) Wage rate schedules shall be regularly issued on or about February 15 and September 15 of

each year. Additional wage rate schedules, addenda, and notices of changes will be issued as the director deems necessary.

(c) Requests for determination by the director of wage rates for classes of laborers and mechanics not listed on the current schedule of wage rates or for any change, modification, or review of wage rates shall be submitted by the governmental contracting agency or any interested party at least thirty calendar days before advertisement of the specifications for which the determination is sought. Exceptions from this provision shall be made only upon a proper showing in unusual circumstances.

(d) Any increase in wage rates, as determined by the director and issued in the wage rate schedule, shall be applicable during the performance of the contract, in accordance with section 104-2(a) and (b), [~~Hawaii Revised Statutes.~~] HRS.

(e) No wage rate determined by the director shall be less than the rate established by the Secretary of Labor (USDOL) for the corresponding class.

(f) Any changes to the wage rates shall be recognized by the director only upon complete and timely submission of the information, in accordance with [~~section 104-11, Hawaii Revised Statutes.~~] this chapter. [~~The~~] Notwithstanding the effective or adoption date of a collective bargaining agreement or rates contained therein, the effective date of these changes shall be the date of publication in the wage rate schedule and shall not be retroactive. [Eff 7/27/81; am and comp 4/1/96; am and comp

] (Auth: HRS §104-29) (Imp: HRS §§104-2, 104-31, 104-34)

§12-22-4 Method to determine fringe benefit hourly rates. In determining the hourly equivalent of a monthly rate of contribution for a fringe benefit, the monthly rate of contribution shall be divided by one hundred [~~and~~] seventy-three hours and the quotient

shall be the hourly rate. [Eff 7/27/81; comp 4/1/96;
comp] (Auth: HRS §104-29) (Imp:
HRS §104-2)

§12-22-4.1 Method to determine overtime compensation rate. (a) In determining the hourly overtime compensation due a laborer or mechanic the rate shall be computed by multiplying the basic hourly rate times the overtime multiplier according to the wage rate schedule classification and then adding the hourly fringe benefit rate.

(b) No credit for fringe benefits made by monthly contributions as calculated in section 12-22-4, is allowed in determining the overtime rate. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-5 Meeting prevailing wage requirements.
A contractor shall pay the prevailing wages contained in a wage rate schedule applicable to laborers or mechanics in any of the following ways:

- (1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits as specified in the wage rate schedule;
- (2) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for fringe benefits in a total amount not less than the total of the fringe benefits required by the wage rate schedule;
- (3) By paying the basic hourly rate in cash directly to the laborers or mechanics and by making an additional cash payment in lieu of the fringe benefits required by the wage rate schedule; or

- (4) By paying an hourly rate, partly in cash and partly in fringe benefits, which total not less than the prevailing wages. [Eff 7/27/81; am and comp 4/1/96; comp] (Auth: HRS §104-29)
(Imp: HRS §104-2)

§12-22-6 Apprentice [~~and trainee~~] rates. Any apprentice [~~or trainee~~] wage rates established by the director shall apply only to:

- (1) Contractors who are a party to a bona fide apprenticeship program which has been registered with the department;
- [~~(1)~~](2) Apprentices [~~and trainees~~] who are parties to apprenticeship [~~and trainee~~] agreements which have been registered with the department or recognized by the department as a USDOL nationally approved apprenticeship program[~~+~~], and who have been individually registered by name with the department; and
- [~~(2)~~](3) The number of apprentices [~~or trainees~~] on any public work which, in relation to the number of journeyworkers in the same craft classification as the apprentices [~~or trainees~~] employed by the same employer on the same public work, is not in excess of the ratio allowed for employment of apprentices [~~and trainees~~] by the employer under the apprenticeship [~~or trainee~~] standards agreed and subscribed to by the employer and registered with or recognized by the department. A registered or recognized apprentice receiving the journeyworker rate will not be considered a journeyworker for the purpose of meeting the ratio requirement. [Eff 7/27/81; am and comp 4/1/96, am and comp]
(Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-7 Contract provisions. The governmental contracting agency shall cause or require to be inserted in all specifications, solicitations, and contracts made and entered into by the agency for construction of any public work, [~~the wage rate schedule issued~~] a requirement that prevailing wages be paid as determined by the director and any other stipulation or provision required by chapter 104, [Hawaii Revised Statutes.] HRS. [Eff 7/27/81; am and comp 4/1/96, am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-8 Classification of laborers and mechanics. (a) The governmental contracting agency shall require that any class of laborers or mechanics which will be employed on a public work and for which the director has not made a wage determination shall be classified by the contractor in a manner which conforms to the classifications contained in the wage rate schedule issued by the director.

(b) If there is a disagreement on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the governmental contracting agency shall submit a written report of the issues in disagreement and refer the matter to the director for determination.

(c) If the governmental contracting agency fails to refer the disagreement to the director as provided by subsection (b) within ten days after a request in writing is made to the governmental contracting agency by any interested party, the interested party may refer the question in writing to the director. [Eff 7/27/81; am and comp 4/1/96, comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-8.1 Investigation of complaints. Any complaint received by a governmental contracting agency with respect to matters under chapter 104, [~~Hawaii Revised Statutes,~~] HRS, shall be referred to the director for investigation and report. [Eff and comp 4/1/96, am and comp] (Auth: HRS §104-29) (Imp: HRS §104-21)

§12-22-9 Appeal[-] of classification determination. (a) Any person aggrieved by the director's determination made pursuant to section 12-22-8 may, within ten days after mailing of the determination, appeal in writing to the [~~labor and industrial relations appeals board.~~] hearings officer appointed by the director in conformance with chapter 91, HRS.

(b) Any party to the appeal may obtain judicial review of the appeals decision in the manner provided in chapter 91, HRS. [Eff 7/27/81; comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-10 [~~Record~~] Certified payroll and record keeping requirements. (a) Each contractor shall maintain accurate and complete payroll records and related employment records during the course of the work and preserve the records for a period of three years from the close of the project for all laborers and mechanics working on the public works construction project in English containing the following information and data on each laborer and mechanic engaged in the performance of the contract at the job site:

- (1) Name in full;
- (2) Home address;
- (3) Last four digits of social security number;
- (4) Copy of the apprentice's registration with the department;

- ~~[(3)]~~ (5) Job classification~~[+]~~ for each classification of work performed;
- ~~[(4)]~~ (6) Rate of pay;
- ~~[(5)]~~ (7) Hours worked each workday and total hours worked each workweek;
- ~~[(6)]~~ (8) Total weekly straight-time earnings;
- ~~[(7)]~~ (9) Total weekly overtime earnings;
- ~~[(8)]~~ (10) Total weekly gross earnings;
- ~~[(9)]~~ (11) The amount and purpose of each deduction; ~~and~~
- ~~[(10)]~~ (12) Total net wages paid and the date paid~~[-]~~; and
- (13) Other information as the director may require.

(b) Whenever a contractor provides fringe benefits to covered workers, the contractor shall further maintain records showing the irrevocable commitment to provide the benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing the benefits.

(c) Contractors employing apprentices under an approved program shall maintain a written record of the registration of the apprenticeship program, the registration of the apprentices, and the ratios and wage rates prescribed for the applicable program.

(d) A contractor shall submit weekly for each week in which any construction work is performed a copy of all certified payrolls to the contracting agency. The certified payrolls submitted shall set out accurately and completely all of the information required to be maintained under this chapter. The general contractor is responsible for the submission of the certified payroll records for all subcontractors.

(e) Each certified payroll submitted shall be accompanied by a "Statement of Compliance", signed by the contractor or the contractor's designated representative and shall certify or attest that:

- (1) The information for the payroll period reported is correct and complete;
- (2) Each laborer or mechanic, or apprentice employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth by law; and
- (3) Each laborer or mechanic has been paid not less than the applicable prevailing wage and fringe benefits or cash equivalent for the classification of work performed, as specified in the wage rate schedule applicable to the public work construction project at the time the work was performed.

(f) Certified payrolls submitted shall be numbered consecutively from the first week in which work is performed. Subsequent weeks shall be numbered in chronological order with the final week in which work is performed to be labeled "final".

(g) Amended certified payroll records submitted shall be labeled amended with a detailed explanation of the reason for the amendment.

(h) The falsification of any of the required documents may subject a contractor to civil penalties including suspension or criminal prosecution, or both.

(i) The contractor shall provide an electronic copy of the records or make the records available for inspection and photocopying, or transcription by the director and the director's authorized representatives. The contractor shall permit the director or the director's representatives to privately interview employees during working hours on the job. If a contractor fails to submit required records or to make the records available, or fails to allow private interviews with employees, the director may take such action as may be necessary to cause the suspension of any further payment. Failure to comply may also be grounds for immediate suspension pursuant to chapter 104, HRS. [Eff 7/27/81; comp 4/1/96; am

and comp] (Auth: HRS §104-29) (Imp:
HRS §§104-3, 104-22, 104-25)

§12-22-11 Rulings and interpretations. All questions arising in any governmental contracting agency relating to the [~~application~~] applicability and interpretation of chapter 104, [~~Hawaii Revised Statutes,~~] HRS, and of this chapter shall be referred to the director for ruling and interpretation. The director, in making the ruling or interpretation, shall take into consideration the prevailing practice of the construction industry in the locality. [Eff 7/27/81; comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-21)

§12-22-12 Disbursement of accrued amounts withheld on contract. (a) Within sixty days from the date of written request by the director, the contracting agency shall pay or transfer specified amounts from accrued payment withheld on a contract to the director for:

- (1) Wages, overtime compensation, or both due to laborers and mechanics;
- (2) Penalties assessed for a first [~~or~~], second, or third violation; or
- (3) Both paragraphs (1) and (2).

(b) Amounts collected or transferred for back wages shall be deposited or credited to the wage claim fund of the department. Amounts collected for penalties shall be deposited or credited to the general fund.

(c) The department shall disburse from the wage claim fund any wages or overtime compensation due to laborers or mechanics. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-2, 104-21)

§12-22-13 Computation of time. The time in which any act provided by these rules is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded. As used in this section, "holiday" includes any day designated as such pursuant to section 8-1, [~~Hawaii Revised Statutes.~~] HRS. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-29)

~~[§§12-22-14 to 12-22-24 (Reserved)]~~

SUBCHAPTER 2

PENALTY FOR [~~FIRST VIOLATION~~] VIOLATIONS

§12-22-25 Notification of violation. (a) Where the department, either as a result of its own investigation or as a result of a report by a contracting agency, finds that a [~~first~~] violation of chapter 104, [~~Hawaii Revised Statutes,~~] HRS, has been committed, the department shall issue a notification of violation to the contractor. Each notice of violation shall involve only one project. Each offense shall be as described in section 104-24(e), HRS.

(b) A first violation refers to the first investigation in which the department finds that a contractor has failed to comply with chapter 104, [~~Hawaii Revised Statutes,~~] HRS, or a violation which occurs more than two years after the date of notification of first violation. [~~A first violation investigation may involve more than one project; however, offenses shall be determined separately for each project.~~] A second violation refers to a

violation which occurs within two years of the date of the first notification of violation. A third violation refers to a violation which occurs within three years of the date of the second notification of violation. Additional violations occurring after the third violation shall be treated in the same way as the third violation.

(c) A notification of violation shall be final and conclusive twenty days after the date of mailing to the contractor, unless a written notice of appeal is filed with the director, as provided in section ~~[104-5(b),]~~ 104-23, [Hawaii Revised Statutes.] HRS. [Eff and comp 4/1/96; am and comp]
(Auth: HRS §104-29) (Imp: HRS §§104-23, 104-24)

§12-22-26 [Penalty.] Delay or falsification penalty. (a) A penalty of ~~[up to \$1,000]~~ \$10,000 per ~~[offense]~~ project shall be assessed against a contractor for ~~[a first violation of chapter 104, Hawaii Revised Statutes.]~~ interference or delay including failure to provide requested records under section 104-3, HRS, or failure to allow employees to be interviewed during working hours on the job.

(b) ~~[In determining the offenses committed by a contractor, the department shall assess a separate penalty for each section of chapter 104, Hawaii Revised Statutes, under which the contractor is cited, with respect to each project and each employee.]~~ An additional penalty of \$1,000 for each day thereafter that the contractor fails to comply shall be assessed against the contractor.

(c) A penalty of \$10,000 per project shall be assessed against a contractor for falsification of records.

~~[(c) The amount of the penalty for a first violation shall be determined by application of the following criteria:~~

- ~~(1) The severity of the offense;~~
- ~~(2) Whether the contractor has made a good faith effort to comply with the provisions of~~

~~chapter 104, Hawaii Revised Statutes, and these rules; and~~

~~(3) Other relevant factors as determined by the director.]~~

(d) The contractor shall be immediately suspended for a period of three years.

~~[(d)](e)~~ Concurrent with or after the issuance of a notification of violation, and within a reasonable period after completion of the investigation, the department shall notify the contractor of violations of the chapter committed and the penalty assessed, which shall then be due and payable within twenty days from the date of the mailing of the notification of violation.

~~[(e) Appropriate penalty shall be assessed even if the contractor, after being informed of the offense by the department, initiates immediate action to correct the offense.]~~ [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-22, 104-24, 104-25)

12-22-27 Violation penalties. (a) Where the department finds that a first, second, or third violation has been committed, penalties shall be as described in sections 104-22, 104-24, and 104-25, HRS.

(b) Additional violations committed after the third violation shall be penalized in the same way as the third violation.

(c) Concurrent with or after the issuance of a notification of violation, and within a reasonable period after completion of the investigation, the department shall notify the contractor of violations of the chapter committed and the penalty assessed, which shall then be due and payable within twenty days from the date of the mailing of the notification of violation. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§104-24, 104-25)

SUBCHAPTER 3

HEARING OF APPEAL

§12-22-40 Definitions. As used in this subchapter:

"Hearing" shall have the same meaning as the term agency hearing as defined in section 91-1, HRS.

"Party" or "parties" shall have the same meaning as in section 91-1, HRS and shall include any other person such as the contractor or contractor's representative, the department, or both. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-1, 104-23)

§12-22-41 Prehearing conference. (a) Upon docketing an appeal, but prior to a hearing, the hearings officer may hold a prehearing conference with the parties.

(b) Any matter not raised at the prehearing conference shall not be allowed during the hearing. Matters to be discussed at the prehearing conference may include but are not limited to the following:

- (1) A discussion of the issues raised by the appellant and the explanations and defenses to be presented by the parties at the hearing;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining stipulations which will avoid unnecessary proof;
- (4) The possibility of a settlement between the parties; and
- (5) Other matters that may aid in the disposition of the case.

(c) If the parties agree to the terms of a settlement at the prehearing conference, the settlement shall be reduced to writing, signed by the parties, and approved by the hearings officer. If

approved, the case will be dismissed without a finding on the merits of the complaint and a copy of the final prehearing settlement shall be sent by mail to the department and the appellant.

(d) A prehearing settlement shall not affect the processing of any other case, including but not limited to complaints in which the allegations are like or related to the individual allegations settled.

(e) Prehearing conference statements shall be filed by the parties no later than three business days before the scheduled prehearing conference covering those areas identified in the notice of prehearing conference. Additional conferences may be scheduled at the hearings officers' discretion. [Eff and comp

] (Auth: HRS §104-29) (Imp: §104-23)

§12-22-42 Prehearing order. (a) When a prehearing conference is held, the hearings officer may enter a prehearing order which recites the action taken at the prehearing conference, including;

- (1) The agreements made by the parties as to any of the matters considered;
- (2) The issues for hearing not otherwise disposed of by stipulation or agreement of the parties; and
- (3) The exchange of exhibits, witness list, and prehearing memorandum deadlines.

(b) The prehearing order shall control the subsequent course of the appeal, unless modified by the hearings officer at the hearing or prior thereto to prevent manifest injustice. The prehearing order shall supersede the pleading where there is any conflict and shall supplement the pleading in all other respects. [Eff and comp

] (Auth: HRS §104-29) (Imp: §104-23)

§12-22-43 Hearing. (a) Any hearing under this subchapter shall be held in accordance with chapter 91, HRS.

(b) The hearing on appeal shall be held within sixty days of the notice of appeal.

(c) All parties shall be given written notice of hearing at least fifteen days before the hearing.

(d) The parties shall be present at the hearing, and shall be allowed to call, examine, and cross-examine witnesses, and introduce papers, documents, or other evidence, in person or by counsel.

(e) At the discretion of the hearings officer, any other person may be allowed to participate, in person or by counsel, for the purposes and to the extent that the hearings officer shall determine.

(f) Witnesses at the hearing shall be examined orally, under oath or affirmation, and a record of the proceedings shall be made by the hearings officer. The hearings officer or a person designated by the hearings officer may administer oaths or affirmations at the hearing.

(g) The hearings officer may continue a hearing from day to day or adjourn it to a later day or to a different place by announcement thereof at the hearing or by appropriate notice to all parties. The hearings officer may also continue a hearing upon request of any party. At the discretion of the hearings officer, a hearing may be reopened.

(h) If the employer or employer's representative is absent without notice, the hearings officer shall base the decision on the available evidence. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-9.5, 104-23)

§12-22-44 Powers and duties of hearings officer.

(a) The hearings officer shall have full power and authority to:

- (1) Control the procedures of the hearing;
- (2) Admit or exclude testimony or other evidence;

- (3) Rule upon all motions and objections;
- (4) Call and examine witnesses;
- (5) Direct the production of papers or other matter present in the hearings room; and
- (6) Take other actions that are necessary and proper for the conduct of the hearing.

(b) The hearings officer may issue subpoenas either at will or upon written request of a party to the proceeding whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers, or any other evidence, which relates to any matter in question before the hearings officer. Where a subpoena is issued at the instance of a party to the proceeding other than the hearings officer, the cost of service and witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Witness and mileage fees shall be the same as fees paid witnesses in the circuit court.

(c) The hearings officer, whenever necessary or required during the hearing and on terms and conditions as the hearings officer may determine, shall take or cause to be taken deposition of witnesses residing within or without the State of Hawaii in the manner prescribed by law for deposition in civil actions. A request by a party other than the hearings officer for deposition of witnesses shall be in writing. The cost of any deposition shall be borne by the party at whose request the deposition was taken. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-45 Rules of evidence. (a) The admissibility of evidence at hearing shall not be governed by the laws of evidence, and all relevant oral or documentary evidence shall be admitted if it is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into

evidence. The hearings officer shall give effect to the rules of privilege recognized by law.

(b) Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the unavailability of the original and the reasons therefor shall be considered by the hearings officer when considering the weight of the documentary evidence. [Eff and comp]
(Auth: HRS §§91-2, §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-46 Official notice of facts. The hearings officer may take official notice of those matters that may be judicially noticed by the courts of the State. The hearings officer may also take official notice of generally recognized technical or scientific facts within the agency's specialized knowledge, upon notice to all parties before or during trial. Any party shall have an opportunity to contest the facts so noticed, within the time specified by the hearings officer. [Eff and comp]
(Auth: HRS §§91-2, §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-47 Decision. (a) The hearings officer shall render a written decision on a notification of violation within sixty days after the conclusion of the hearing, which shall include findings of fact and conclusions of law.

(b) A certified copy of the decision shall be served by personal delivery or by mail upon each party. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-23)

§12-22-48 Judicial review. Any party aggrieved by the decision of the hearings officer shall be entitled to judicial review as provided by section 91-14, HRS. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-26)

SUBCHAPTER 4

CONSTRUCTION ON PROPERTY LEASED BY THE STATE OR COUNTY

§12-22-60 Definitions. As used in this chapter: "Assignable square feet" means the total area of the project available for lease as determined by the master lessor.

"Leasing agency" means the state or county agency who is the lessee of a leased space.

"Project" means all the buildings, other improvements, or both, on the property where a lease is located including the leasing agency's leased area. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-61 Construction for state and county leases policy. Where construction work to property to be leased by the state or any county agency is to be undertaken, the laborers and mechanics working on that construction project shall be paid prevailing wages required under section 104-2, HRS, provided that more than fifty per cent of the assignable square feet of the project is or will be leased by the state or any county agency. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-62 Submission of leases to department.

Upon execution, renewal, termination, or any change to a lease, the leasing agency shall submit the lease to the department and the department of accounting and general services within thirty days of the execution, renewal, termination or change in the lease. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-63 Lease required to state square footage. Every lease entered into by the state or any county agency shall state the total assignable square footage of the project and the amount leased by the state or any county agency leasing space in or on the project. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-64 Challenges to square footage. All questions or challenges of the stated measurement of the square footage of the project of the lease shall be filed, heard, and decided by the hearings officer appointed by the director in conformance with chapter 91, HRS. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-65 Lessors required to notify contractors. A lessor contracting any construction work to the leased property that is subject to section 104-2.5, HRS, shall provide written notice to the contractor that prevailing wages shall be paid to all laborers and mechanics employed on the construction project. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

SUBCHAPTER 5

CONSTRUCTION PROJECTS FINANCED WITH
SPECIAL PURPOSE REVENUE BONDS

§12-22-75 Definitions. As used in this chapter:
"Project agreement" shall have the same meaning
as in chapter 39A, HRS.

"Project party" shall have the same meaning as in
chapter 39A, HRS.

"Special purpose revenue bonds" shall have the
same meaning as in chapter 39A, HRS. [Eff and comp
] (Auth: HRS §104-29) (Imp: HRS
§104-2)

§12-22-76 Contract provisions, special purpose
revenue bonds. (a) The director of finance shall

require in a construction project under chapter 39A,
HRS, that the project party insert in all
solicitations and contracts made and entered into by
the project party that prevailing wages in accordance
with chapter 104, HRS, be paid to the laborers and
mechanics employed.

(b) The following provisions shall be included
in any agreement for construction of a project funded
by special purpose revenue bonds between a project
party and the contractor:

- (1) The project party or the contractor retained
by the project party shall maintain and be
responsible for all payroll records in
accordance with the requirements and be the
responsible entity for compliance with
chapter 104, HRS, and this chapter,
including the maintenance of the certified
payroll records during the course of the
construction work and preserve these records
for a period of three years from the close
of the project for all laborers and
mechanics so employed; and

(2) Any other information or requirement as the director may require under chapter 104, HRS, or this chapter. [Eff and comp
](Auth: HRS §104-29) (Imp:
HRS §104-2)

§12-22-77 Project party collective bargaining agreement. Where the project party has entered into a collective bargaining agreement with a bona fide labor union governing the project party's workforce, as set forth in section 104-2(h), HRS, the terms of that collective bargaining agreement and associated provisions shall be deemed the prevailing wages such that the project party shall not be required to pay to its laborers and mechanics covered by the collective bargaining agreement the wages in comparable classifications as published by the director in the wage rate schedules, unless otherwise required under the director's enforcement powers contained in section 104-2(g), HRS." [Eff and comp
](Auth: HRS §104-29) (Imp: HRS §104-2)

2. Material, except source notes, to be repealed is bracketed and stricken. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 12-22, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised

Statutes, which were adopted on _____, and
filed with the Office of the Lieutenant Governor.

LINDA CHU TAKAYAMA
Director of Labor and
Industrial Relations

APPROVED AS TO FORM:

Deputy Attorney General