

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

April 16, 2008

No. 1 Capitol District Building – Conference Room 410

- I. **CALL TO ORDER:** Vice Chair Pang called the meeting to order at 10:30 a.m., with a quorum present.

MEMBERS PRESENT:

- Sharon Pang
- Michael Yee
- Donald Dymond
- Richard Schnitzler
- Bruce Bucky
- Dorvin Leis
- Charles Au

ABSENT MEMBERS:

- Lynne Woods
- Peter Yukimura

STAFF:	<u>DBEDT</u> Dori Palcovich Steve Bretschneider Pearl Imada-Iboshi Ilene Deutsch	<u>Office of the Attorney General</u> Margaret Ahn
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GUESTS:

David De Luz, Jr., Vice President, Big Island Toyota
 Thomas Vendetta, Chair, Hoisting Machine Operator's Advisory Board
 Jamesner Dumlaog, Operations Manager, Hawaii Occupational Safety and Health (HIOSH), Department of Labor and Industrial Relations (DLIR)
 Bill Comerford, President, Hawaii Bar Owners Association, (HIBOA)
 Jolyn Tenn, Member, HIBOA
 Michael Zehner, Associate Member, HIBOA
 Ty Nohara, Securities Enforcement Attorney, Department of Commerce and Consumer Affairs, (DCCA)
 William Pierpont, Branch Chief, Measurements Standards Branch, Quality Assurance Division, Department of Agriculture
 Kawika Crowley, Hawaii Smokers Alliance
 George Massengale, Director of Policy, Coalition for a Tobacco Free Hawaii
 Barbara Yamashita, Chief, Community Health Division, Department of Health, (DOH)
 Danette Wong Tomiyasu, Chief, Chronic Disease Management and Control Branch, (DOH)
 Julian Lipsher, Public Health Educator, Chronic Disease Management and Control Branch, (DOH)

WORKING LUNCH AS THE MEETING PROGRESSED

- II. **INTRODUCTION AND RATIFICATION OF BOARD MEMBER NOMINATION** – Vice Chair Pang introduced Mr. David De Luz, Vice President of Big Island Toyota, as a prospective nominee for this Board. Mr. De Luz was born and raised in Mount View on the Big Island and he belongs to various community boards and associations. After some discussion and upon hearing from Mr. De Luz, Mr. Schnitzler recommended that Mr. De Luz be nominated as a member of this Board; the Board unanimously agreed.
- III. **APPROVAL OF MINUTES:** Minutes of the March 19, 2008 board meeting were approved as amended.
- IV. **OLD BUSINESS**
- A. Review and discussion of post public hearing statement of proposed repeal of HAR Chapter 16-38 and adoption of HAR Chapter 16-39 "Securities" (DCCA) – Ms. Ty Nohara, Securities Enforcement Attorney at DCCA's Securities Enforcement Branch, explained that at the public hearing there was no testimony, written or oral; prior to the hearing no comments were received from the groups with which DCCA was working with while drafting the rules. No substantive changes were made since the rules were first submitted to this Board with the exception of housekeeping measures. A copy of the post public hearing

statement was simultaneously submitted to the Governor's office along with this Board. Mr. Yee recommended that these post public hearing statements proceed to the Governor's office for adoption; the Board unanimously agreed.

- B. Re-review and discussion of HAR Chapter 12-48, "Relating to Hoisting Machine Operators" (DLIR) – Mr. Thomas Vendetta, Chair of the Hoisting Machine Operator's Advisory Board stated this revision to the rules is mainly housekeeping; the only major addition is training and certification of tower crane operators. There are not many tower cranes operating on Oahu at any one time and most of them are certified by the National Commission for the Certification of Crane Operations NCCCO). The tower crane equipment is regulated by HIOSH even though there are few cranes operating in the state. Mr. Jamesner Dumlao, Operations Manager at HIOSH, stated that the certification rule tightens up the requirements for training and ensures that the operators are up to par with state and industry expectations. Most crane operators are certified; there has been no opposition to bringing in this small group of tower crane operators into the system. Most operators are nationally certified; to qualify for state certification crane operators must have an NCCCO certification and a medical clearance card. Mr. Dumlao also stated there was classroom training as well as practical application on the crane itself and everyone who operates a crane must record their operating hours. The national certification is a hands-on examination and the operator must show their proficiency to an examiner sent by the NCCCO. Upon review, Mr. Leis recommended that the proposed rules proceed to public hearing; the Board unanimously agreed.

V. NEW BUSINESS

- A. Review and discussion of proposed amendments to HAR Chapter 4-87, "Voluntary Registration of Service Persons" (DOA) – Mr. William Pierpont, Branch Chief of DOA's Measurement Standards Branch in the Quality Assurance Division, explained that the proposed rule changes include the addition of a registration fee, annual renewal fee, late fees, and housekeeping measures which update and clarify language; prior to these amendments, there was no registration fee. He explained that the person registered with the state is the individual who installs, calibrates and places the commercial device in service; such devices include gas pumps, taxi meters and scales used to measure commodities. It is the Measurement Standard Branch's responsibility to maintain the records of the devices that are placed in service, register those devices, certify that they are appropriated for, and that they are working correctly. After review and clarification of the rules, Mr. Schnitzler recommended that the proposed rules proceed to public hearing and Mr. Dymond recommended that the taxi drivers along with other impacted associations be notified of the public hearing; the Board unanimously agreed.
- B. Review and discussion of proposed amendments to the HAR Chapter 4-96, "Schedule and Fees for Licensing Devices Susceptible of Commercial Usage and Measuring Devices and Measurement Standards for Testing or Certification" (DOA) – Mr. William Pierpont, Branch Chief of DOA's Measurement Standards Branch in the Quality Assurance Division, explained that the proposed amended rule changes include the addition of an annual examination and calibration fee for measurement standards. The amendments also increase the annual registration fee for devices susceptible to commercial usage and update the language for clarity; monies from these fees will go back to the general fund. Mr. Schnitzler recommended that the proposed rules proceed to public hearing; the Board unanimously agreed.
- C. Review and discussion of the adoption of HAR Chapter 11-81, "Smoking in Workplaces and Public Places" (DOH) – Mr. Julian Lipsher, Public Health Educator from the Chronic Disease Management and Control Branch at DOH, provided the members with the history and overview of the proposed new rules. He explained that in 2006 the legislature passed Senate Bill 3262, it was signed into law by the Governor on July 10, 2006, and became effective November 16, 2006. At that time, Hawaii was the fourteenth state to enact the smoke-free workplace law and since that time twenty-four states have passed similar laws. Prior to the enactment of the state law, each of Hawaii's counties enacted ordinances to provide protection either in closed workplaces or restaurants. Between July and November 2006, DOH embarked on a statewide public education campaign where the community was informed as to what the state's new law would entail; the department provided informational material with a special mailing to all liquor permittees, television and radio announcements, presentations, on-sight visits, and provided signage; signage samples were distributed to the members. The materials provided to the members included copies of comments from nine of the twelve small businesses solicited. Comments were received from restaurants, bars, commercial property management organizations, and from small hotels, representing a good cross section of small businesses. The law requires that comments be solicited from a minimum of three small businesses.

Paraphrased testimony follows:

Ms. Jolyn Tenn, co-chair of Hawaii's Smoker's Alliance and associate member of the Hawaii Bar Association, explained that she would like to have a "third disinterested party" conducting an economic impact statement, not a cancer institute and not an expert outside of the State of Hawaii. She stated that the smoking ban has contributed to a twelve percent decline in Hawaii tourism from Japan. She personally interviewed 130 bar owners regarding the affects the rules would have on their business; Rosa's, one of those businesses surveyed, was forced to close due to the smoking ban. Mr. Michael Zehner, an associate member of the Hawaii Bar Owner's Association, and a member of Hawaii Smoker's Alliance, believes that it was inappropriate to have DOH in charge of drafting the proposed rules as they are deeply imbedded with a very large anti-smoking lobby with no compassion for the establishment. He would like to see "checks and balances" regarding the powers of DOH.

Mr. George Massengale, Policy Director of the Coalition for a Tobacco-Free Hawaii, stated that the law is already in effect and the proposed rules are regulations that will enable DOH to discharge their duties in the enforcement of law. Mr. William Comerford, President and spokesperson for the Hawaii Bar Owner's Association, stated that the ban on cigarette smoking in public places began with good intention but the rules as written are unfair and against the law. He believes the rules do not protect but punish the businesses for the customer's actions. He stated that the whole basis of the rules is on the employees however the economic impact on the employees was not considered, and the employees' opinions were never asked. On behalf of the Hawaii Bar Owner's Association, fairness is needed as the rules are too harsh and are very punitive upon businesses as well as bar owners. Mr. Comerford explained that the rules do not give the business owners any power to enforce the rules. Ms. Imada-Iboshi explained that this Board is concerned with whether the proposed rules accurately reflect the law or that the regulations are not onerous to small businesses.

Much discussion ensued. Mr. Lipsher stated that it is a violation of the rules if someone is found smoking in the business owner's bar as the state requires customers not to be subjected to second-hand smoke. Therefore, if a customer was found smoking and refused to stop smoking, even though the business owner had the required signage or partially enclosed area or within twenty feet of an entrance, the owner could still be in violation of the law and a citation could be issued. Mr. Au stated that the impact study claims that the only thing a business is required to do is have the required signage and inform customers that smoking is not permitted within twenty feet of an entrance. Mr. Schnitzler reflected that if a bar owner does everything he is supposed to do in regards to the rules and yet he gets cited because someone is smoking in his establishment, he would still be in violation of the rules. In response to these comments, Mr. Lipsher stated that he does not want to pre-judge the courts; for example, if a court decides an owner or manager refuses to serve an individual who is smoking, this may fulfill its duty and only the smoker may be in violation. Vice Chair Pang stated that the bar owner, whether intentional or non-intentional, is still responsible and is in violation for the customer breaking the rules, and thus has no recourse; as Mr. Bretschneider also stated, particularly when anyone can call and made a complaint, even a competitor. Ms. Imade-Iboshi questioned whether a definition of what a "violation" is would be needed. Mr. Dymond stated that essentially the customers are enforcing the rules by allowing the customers to inform of a violation; he also stated that allowing the State to be able to revoke a license or a permit is rather draconian if the bar or restaurant owner is not allowed to inform of a violation. Mr. Lipsher explained that DOH does not have the ability or authority to revoke or suspend a license that it does not issue.

Upon hearing from Mr. Lipsher and the testifiers, each member discussed their reactions and viewpoints to the proposed rules. Mr. Au stated that it is apparent changes are needed in the rules to clarify the laws and he would like to have a better understanding of what exactly is a "violation" and what are the citation powers. Mr. Bucky stated that the rules need to be taken back and looked at closer as there are too many loopholes and questions in the rules because the rules as written are too vague. Mr. Yee also believes that the rules need more work and questioned whether the statute should be reviewed to see how it compares with the rules. Mr. Lipsher indicated that a letter from the Attorney General's (AG's) Office stated that the draft rules do not go above and beyond the statute; Mr. Lipsher will provide Ms. Palcovich a copy of this letter. Mr. Yee also questioned whether a request by the AG's office comparing the proposed rules with the existing law was unusual, to which Ms. Ahn stated it was. Mr. Dymond agreed that this Board needs to review the statutes to see how consistent the rules are with the statute. He also believes there is some deception in the language of the document presented to this Board as to how simple the rules are and how simple it is for the business owners to follow the rules when in fact the owners will be

putting their whole existence at risk. Mr. Schnitzler stated that although the intentions are good, he agrees with the other members as this is a work in progress and that the State is setting itself up with potential lawsuits with the proposed rules, as is. Vice Chair Pang also indicated that she is in agreement with the members' opinions and that they are not as simple as they may seem and that enforcement is reported to who can be enforced by the police or the liquor commission. Thus, she is not exactly sure where the responsibilities lie. She also agrees that the rules are a work in progress; it behooves this Board to compare the statute with the rules to look at the methodology in the application and the exemptions, if any.

Upon hearing from the members, Mr. Lipsher indicated that he was planning to take the rules back to the Deputy Attorney General and look at any inconsistencies between the law and the rules. He stated that the law requires that DOH request and receive comments from small businesses with which they solicited comments from twelve restaurants and bars, commercial properties, and hotels; he believes the department received a good cross-section from various businesses. He stated that currently the police, the sheriff's office and the Attorney General's Office have powers under this law to enforce the rules. Only through a memorandum of agreement, between the other departments would anyone else become part of the enforcement of the rules, and noted that the Liquor Commission does not have the authority to enforce the rules, but it could if there was an agreement between DOH and the Liquor Commission.

Mr. Au suggested and encouraged that all the testifiers in front of this Board write down their specific concerns about the proposed rules and provide input to DOH. Mr. Comerford is happy to contribute to drafting the rules. Upon much discussion, Mr. Dymond recommended this Board defer comments on the proposed rules as written, that the Department of Health withdraw the proposed rules, that they revisit the rules based on the commentary in this meeting, that they work with the associations that are impacted by the rules and that they come back to this Board with another set of rules that are approved and ready to take to public hearing; the Board unanimously agreed.

Mr. Zehner questioned section 201M-2, "Determination of small business impact; small business impact statement," and section 201M-6, "Petition for regulatory review," and whether he may bring his concerns to this Board regarding the small business impact statement. It was conveyed that because this Board has not approved the proposed rules as presented, any small business impact statement would be a subsequent one with which the Board will receive after the rules are amended, based on the commentary made at this board meeting.

- D. Discussion of Mid-year Budget Review / Outreach Programs** – Vice Chair Pang stated that this Board has currently utilized a little more than \$12,000 of the \$20,000 allotted budget for fiscal 2008. She noted that last year the members worked very closely with Hastings & Pleadwell in an attempt to position the Board in the marketplace, but only \$450 has been expended to date for outreach. She believes that when she goes into the community, it is generally recognized what the Board's purview is, however, it is necessary for the Board to continue with its outreach. Ms. Palcovich explained that she and Steve Bretschneider, who will represent DBEDT, are planning to attend the Small Business Administration's (SBA) Annual Small Business Awards ceremony on April 30, 2008, and that it would also be relevant for some of the board members to attend; Mr. Yee explained that he is attending. After much discussion, Mr. Au recommended that funds are appropriated for the SBA event and recommended that Messrs. Leis and Dymond, along with Ms. Palcovich and Mr. Bretschneider, also attend the awards ceremony on behalf of this Board; the Board unanimously agreed.

Ms. Palcovich and Vice Chair Pang indicated that Chair Woods would like to schedule a planning session for June 25th. Messrs. Dymond and Au have agreed to use their memberships at the Pacific Club where the Board will schedule its strategic session. Vice Chair Pang explained that planning meetings are very important in order to take the Board beyond all the work the members have expended through their marketing efforts that were enhanced by the contract with Hastings & Pleadwell. Ms. Palcovich explained that Chair Woods was planning to be the facilitator for the planning session, however, Mr. Au stated that he is not in favor of this because Chair Woods' input is important and therefore her role as a facilitator and an attendee may be compromised; the members all concurred. The three bid process in hiring a trained facilitator was discussed; Mr. Bretschneider recommended that Ms. Palcovich look into a sole source services project. Upon discussion, Mr. Schnitzler recommended that the Board appropriate funds to convene a strategic planning session on June 25th combined with the Board's regular monthly meeting, preferably at the Pacific Club utilizing the three bid process; the Board unanimously agreed.

VI. LEGISLATIVE BUSINESS

A. Update, ratification if necessary, of legislative bills; including:

1. HB 2253, "Relating to Amending or Repealing Various Provisions of Chapter 281, HRS, Intoxicating Liquor, for the Purpose of Clarifying Language, Correcting Errors, and Deleting Unnecessary and Obsolete Provision" – Mr. Dymond, on behalf of his industry, provided the members with a review of his analysis of the subject bill and pointed out that his industry was in support of the majority of the bill. He explained that the law states that education was only used from the "fine monies;" it was brought up at the Senate hearing that this provision was against the law although the Liquor Commission was at the same time attempting to change the law. The Senate committee passed the bill with the amendments relating to section 4 which included the provision of the use of fine monies.
2. HB 2736, HD2 SD1 "Relating to the Small Business Bill of Rights" – Vice Chair Pang explained that this bill, along with HB 2781 HD2 SD2 "Relating to Small Business," were combined. See section 3.
3. HB 2781, HD2 SD2, "Relating to Small Business" – Vice Chair Pang stated that the House disagreed with the Senate amendment of this bill. Senate conferees were appointed and consist of Senators Fukunaga, Taniguchi, Tsutsui. House representatives include Messrs. Yamashita, Waters, Tokioka, Wakai, and Ching. As of April 14, 2008, the bill was referred to the following three committees: Economic Development and Business, Judiciary and Finance.
4. HB 2974, HD21, "Relating to Labor" – Mr. Schnitzler explained that this bill allows bargaining units to approach a company's employees and request that the employees sign up with the union. He further explained that various meetings are held with the employees, the employers and the unions which ultimately become a campaign. Because this Board provided the Governor with a memorandum requesting that the bill be vetoed, Mr. Dymond recommended that the memorandum be ratified; the Board unanimously agreed. In addition, Mr. Schnitzler recommended that this Board write a memorandum to the legislators who are assigned as committee members requesting that they do not override the Governor's veto on this bill; the Board unanimously agreed.

VII. Report from Vice Chair and Board Members – Nothing was discussed.

VIII. Report from Committees:

Findings and recommendations from the following taskforces:

Honolulu Liquor Commission Taskforce – Mr. Schnitzler, on behalf of the taskforce, presented its findings to this Board. The findings entail accepting sixteen sections of the proposed rules, which relate to the hotel class license and that they go forward for approval by the Mayor. The taskforce is not, however, recommending approval of sections 17.51, License fees, 17.7, Monies collected from assessment of fines, 17.8, Waiver, and 38.25, Restrictions or conditions on licenses." The taskforce will review these four sections and present its findings at the next board meeting.

Legislative Taskforce – Mr. Dymond read to the members the testimony provided at the Senate hearing from this Board's legislative taskforce. Upon review, Mr. Au recommended that the Board ratify the testimony; six members approved and Mr. Dymond abstained.

IX. Announcements – Nothing was discussed.

IX. NEXT MEETING - Wednesday, May 28, 2008, No. 1 Capitol Building, 250 South Hotel Street, Conference Room 410.

X. ADJOURNMENT – Vice Chair Pang adjourned the meeting at 1:27 p.m.