

HAWAI‘I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 ·PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 1, 2017
2:00 p.m.
Conference room 325

To: The Honorable Scott Nishimoto, Chair
and Members of the House Committee on Judiciary

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: H.B. No. 77

The Hawai‘i Civil Rights Commission (HCRC) has jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services.

The HCRC opposes H.B. No. 77.

The HCRC is composed of two sections. The HCRC enforcement section receives, investigates, and conciliates complaints of discrimination. The HCRC adjudication section conducts contested case hearings on complaints that do not conciliate, and the Commissioners issue final decisions on those cases. Pursuant to HRS § 368-2(a), Commissioners are selected by the Governor based on their knowledge and experience in civil rights matters, and pursuant to HRS § 368-3(2) and (5), the Commission is authorized to hold hearings and order appropriate legal and equitable relief. To avoid any conflicts of interest, there is a physical separation between the HCRC enforcement and adjudication sections. In addition, pursuant to HAR § 12-46-40,

ex parte communications between the enforcement section and the adjudication section/Commissioners on any open cases are strictly prohibited.

The HCRC opposes H.B. No. 77 which, in section 31 of the bill, would eliminate the Commission’s adjudication functions and would place these functions in a centralized office of administrative hearings. The discrimination laws (statutes, administrative rules, and caselaw) that are interpreted and applied in HCRC contested cases involve complex analyses and a myriad of elements, proof standards and defenses. Hearings officers in a centralized office of administrative hearings would likely not have the specialized expertise or experience required to correctly apply the law in conducting contested hearings, ruling on motions, and rendering proposed and final decisions in HCRC discrimination cases. The result will be poorer quality final decisions in HCRC cases, and messier records on appeals to the courts.

The intent of the legislature in creating the HCRC was “... to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State’s commitment to preserving the civil rights of all individuals.” 1989 House Journal, Standing Committee Report 372. The legislature believed that “[t]he establishment of a civil rights commission would facilitate the development of a staff with expertise in all discrimination laws...” 1988 House Journal, Standing Committee Report 660. H.B. No. 77 would erode and diminish the strong Civil Rights Commission that the legislature intended to create, more than twenty-five years ago.

For these reasons, the HCRC urges you to hold this bill. Alternatively, the HCRC would urge you to delete section 31 of the bill to exclude the HCRC from this proposed chapter.

DAVID Y. IGE
GOVERNOR OF
HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
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Testimony of
SUZANNE D. CASE
Chairperson

Before the House Committee on
JUDICIARY

Wednesday, February 1, 2017
2:00 PM
State Capitol, Conference Room 325

In consideration of
HOUSE BILL 77
RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS

House Bill 77 proposes to establish an Office of Administrative Hearings for the State's executive branch. **The Department of Land and Natural Resources (Department) opposes this bill. This bill would eliminate fundamental decision-making responsibility from the Board of Land and Natural Resources and the Commission on Water Resources Management.**

Most importantly, the Department believes that final decision making power in all contested cases of the Department shall continue to rest with the Board of Land and Natural Resources and the Commission on Water Resources Management, and not with one or more hearings officers of this new office. To do that otherwise runs afoul of the letter, spirit and intent of the State's Constitution, which provides that "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law..." (Constitution of the State of Hawaii, Article XI, Section 2).

The Board of Land and Natural Resources and the Commission on Water Resources Management are established to be the administrative decision-making bodies for state land and water matters, respectively. These matters are heard and decided in sunshine meeting with opportunity for the applicant or affected party and the public to testify.

Under certain circumstances, an affected party is entitled to request a contested case proceeding so that the matter can be heard in more detail by the board, with the parties given opportunity to present a case and to cross-examine. Because this is a time consuming process, these

proceedings are sometimes contracted out to be heard by a hearing officer, who is generally an attorney or retired judge with some familiarity with the statutory and regulatory framework. The hearing officer hears the matter independently of board and staff involvement, creates a record, provides draft findings of fact and conclusions of law, and makes a recommendation to the board.

The Board of Land and Natural Resources or the Commission on Water Resources Management then considers the record, draft findings and conclusions, and recommendation, and makes its own independent decision on the contested case. The decision itself is never delegated, as that would be an unlawful delegation of the board's fundamental decision-making responsibility.

Centralizing contested case decision making would abrogate the fundamental function of state boards.

If this were a procedural bill only and not a delegation of authority, a centralized process, by itself, could provide some benefit in terms of efficiencies. It could also, on the other hand, lead to the loss of hearing officers' subject matter expertise from our current level. The Department's contested cases often involve very complex, discipline and locality specific, and even technical and historic issues that require in-depth knowledge of and expertise in the subject matters. Appointing a hearing officer who is not familiar with the Department's statutes, regulations and subject matters will not be an effective or efficient approach in meeting the Department's contested case needs or serving the public's interest or interest of the parties involved.

Also, as to minor and routine cases, such an approach will complicate and significantly prolong the procedure, decrease efficiency. For example, the Department currently operates a simplified hearing process under the Civil Resource Violations System, which is authorized under Chapter 199D, Hawaii Revised Statutes. Transferring cases from this system to the centralized office will create unnecessary steps in the procedure for both the Department and the contesting parties. It is very likely that this measure if adopted will deter divisions of the Department from initiating enforcement cases in fear that they will get into prolonged proceedings with another state agency which may not give their cases the deserved priority.

The Department believes that its current procedures in clearing any potential conflicts of interest and appearance of conflict are sufficient. In addition, the Board of Land and Natural Resources as a panel retains the power to review any cases in dispute, including any contest on a hearing officer's impartiality, before making its final decisions. This final review process gives added confidence to the parties and the public because it can be perceived as less subject to political influence than in other state agencies headed by an appointed director. This is exactly one of the reasons why the Board of Land and Natural Resources was created as the head of the Department under the State's Constitution and statutes. For these reasons, the Department sees that this measure as unnecessary to preserve the integrity of the state agencies' administrative proceedings and remove any ambiguity of conflicts of interest.

To address these concerns, the Department proposes amending the bill to make referral to this centralized office optional instead of mandatory, without delegating the ultimate decision-making authority.

The Department recognizes the importance of this bill and respectfully requests your consideration of its testimony and proposed amendment.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIJO
DEPUTY DIRECTOR

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February 1, 2017

To: The Honorable Scott Y. Nishimoto, Chair,
The Honorable Joy A. San Buenaventura, Vice Chair, and
Members of the House Judiciary Committee

Date: Wednesday, February 1, 2017
Time: 2:00 p.m.
Place: Conference Room 325, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 77 Relating to an Office of Administrative Hearings

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal is intended to establish a centralized office of administrative hearings to separate administrative adjudicatory authority from the regulatory, enforcement, and prosecutorial functions of state agencies.

The department opposes the measure.

II. CURRENT LAW

Section 368-14, HRS, provides the Hawaii Civil Rights Commission (HCRC) the authority to appoint hearings examiners to hold hearings on contested cases in accordance with chapter 91. The hearings examiner issues a proposed decision containing a statement of reasons including a determination of each issue of fact or law necessary to the proposed decision that shall be served upon the parties.

Adversely affected parties may file exceptions and present arguments to HCRC, which shall consider the whole record or such portions thereof as may be cited by the parties. If HCRC finds that unlawful discrimination has occurred, the commission issues a decision and order in accordance with chapter 91 requiring the respondent to cease the unlawful practice and to take appropriate remedial action.

Sections 104-23(c),(p. 19) and 398-24, HRS (p.64) authorizes a hearings officer appointed by the Director to review the case de novo in accordance with chapter 91 that provides for judicial review on appeal. The Wage Standards Division administers these provisions.

III. COMMENTS ON THE HOUSE BILL

The department appreciates the intent of this proposal to ensure that administrative hearings are conducted fairly and without conflicts of interest, but opposes the measure.

- The department is concerned that a centralized administrative hearings branch will lack the subject matter expertise necessary to adequately adjudicate the complex civil rights laws administered by HCRC, the Wages and Hours of Employees on Public Works Law, chapter 104, HRS, and the Hawaii Family Leave Law, chapter 398, HRS, administered by the Wage Standards Division. When contested cases are heard by individuals lacking expertise on civil rights laws, final administrative decisions will be lacking as well, and both final decisions and records of the administrative case proceedings will be inadequate on appeal to the courts.
- Hearings officers in the Wage Standards Division are experienced in the administration of the complex issues associated with chapters 104 and 398, HRS. While the hearings officers in Wage Standards Division are not required to be licensed attorneys, they receive judicial training that provides appropriate qualifications and expertise in conducting a fair and impartial proceeding. Allowing only individuals who are licensed to practice law in Hawaii to adjudicate these issues will increase costs to the State and limit the pool of appropriate candidates for these positions.



DAVID Y. IGE
GOVERNOR
SHAN S. TSUTSUI
LT. GOVERNOR

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CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

**TO THE HOUSE COMMITTEE ON
JUDICIARY**

**TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017
Date: Wednesday, February 1, 2017
Time: 2:00 p.m.
Conference Room: 325**

**TESTIMONY FOR HEARING ON HOUSE BILL NO. 77
RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS**

**TO THE HONORABLE SCOTT Y. NISHIMOTO, CHAIR,
AND THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE**

The Office of Administrative Hearings (“OAH”) of the Department of Commerce and Consumer Affairs (“DCCA” or “Department”) appreciates the opportunity to offer comments for the Committee’s Hearing on House Bill 77 (“Bill”), relating to an Office of Administrative Hearings. My name is Craig Uyehara, and I am the Senior Hearings Officer of OAH.

The Bill would establish a central hearing agency in the Executive Branch for the purpose of separating the adjudicatory function from the investigatory, prosecutory and policy-making functions of agencies of the Executive Branch. The Bill appears to generally apply to all agencies that employ or engage hearings officers to adjudicate contested cases unless the agency has been exempted.

While the Department shares the Legislature's concerns expressed in this measure about avoiding potential conflicts of interest, maintaining the integrity of administrative adjudications, and ensuring an effective administrative hearings process, the Department does not believe that the process and relocation of OAH to a central office as proposed in this Bill is the appropriate answer to those concerns.

First and foremost, OAH has always maintained its independence from the agencies whose decisions it reviews, including the other divisions of the Department. In November 1991, OAH adopted the Model Code of Judicial Conduct for Administrative Law Judges of State Central Panels ("ALJ Model Code"), which serves as a model for establishing basic ethical conduct standards for administrative law judges or any other hearings officials in any state with a central panel administrative hearing system. The adopted ALJ Model Code requires OAH's hearings officers to uphold the integrity and independence of the office and avoid impropriety or the appearance of impropriety in all activities. In practice, OAH hearings officers constantly guard against the appearance of a conflict by, for example, refraining from engaging in any *ex parte* communications and routinely recusing themselves in order to avoid any potential for a conflict. Moreover, the past decisions of OAH show that OAH's hearings officers do not hesitate

to disagree with other agencies' decisions when those decisions, in the hearings officer's opinion, are not supported by the evidence or the law. Ultimately, the decisions of OAH are appealable to the circuit court. And while issues of bias or conflict can be reviewed by the court, OAH is unaware of any such claims made, let alone sustained, by the court in any of its decisions.

Second, the Department is concerned that removing OAH from DCCA and moving it to a central hearings agency will dilute the expertise developed by OAH's hearings officers with respect to the subject matter of commercial and consumer protection issues that OAH has built up over years of operating within DCCA. As a part of the Department, OAH is well-versed in the laws concerning DCCA-regulated businesses and professions, including the administrative rules, regulating professional licenses, the Uniform Securities Act, personal injury protection benefits, and rights to trade and other business names. Over many years, OAH has also developed a strong working knowledge of the customs and practices followed in many of the professions and trades the Department regulates, which can be an important consideration in arriving at a well-informed decision.

In addition to the specialized subject matter expertise that OAH has developed for the Department, the various DCCA programs and industries that utilize OAH's services have come to follow established processes and procedures for administrative hearings that would likely be disrupted by the movement of OAH to a central panel housed under a different department. Rather than create a system that revamps the rules to which DCCA and regulated industries have come to develop and prove out over

time, the Department would request this Committee to consider leaving its current structure in place.

Additionally, OAH has, for many years, conducted administrative hearings to review denials of procurement protests at the State and County levels pursuant to HRS Chapter 103D, as well as denials of ordinary and service-connected disability retirement benefits for the Employees Retirement System. OAH's strong familiarity with the law and past decisions in these areas can be critical to the rendering of consistent decisions and to educating the public as to how the laws are interpreted and applied in these particular areas. This can in turn lead to less protests and delays in the commencement of government projects and/or more consistent application of laws in these areas. The Department is concerned that the subject matter and procedural expertise built up for these non-DCCA areas may be adversely affected by a transfer of these services to a central hearings office outside of OAH.

Given OAH's independence and proven integrity which it has established over many years of service, as well as the expertise OAH has developed after conducting countless hearings in various areas related to commerce regulation, the Department believes that parties to an administrative hearing and the public may be better served by strengthening the laws governing the ethical conduct of state hearings officers.

Thank you for the opportunity to provide comments on this proposed legislation.

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller
AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE ON JUDICIARY
ON
WEDNESDAY, FEBRUARY 1, 2017
2:00 P.M.
CONFERENCE ROOM 325

H.B. 77

RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS.

Chair Nishimoto, Vice Chair San Buenaventura, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 77.

The bill establishes a centralized office of administrative hearings (Office), which will be attached to the Department of Accounting and General Services (DAGS) for administrative purposes. The bill removes the authority of the various departments and agencies to appoint hearings officers, and places that authority in the Office, which will take over administrative contested case hearings for the various departments and agencies. The bill contemplates the transfer of staff from the various departments and agencies to the office.

DAGS has concerns regarding this measure and offers the following comments for your consideration.

1. Scope of Bill: The scope of the bill is broad and expansive. The bill will impact numerous programs and agencies ranging from highly complex matters such as utility

ratemaking and mergers, health insurance rate regulation, and mortgage licensing, to the more day-to-day matters of the practice of barbering and mix martial arts contests.¹ Given the diverse programs being impacted, DAGS believes that the administrative hearings may already be appropriately placed within their respective departments and agencies, with their specialized staff and department attorney generals to handle them.

2. Specialized Industry Expertise: Many of the programs the bill proposes to impact require specialized subject matter knowledge and expertise, and the departments and agencies have acquired and developed technical staff with the requisite knowledge and expertise over long periods of industry practice. Hearings officers transferred from the departments and agencies may lose institutional knowledge and expertise, which could impact the viability of the Office, and raise questions as to the decisions rendered by the Office.

3. Opt Out Provision: Although the bill proposes an opt out provision, the option may not be practicable. Proposed section -2(b) provides that the new office will have mandatory jurisdiction over all cases, except for those the head of agency will hear by themselves. In practice, this would appear to mean that only departments or agencies that are structured to hold hearings, such as the Public Utilities Commission, may opt out of the Office's jurisdiction. Since

¹Programs impacted: Chapter 6E, Historic Preservation; Chapter 11-407, Elections; §26-9, Department of Commerce and Consumer Affairs; Chapter 103D, Procurement Code; Chapter 104-23, Wage and Hours of Employees on Public Works; Chapter 128D, Environmental Response Law; Chapter 174C, State Water Code; Chapter 269, Public Utilities Commission; Chapter 269E, One Call Center; Chapter 271, Motor Carrier Law; Chapter 271G, Water Carrier Act; Chapter 304A, University of Hawaii System; Chapter 305J, Post-Secondary Education Authorization; Chapter 342B, Air Pollution Control; Chapter 342D, Water Pollution; Chapter 342F, Noise Pollution; Chapter 342G, Integrated Solid Waste Management; Chapter 342H, Solid Waste Pollution; Chapter 342J, Hazardous Waste; Chapter 342L, Underground Storage Tanks; Chapter 342P, Asbestos and Lead; Chapter 346, Department of Human Services (Medicaid); Chapter 356D, Hawaii Public Housing Authority; Chapter 368, Civil Rights Commission; Chapter 373, Commercial Employment Agencies; Chapter 398, Family Leave; Article 431:14G, Health Insurance Rate Regulation; Chapter 436B, Uniform Professional and Vocational Licensing Act; Chapter 437, Motor Vehicle Industry Licensing Act; Chapter 438, Barbering, Practice Of; Chapter 440, Boxing Contests; Chapter 440E, Mixed Martial Arts Contests; Chapter 444, Contractors; Chapter 449, Escrow Depositories; Chapter 454F, Secure and Fair Enforcement for Mortgage Licensing Act; Chapter 454M, Mortgage Servicers; Chapter 576E, Administrative Process for Child Support Enforcement.

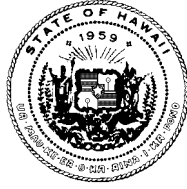
the bill takes away the authority to appoint hearings officers, departments and agencies that do not regularly hold hearings, would not be able to opt out since they have lost their ability to hold hearings and would have to defer to the Office.

4. Means of Financing: The bill proposes to transfer staff from departments and agencies that are compensated through special funds. Although the bill provides general fund appropriations for fiscal years 2017-2018 and 2018-2019, it is unclear what funding sources will be used going forward. If the intent is to use special funds for the transferred staff, there may be problems with restrictions on the use of special funds.

5. Ability of DAGS to Support the Office: DAGS is concerned with the workload that will be placed upon its limited staff and resources. DAGS would be required to provide administrative support in terms of payroll, human resources, budgeting, etc. In addition, the possible transfer of staff from these diverse programs and agencies to the Office may pose a complicated administrative undertaking.

Thank you for the opportunity to submit testimony on this matter.

DAVID Y. IGE
GOVERNOR



PANKAJ BHANOT
DIRECTOR

BRIDGET HOLTHUS
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES**

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 1, 2017

TO: The Honorable Representative Scott Y. Nishimoto, Chair
House Committee on Judiciary

FROM: Pankaj Bhanot, Director

SUBJECT: **HB77 - RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS**

Hearing: February 1, 2017, 2:00 p.m.
Conference Room 325, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the Legislature's attention to the integrity of administrative proceedings and provides comments. DHS defers to comments and testimony of other departments, commissions and entities that may be affected by this measure. As the measure progresses through the legislative process, DHS may add additional comments.

PURPOSE: The purpose of this bill is to establish a centralized office of administrative hearings in the Department of Accounting and General Services (DAGS) to hear cases referred to it by state executive branch agencies to address; and appropriates funds. As stated in the preamble, the Legislature believes the combination of regulatory, enforcement, prosecutorial and adjudicatory authority in a single agency creates a potential conflict of interest and may compromise the integrity of administrative adjudications.

The Administrative Appeals Office (AAO) of DHS has processes in place to maintain integrity of administrative adjudications and avoid any appearance of a conflict of interest. The hearing officers are not DHS employees: they are private attorneys, who are independent contractors, are impartial, and are not involved nor interested in the outcome of the matter.

SB 77 seeks to be a comprehensive proposal that restructures the administrative law system of the Executive branch. Section 29 applies to DHS, and proposes to amend section 346-

59.7, Hawaii Revised Statutes (HRS), that addresses enforcement of decisions regarding Medicaid overpayment recovery related to *providers* and judgment rendered thereon. DHS seeks clarity as to the Legislature's intent to only carve out these particular claimants.

Of the nearly 1,900 annual requests for administrative relief to DHS AAO, in the last three years there have only been 27 total requests (2015=9; 2016=10; 2017=8) for administrative hearings made by providers pursuant to section 346-59.7, HRS. These petitioners were represented by counsel in 24 of the 27 cases; and in only two cases were Chapter 91 petitions filed at circuit court following the issuance of the administrative hearing decision.

DHS acknowledges that these cases involving Medicaid over payments to medical providers are very complex and time consuming. If the Legislature intends to carve out this complex fraction of administrative claims, DHS alerts the committee that the practical effect is two systems of administrative proceedings, one for medical providers and one for recipients. It is unclear whether having two administrative tribunals will diminish the appearance of conflict of interest or enhance it.

To implement the proposed measure, DHS will require additional review and consultation to determine the applicable administrative processes, compliance and privacy regulations, as well as fiscal implications associated with this proposal, and requests an appropriate effective date to make these changes.

To avoid confusion, given the other 1,890 other annual requests for administrative appeals made by *recipients* of public benefits or social services, very clear procedures must be established as it is inevitable that *recipients* will submit request for administrative relief to the Central Administrative Appeals Office instead of the DHS Administrative Appeals Office. Responses, hearings, and decisions are time sensitive, and if time frames are missed, *recipients* may be denied access to benefits they are eligible to receive, or DHS may pay out benefits to an ineligible recipient and be required to recoup those benefits.

Lastly, to maintain program integrity and compliance with program regulations, the budget for the DHS Administrative Appeals Office should not be reduced to fund the fraction of cases that will be handled by the Central Administrative Appeals Office.

Thank you for this opportunity to provide comments on this bill.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 77, RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Wednesday, February 1, 2017 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Lynette J. Lau, Administrator, Child Support Enforcement Agency

Chair Nishimoto and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to establish a centralized administrative hearing office to hear all contested cases that arise from a non-exempt agency.

Although this bill is concerned with administrative adjudications taking place within agencies that combine regulatory, enforcement, prosecutorial, and adjudicatory authority in a single agency, for the purposes of child support, there already is a separation between the adjudicatory function in contested cases and the enforcement and prosecutorial functions.

The Child Support Enforcement Agency (CSEA) is responsible to enforce child support orders. The Office of Child Support Hearings (OCSH) is responsible for adjudicating all contested actions where child support orders are being established, modified, or terminated. Although both are divisions under the Department of the Attorney General, their functions are kept separate and interactions between the two divisions are limited appropriately. In addition, the issue of child support is one that involves both parents as the parties in interest. In those cases where a child is not receiving public assistance, CSEA does not have an interest in the outcome of any contested action. In cases where a child is receiving public assistance, CSEA does have an interest in the establishment of an order for support. However, if the action is contested and the matter is set for an administrative hearing, OCSH will hear the

matter. For the purposes of administrative hearings for child support, the concerns regarding a potential conflict of interest or the process perceived as being unfair by a litigant opposing the agency are not issues as OCSH does not have an interest in the outcome of the contested action.

Section 50 of the bill, page 90, lines 7-12, proposes to amend section 576E-7, Hawaii Revised Statutes (HRS), by removing CSEA's authority to sign the proposed order as the final order when the parties fail to request an administrative hearing. This is in conflict with section 576E-2(b) on page 4, lines 14-17, which grants the office of administrative hearings jurisdiction to resolve all contested cases, unless the agency hears the case without assigning it to a hearings officer. Because the parties did not request a hearing after being appropriately notified of the action, there is no contested case and CSEA would not refer the case to an administrative hearing officer. Also, the Legislature specifically approved the signing of default orders by CSEA rather than a hearings officer in order to expedite the filing and implementation of default orders in 2008 as Act 178.

Section 54 of the bill, page 92, line 3, through page 94, line 14, seeks to amend section 576E-14(a), (d), (e), and (f) by removing CSEA and inserting the office of administrative hearings as the sole point of contact for additional administrative actions not relating to contested case proceedings. These amendments would have the unwelcome effect of inserting the office of administrative hearings directly in each step of the administrative process, which would be burdensome and unnecessary and would result in a delay in providing services to the public. It would require the office of administrative hearings to maintain records and track cases even though no referral was made by CSEA because of a contested action.

The Department of the Attorney General respectfully requests that the provisions in sections 49 through 54 of the bill relating to chapter 576E, HRS, be removed if this bill is passed.

CHRISTOPHER J. YUEN
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LATE

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January 31, 2017

Testimony re HB77, Administrative Hearings

Rep. Nishimoto and Members of the House Judiciary Committee:

I am writing to oppose HB77 in its current form. It has consequences that go far beyond its stated intent. As currently written, it takes away the core functions of several major state boards and commissions.

HB77's stated intent is to deal with the apparent "conflict of interest" that occurs when one branch of an agency cites an alleged violator, and the agency then conducts a contested case hearing on the validity of the citation. For example, the Department of Health may cite someone for a noise violation, and the alleged violator can get a contested case hearing before the director of the Department of Health (or a hearing officer appointed by the director) to decide whether the citation is valid.

Having an independent panel of administrative law judges is one common method of dealing with this possible conflict between an agency's enforcement duties and its duty to give a neutral and fair hearing.

While HB77 may be intended to deal with this narrow situation, it broadly states that it "shall apply to each agency that employs or engages one or more hearings officers, either full or part-time, to adjudicate contested cases..."

In Hawai'i, largely because of judicial rulings, many of the core decisions made by boards and commissions involving major public policy questions are handled as contested case hearings, including:

- All LUC boundary amendments, for example, changing land from Agricultural to Urban
- Major CWRM decisions allocating water, for example, the Waiahole and East Maui water cases
- Many major conservation district use applications before the BLNR, such as astronomical facilities

These types of decisions should be made by the boards and commissions established by law to weigh competing public policy considerations, not by a single hearing officer. Under current law, even when the boards or commissions use hearing officers, their decision is advisory to the board, which has the final say.

To more specifically tailor HB77 to the "conflict of interest" situation, the clause quoted above that this should apply to "each agency that engages one or more hearing officers..." should be stricken, and the bill rewritten to apply only to a specified set of actions, such as those in section 3 to section 54.

I am not familiar enough with most of the agency functions in sections 3 to 54 to comment whether they should be covered by a bill like this, except for the following:

1. Section 3 refers to violations of state historic preservation laws, which may be eventually decided by the BLNR in a contested case hearing. While this does involve a potential “conflict” between enforcement and adjudicatory roles, it is a very rare type of proceeding. Other BLNR contested case hearings sometimes have the board adjudicate violations cited by DLNR staff, but in these, major public policy considerations are often intertwined with the strictly legal aspects, and these should also be decided by the board rather than a single hearing officer.

2. Section 10 gives CWRM contested case hearings to the administrative hearings office. This basically does away with CWRM, and thus violates art. XI, sec. 7 of the state constitution.

Finally, Sec. 55 must be substantially rewritten because it also broadly transfers contested case functions away from various departments, not just those involving a potential conflict between enforcement and adjudicatory functions.

Thank you for reviewing my testimony on this bill.