

ACT 64

H.B. NO. 404

A Bill for an Act Relating to Administrative Rules.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. The legislature finds that interpretations made by the Supreme Court of Hawaii of the public hearing notice provisions of section 91-3, Hawaii Revised Statutes, have resulted in great uncertainty about the validity of many of the adopted administrative rules. In order to avoid case-by-case challenges to the validity of administrative rules on the grounds of faulty public hearing notices, the counties or the agencies of the State of Hawaii as defined in section 91-1, Hawaii Revised Statutes, will have to re-adopt their administrative rules and will have to incur as much as \$10,000,000 in publication and travel costs in order to have public hearing notices that contain a sufficient amount of information about the rules to satisfy the interpretation of section 91-3 made by the Supreme Court of Hawaii. Furthermore, at least one state agency that attempted to comply with the interpretation of section 91-3 made by the Supreme Court of Hawaii has been criticized for including too much detail about its proposed administrative rules in the public hearing notices.

Section 91-3(a)(1), Hawaii Revised Statutes, provides that the notice of the public hearing on the proposed adoption of an administrative rule "shall include a statement of the substance of the proposed rule." In *Costa v. Sunn*, 64 Haw. 389 (1982), the Supreme Court of Hawaii invalidated certain amendments made to the administrative rules of the Department of Social Services and Housing and stated that "substance" within the meaning of that phrase "means not merely the subject of it, but an intelligible abstract or synopsis of its material and substantial elements"; that the notices involved in that case "stated little more than the headings of the new rules and did not provide interested persons with sufficient information to 'direct their comments toward concrete proposals'"; and that "the notice should fairly apprise interested parties of what is being proposed so they can formulate and present rational responses to the proposal". As a consequence of the Supreme Court's decision, the Department of Social Services and Housing was forced to republish rule amendment notices at a cost of over \$30,000 and to devote considerable staff time and effort to recalculate public assistance benefits under the old unamended rules and then again under the amended rules after the amendments were readopted.

In *State v. Rowley*, No. 12580 (Nov. 18, 1988), the Supreme Court of Hawaii invalidated an administrative rule of the Department of Land and Natural Resources that prohibited nudity in state parks. The Supreme Court invalidated the rule on the basis that the notice of public hearing published in 1971 did not meet the requirements of section 91-3 as interpreted in 1982 in *Costa v. Sunn*, even though the 1971 rules were repealed and reformatted in 1981, the rule prohibiting nudity in state parks had been a public record for over ten years, and the public hearing notice published in 1981 expressly stated that "Copies of the proposed Administrative Rules and of the regulations to be repealed are available for public

inspection” and stated where the rules were available for inspection. As pointed out in the dissenting opinion in *State v. Rowley*, the opinion of the Supreme Court “effectively invalidates all the rules governing the State Park System on a questionable ground that rules repealed in 1981 were not validly adopted in 1971.” Furthermore, the administrative rules of all other agencies that were primarily just reformatted about 1981 in total without detailed explanation of the substance of the rules that had previously been in force and effect are also in danger of being invalidated. A considerable expense of staff time and effort will be required to review all public hearing notices published pursuant to the Hawaii Administrative Procedure Act since its original enactment took effect on January 2, 1962, or to republish detailed notices of public hearings and re-adopt all existing administrative rules.

Consequently, the purposes of this Act are to:

- (1) Expressly ratify and validate all administrative rules and rule amendments and repeals that were filed pursuant to section 91-4, Hawaii Revised Statutes, before the close of business on December 31, 1986, to the extent that those administrative rules and rule amendments and repeals shall be considered to be free from any noncompliance with the statutory procedural requirements for the adoption, amendment, or repeal of administrative rules;
- (2) Provide clarifying statutory wording that will expressly enable agencies to publish notices that generally describe the subjects involved and the purposes to be achieved by a proposed rule, together with a description of where and how free copies of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be requested, instead of including in the notice only a statement of the substance of the proposed rule; and
- (3) Impose a three-year limitations period on challenges to the validity of any adopted administrative rule adoption, amendment, or repeal on the basis of noncompliance with the procedural requirements for rule adoption, amendment, or repeal.

SECTION 2. Section 91-3, Hawaii Revised Statutes, is amended to read as follows:

“§91-3 Procedure for adoption, amendment or repeal of rules. (a) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

- (1) Give at least [twenty] thirty days’ notice for a public hearing. [Such] The notice shall include [a]:
 - (A) Either:
 - (i) A statement of the substance of the proposed rule[, and of the] adoption, amendment, or repeal; or
 - (ii) A general description of the subjects involved and the purposes to be achieved by the proposed rule adoption, amendment, or repeal; and
 - (B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed at no cost to any interested person who requests a copy, together with a description of where and how the requests may be made; and
 - (C) The date, time, and place where the public hearing will be held and where interested persons may be heard [thereon.] on the proposed rule adoption, amendment, or repeal.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its [rulemaking] rule-making proceedings, and published at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies.

- (2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date as to when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination.

(b) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals or to livestock and poultry health requires adoption, amendment, or repeal of a rule upon less than [twenty] thirty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(c) The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor of the county. The provisions of this subsection shall not apply to the adoption, amendment, and repeal of the rules and regulations of the county boards of water supply.

(d) The requirements of subsection (a) may be waived by the governor in the case of the State, or by the mayor in the case of a county, whenever a state or county agency is required by federal provisions to promulgate rules as a condition to receiving federal funds and such agency is allowed no discretion in interpreting such federal provisions as to the rules required to be promulgated; provided that the agency shall make such adoption, amendment, or repeal known to the public by publishing a statement of the substance of the proposed rule at least once in a newspaper of general circulation in the State prior to the waiver of the governor or the mayor.

(e) No adoption, amendment, or repeal of any rule shall be invalidated solely because of the inadvertent failure to mail an advance notice of rule-making proceedings or the inadvertent failure to mail or the nonreceipt of requested copies of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed. Any challenge to the validity of the adoption, amendment, or repeal of an administrative rule on the ground of noncompliance with statutory procedural requirements shall be forever barred unless the challenge is made in a proceeding or action, including an action pursuant to section 91-7, that is begun within three years after the effective date of the adoption, amendment, or repeal of the rule."

SECTION 3. The legislature hereby declares that all administrative rules and rule amendments and repeals that were filed pursuant to section 91-4, Hawaii Revised Statutes, before the close of business on December 31, 1986, shall be considered to be validly adopted, amended, or repealed and free from any non-compliance with statutory procedural requirements for the adoption, amendment, or repeal of administrative rules. An administrative rule or rule amendment or repeal filed pursuant to section 91-4 before the close of business on December 31, 1986, shall not be invalidated by a court on the ground of noncompliance with the statutory

procedural requirements for the adoption, amendment, or repeal of administrative rules.

SECTION 4. The validity of any administrative rule adoption, amendment, or repeal filed pursuant to section 91-4, Hawaii Revised Statutes, after December 31, 1986, and before the effective date of this Act may be challenged on the grounds of noncompliance with statutory procedural requirements for the adoption, amendment, or repeal of administrative rules, subject to the three-year limitations period applicable pursuant to section 91-3(e), Hawaii Revised Statutes, as set forth in this Act. For the purposes of determining the three-year limitations period for administrative rule adoptions, amendments, or repeals filed after December 31, 1986, but before the effective date of this Act, the three-year limitations period shall be deemed to commence on the effective date of the rule adoption, amendment, or repeal or the effective date of this Act, whichever date is later.

SECTION 5. Notwithstanding sections 3 and 4 of this Act, this Act does not affect challenges made to the validity of any administrative rule in proceedings that were begun before the effective date of this Act.

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon its approval, except that to the extent that this Act applies to the adoption, amendment, or repeal of administrative rules that occurred before the enactment of this Act, this Act is intended to have retrospective effect and operation.

(Approved May 3, 1989.)