

# S .B. NO. 2895

JAN 27 2016

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## A BILL FOR AN ACT

RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Section 368-13, Hawaii Revised Statutes, is  
2 amended to read as follows:

3           "§368-13 Investigation and conciliation of complaint. (a)  
4 After the filing of a complaint, or whenever it appears to the  
5 commission that an unlawful discriminatory practice may have  
6 been committed, the commission's executive director shall make  
7 an investigation in connection therewith. At any time after the  
8 filing of a complaint but prior to the issuance of a  
9 determination as to whether there is or is not reasonable cause  
10 to believe that part I of chapter 489, chapter 515, part I of  
11 chapter 378, or this chapter has been violated, the parties may  
12 agree to resolve the complaint through a predetermination  
13 settlement.

14           (b) The executive director shall issue a determination of  
15 whether [~~or not~~] there is reasonable cause to believe that an  
16 unlawful discriminatory practice has occurred within [~~one-~~  
17 ~~hundred and~~] one hundred eighty days from the date of filing a  
18 complaint unless the commission grants an extension of time to

1 issue a determination.

2 (c) When the executive director makes a determination that  
3 there is no reasonable cause to believe that an unlawful  
4 discriminatory practice has occurred in a complaint filed, the  
5 executive director shall promptly notify the parties in writing.  
6 The notice to complainant shall indicate also that the  
7 complainant may bring a civil action as provided under section  
8 368-12.

9 (d) When the executive director determines after the  
10 investigation that there is reasonable cause to believe that an  
11 unlawful discriminatory practice within the commission's  
12 jurisdiction has been committed, the executive director shall  
13 immediately endeavor to eliminate any alleged unlawful  
14 discriminatory practice by informal methods, such as conference,  
15 conciliation, and persuasion.

16 (e) [~~Where~~] When the executive director has determined  
17 that there is reasonable cause to believe that an unlawful  
18 discriminatory practice has occurred and has been unable to  
19 secure from the respondent a conciliation agreement acceptable  
20 to the commission within [~~one hundred and~~] one hundred eighty  
21 days of the filing of the complaint, unless the commission has

1 granted an extension of time, the executive director [~~shall~~  
2 ~~demand~~], in the executive director's discretion, may:

- 3       (1) Demand that the respondent cease the unlawful  
4           discriminatory practice[-]; or  
5       (2) Dismiss the complaint and issue a notice to the  
6           complainant indicating that the complainant may bring  
7           a civil action as provided under section 368-12.

8       The executive director's determination that a final  
9 conciliation demand is to be made shall be subject to  
10 reconsideration by the commission on its own initiative but  
11 shall not be subject to judicial review. The executive director  
12 may demand appropriate affirmative action as, in the judgment of  
13 the executive director, will effectuate the purpose of this  
14 chapter, and include a requirement for reporting on the manner  
15 of compliance.

16       The executive director's determination to dismiss a  
17 complaint and to issue a notice of right to sue issued may be  
18 reconsidered on the executive director's own initiative but  
19 shall not be subject to judicial review.

20       (f) Notwithstanding subsection (e) to the contrary, for  
21 complaints alleging violations of chapter 515 and the federal  
22 Fair Housing Act, Title VIII of Public Law 90-284 (42 United

1 States Code section 3601, et seq.), as amended, when the  
2 executive director has determined that there is reasonable cause  
3 to believe that an unlawful discriminatory practice has occurred  
4 and has been unable to secure from the respondent a conciliation  
5 agreement acceptable to the commission within one hundred eighty  
6 days of the filing of the complaint, unless the commission has  
7 granted an extension of time, the executive director shall  
8 demand that the respondent cease the unlawful discriminatory  
9 practice.

10 The executive director's determination to issue a final  
11 conciliation demand shall be subject to reconsideration by the  
12 commission on the commission's own initiative but shall not be  
13 subject to judicial review. The executive director may demand  
14 appropriate affirmative action as, in the judgment of the  
15 executive director, will carry out the purpose of this chapter,  
16 and include a requirement for reporting on the manner of  
17 compliance."

18 SECTION 2. This Act does not affect rights and duties that  
19 matured, penalties that were incurred, and proceedings that were  
20 begun before its effective date.

21 SECTION 3. Statutory material to be repealed is bracketed  
22 and stricken. New statutory material is underscored.

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1 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY: 

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BY REQUEST

**Report Title:**

Hawaii Civil Rights Commission; Investigation and Conciliation of Complaint

**Description:**

Authorizes the Hawaii Civil Rights Commission Executive Director to dismiss a discrimination complaint and issue a notice of right to sue after a determination of a reasonable cause of discrimination is made and conciliation fails. Amends the Executive Director's authority with respect to fair housing to comply with the federal Fair Housing Act.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Labor and Industrial Relations

TITLE: A BILL FOR AN ACT RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

PURPOSE: To provide discretion in all cases except fair housing cases that are dual-filed under state law and the federal Fair Housing Act, for the Executive Director of the Hawaii Civil Rights Commission (HCRC) to either issue a final demand or dismiss the complaint and issue a notice of right to sue after conciliation. In fair housing cases that are dual-filed under state law and the federal Fair Housing Act, the Executive Director will not be provided such discretion, but shall issue a final demand after conciliation. As such, there is in effect no change to current law in fair housing cases.

MEANS: Amend section 368-13, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Section 368-13(e), HRS, requires the HCRC Executive Director to issue a final conciliation demand in every case in which the Executive Director has determined that there is reasonable cause to believe that unlawful discrimination has occurred and has been unable to resolve the complaint by securing a conciliation agreement. Fifteen days after service of the final conciliation demand, if conciliation will not resolve the complaint, section 368-14(a), HRS, requires that the case be docketed for a contested case hearing before a hearings examiner.

The statute imposes mandatory steps in the HCRC process: when the Executive Director makes a reasonable cause determination, the Executive Director *shall* attempt to resolve the complaint through conciliation of the

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complaint; if conciliation fails and the complaint is not resolved through a conciliation agreement, the Executive Director *shall* issue a final conciliation demand; if, fifteen days after the final conciliation demand, the case is not resolved, the case *shall* be docketed for a contested case hearing before a hearings examiner.

The mandatory language in the statute, with the use of the word "shall" prescribing each next step of the process has several consequences negatively affecting the efficiency and effectiveness of HCRC civil rights law enforcement.

The HCRC Executive Director is forced to expend limited enforcement attorney time and resources on conciliation of cases that meet the threshold reasonable cause standard, but are not suitable for litigation, some of which may not be provable by a preponderance of evidence standard at hearing or trial.

In addition, the HCRC cannot efficiently and effectively marshal its civil rights law enforcement resources, including limited enforcement attorney time and resources, to set enforcement priorities and dedicate sufficient resources to prosecute priority cases.

The proposed amendment to section 368-13, HRS, provides for the Executive Director to exercise discretion in cases where there has been a determination of reasonable cause to believe that an unlawful act of discrimination has occurred and conciliation efforts have failed to resolve the complaint, to either issue a final demand or dismiss the complaint and issue a notice of right to sue. This will allow for setting of enforcement priorities and more efficient use of limited enforcement resources in investigation, conciliation, and litigation. Similar discretion is provided to and



exercised by the U.S. Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.

A new subsection (f) is proposed to create an exception to the exercise of discretion by the Executive Director under the amendment to subsection 368-13(e), HRS, to mandate the issuance of a final demand in cases that are dual-filed under both state fair housing law, chapter 515, HRS, and the federal Fair Housing Act. This exception is required to maintain substantial equivalence with federal fair housing law.

Impact on the public: The proposed amendment to section 368-13(e), HRS, will enhance the HCRC's ability to pursue the public interest in elimination of unlawful discrimination by providing for more efficient and effective use of limited civil rights enforcement resources, and allowing for setting of enforcement priorities.

Impact on the department and other agencies:  
None.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: LBR153.

OTHER AFFECTED  
AGENCIES: None.

EFFECTIVE DATE: Upon approval.