

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

July 16, 2008

Leiopapa a Kamehameha Building – State Office Tower - Conference Room 405

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

MEMBERS PRESENT:

- Lynne Woods
- Sharon L. Pang
- Michael Yee
- Dorvin Leis
- Donald Dymond
- Richard Schnitzler
- Charles Au
- Bruce Bucky
- Peter Yukimura

ABSENT MEMBERS:

- David S. De Luz, Jr.

STAFF: DBEDT Office of the Attorney General
Dori Palcovich Margaret Ahn
Steve Bretschneider
Pearl Imada-Iboshi
Alicia Cinense

GUESTS:

Richard Kuitunen, Asset Manager, Hawaii Community Development Authority (HCDA)
Anthony Ching, Executive Director, HCDA
Bin C. Li, Administrative Processing Coordinator, Department of Land and Natural Resources
Craig Nakamoto, Director of Communications, HCDA
Gary Dill, Commercial fisherman, Kewalo Ocean Association (KOA) member
Mike DeRego, President, Inter-island Sport Fishing, KOA member
Scott Barrows, General Manager, Hawaii Longline Association (HLA)
Michael Magaoay, Hawaii State Representative
Eugene Won, Department of the Attorney General
Lynn Finnegan, Hawaii State Representative
Kathy Yokouchi, Executive Officer, Nurse Aide Program, Department of Commerce and Consumer Affairs
Louis Agard, Owner, Marine Supply Company
Terri Byers, Long Term Care Project Manager, Office of Health Care Assurance, Department of Health (DOH)
Ron Gallegos, Vice President and Co-owner, A Caring Touch/Gallegos Care Homes
Brian Andaya, Attorney, Hawaii Coalition of Care Givers
Derrick Ariyoshi, Assistant Program Administrator, Adult and Community Care Services Branch-Program Development, Department of Human Services (DHS)
Vicky Cadiz, Assistant Certified Nurse Aide
Tessa Malama, Certified Nurse Aide (CNA)
Timm Timoney, Boat Owner, KOA
Tom Hahn, Director, HLA
Zena Ozoa, Boat Owner, KOA
Bryant Carualhu, Concerned Citizen
John Mizuno, Hawaii State Representative
Patricia Johnson, Assistant Administrator, Med-Quest Division, DHS
Dianne Okumura, Independent Contractor, DOH
Russell S. Takata, Chief, Indoor and Radiological Health Branch, DOH
Marina Manuel, CNA, Adult Residence Care Home Association (ARCA)
Maria Betty Rodriguez, ARCA Treasurer
Lilia Fajotina, CAN, ARCA
Blantina S. Ratuta, Assistant Treasurer, ARCA

Esther Pascual, CNA, United Group of Home Administrators (UGHA)
Lani Akee, President, Adult Foster Home Association
Juanita Elip, ARCA, UGHA
Romeo Cardenas, CNA, ARCA
Precy Valentina, ARCA
Lori DeVera, CNA, ARCA
Vicky Cadiz, CNA, ARCA
Glenda Leano, CNA, ARCA
Jerry Felicitas, CNA, ARCA
Medy De Lara, CNA, ARCA
Myriam Tabaniag, President, Alliance of Care Home Administrators

WORKING LUNCH AS THE MEETING PROGRESSED

II. APPROVAL OF MINUTES: Minutes of the June 25, 2008 board meeting were approved as presented.

III. OLD BUSINESS

- A. Review of post public hearing statement of HAR Chapter 7-31, "Services to Veterans," and HAR Chapter 7-32, "Hawaii State Veterans Cemetery Rules of Practice and Procedure" (DOD) – Chair Woods** explained that this rule was adopted by the Governor on June 25, 2008. Mr. Yukimura stated that despite the rule being adopted he would recommend that the proposed amendments are adopted by the Governor; the Board unanimously agreed.
- B. Review and discussion of post public hearing statement of HAR Chapter 15-211, 15-212, 15-213, and 15-214, "Relating to Rules for Kewalo Basin" (DBEDT/HCDA) – Mr. Yukimura** disclosed that he had a previous business relationship with Mr. Anthony Ching, Executive Director of HCDA, when Mr. Ching was the Executive Director of the Land Use Commission and Mr. Yukimura was a commissioner; it was noted that this would not impact Mr. Yukimura's voting upon HCDA's issue at hand. Mr. Anthony Ching provided a presentation that included the history and current developments of Kewalo Basin, the harbor jurisdiction, the resumption of HCDA's rulemaking activities and HCDA's objectives and principles. He updated that Board on Kewalo Ocean Association's (KOA's) lawsuit of August 7, 2007 against HCDA for declaratory relief and explained that on May 5, 2008 final judgment was entered by Judge Ahn affirming HCDA's jurisdiction of Kewalo Basin. He also mentioned that although an appeal has been filed, HCDA is obliged and prepared to move forward with the transition of the management of Kewalo Basin.

Mr. Ching explained that there has been no increase in the fees paid by Kewalo Basin permittees for twelve years. He noted that a two-tier rate schedule is proposed. Tier 1 involves existing permittees who occupy front row piers or piers that are not slated for repair; these permittees will receive a rate increase that is tied to the consumer price index. Tier 2 involves existing and new permittees who elect to occupy renovated piers to pay a prorated share of the repair costs; the latter is expected to take place in the next twelve to eighteen months. He explained that repair and maintenance of the harbors is needed and that existing permittees and stakeholders have indicated that the Herringbone Pier is in dire disrepair and should be demolished to allow for extension of other piers and improvements. When asked by Vice Chair Pang about the Kakaako revolving fund and where the monies that were allocated for Kewalo Basin went to, Mr. Ching indicated that all funds currently generated in Kewalo are managed by the Department of Transportation (DOT). HCDA has asked for an accounting of the available funds and a listing of anticipated improvements from DOT. The Kaka'ako revolving fund is for the general benefit of Kakaako District of which Kewalo is a part.

Upon Mr. Ching's presentation, the following paraphrased testimony was provided by testifiers. Mr. Gary Dill, a commercial fisherman, has been at Kewalo Basin since 1988. He stated that, despite this Board's recommendations, there have been no changes to the proposed rules since last year when HCDA presented them after public hearing. He indicated that he was very pleased that the legislature passed the Small Business Bill of Rights bill and hoped it will help to clear some of the misunderstandings that have existed between KOA and HCDA. Mr. Mike DeRego, president of Inter-island Sport Fishing and a KOA member, concurred with Mr. Dill in that HCDA has not addressed any of the rule concerns KOA had from last year when they were first presented. He expressed concern with the two-tier system and acknowledged the decline in Hawaii tourism. He stated that he was not convinced that proposed

improvements at Kewalo Basin will increase his business dramatically. Ms. Timm Timoney, a KOA member and commercial fisherman for the past twenty-five years, owns a bottom fish boat with her husband that is docked in Kewalo Basin. She explained that she could not afford to pay double rent. Mr. Scott Barrows, General Manager of the Hawaii Longline Association (HLA), explained that HLA represents approximately 130 people in Hawaii with long line permits, reflecting 140 active vessels and 160 permits. HLA supports KOA's position and is very concerned about available space at Kewalo Basin. He stated that the long liners that are docked at Kewalo Basin find a 100% increase in fees to be unacceptable as it would price them out of businesses; he expressed that a 15% to 25% increase would be more acceptable to the longliners.

Upon hearing from HCDA representatives and the testifiers, each board member provided their opinions, comments and questions. Mr. Schnitzler stated that his biggest concern is the 100% increase in fees, although the need for improvements is obvious and that the stakeholders may very well see an improvement in their businesses after the improvements are made. Mr. Ching noted that the increase is not quite 100% and that because it is part of the rules, it cannot easily be unpublished; he added that the proposed rules would allow for a sharing of the slips. Second Vice Chair Yee concurred with Mr. Schnitzler in that the biggest issue to the users is the fees as well as the two-tier system. Mr. Yukimura believes there is still some misunderstanding and lack of communication between the parties that might be workable. In clarification to Mr. Au's concerns regarding the funds held by DOT, Mr. Ching explained that there was authorization for a cap to be expended specifically for Kewalo Basin but it was not an allocation of money. Mr. Ching emphasized that the money expended for Kewalo Basin could and should be used for improvements and that DOT is required to provide HCDA with all available funds.

Mr. Bucky stated that Kewalo Basin is a gold mine and compared it with Pier 39 in San Francisco. He noted that after renovations were made to Pier 39, which was dilapidated and falling apart, Pier 39 turned into a tremendous "shopping center." He explained that if the fishermen and business owners in Kewalo Basin believe that they will get something in return and not feel they are being power-housed, it may be successful for them as it was for the merchants in Pier 39. When Mr. Bucky questioned why HCDA hadn't responded to this Board's concerns of last year, Mr. Ching stated that the biggest change was that HCDA is willing to put up their money to make sure the repairs and improvements get started. He added that more than \$4.9 million would be needed.

Upon hearing from each member, Chair Woods stated that there is massive impact to the users of this harbor and there appears to be no motivation from the State's part to help the businesses. In regards to the economy, for those in the visitor industry, there has been a very large drop in business, and that it is highly likely that a number of the companies in Kewalo Basin will go out of business because of these rules. She is concerned with the lack of strategy when the boats need to move out of the harbor when the pier is under construction for repairs. Upon much discussion, Mr. Schnitzler recommended that the proposed rules move forward to the Governor for adoption with the recommendation that in the letter to the Governor it is noted that this Board is aware of Act 158, SLH 2008, and that the Governor do whatever is possible to transfer the \$4.5 million from DOT to HCDA; the Board unanimously agreed.

- C. Re-review and discussion of proposed amendments to HAR Chapter 16-89A, "Nurse Aide" (DCCA) – Chair Woods explained that these rules were deferred from the May 29th board meeting because the members wanted to hear from all three agencies involved in promulgating the statute, including the departments of Health and Human Services. Ms. Yokouchi, Executive Officer of DCCA's Nurse Aide program, explained that years ago when the creation of these rules was first discussed, there was a recommendation that the non-Medicare/Medicaid group form their own certification program or private certification organization. Over time, however, there was pressure from the professions, who wanted parity with the Medicare/Medicaid nurse aides, to have the government continue to certify. She explained that there cannot be two different levels of requirements and that the rules are almost verbatim to the statute.

Ms. Dianne Okumura, formerly with the Office of Health Care Assurance, was representing DOH in an unofficial capacity. She stated that she had an opportunity to work with others on the legislation but that DOH has yet to begin promulgating its portion of the Nurse Aide rules, which addresses the enforcement component. Ms. Patty Johnson, Assistant Administrator from DHS's Med-QUEST Division, which oversees Medicare programs, will promulgate its portion of the Nurse Aide rules. She explained that the nurse aides that perform the 100-hour training course will have earned the title of "certified" nurse aide.

DHS will allow these nurse aides to continue on as nurse aides past the two year period however “certified” implies an ongoing competency testing. She stated that most of the people in this group do not work in a setting where there is a supervising nurse on duty who directly oversees the nurse aides’ work. Vice Chair Pang confirmed that there will be three separate rules for Nurse Aides and inquired as to several issues outlined in the small business impact statement.

Paraphrased testimony was provided by the following testifiers. Attorney Brian Andaya, representing Hawaii Coalition of Caregivers which consists of approximately ninety percent of the community care beds in the State of Hawaii, indicated that the proposed system for nurse aides is in actuality not voluntary. This is because the consumers look for whether someone is certified and has various credentials. He explained that by taking away the certification that the nurse aides already have poses a problem and it is burdensome to take a 24-hour exam every two years but most importantly, there is no requirement in the federal statute to mandate this. He noted that the Hawaii Coalition of Caregivers was not part of the rule-making process when the proposed rule was promulgated. Ms. Johnson explained that the 24-hour exam entails skill-based classes; as part of the class one would have to demonstrate their nursing skills and unless one was very incompetent, a nurse aide would in all probability not fail it. Mr. Ron Gallegos, Vice President and co-owner of A Caring Touch/Gallegos Care Homes and a board member of ARCA, thanked this Board for helping the Small Business Bill of Rights bill pass. He explained that his major concern has always been the additional proposed re-certification requirement for the 24-hours of training as it is costly and unduly onerous for the home operators who run state licensed facilities. He stated that neither the statute nor the proposed administrative rule requires the 24-hour training for re-certification. He believes that imposing a 24-hour training requirement for re-certification without a statute or administrative rule on the books is arbitrary and illegal.

Ms. Myriam Tabaniag, who is president of the Alliance of Care Home Administrators, provided testimony on behalf of the care homes. She is in concurrence with Mr. Gallegos’ testimony and clarified that the Medicare/Medicaid nurse aides have the same schooling as the state licensed/certified nurse aides. The high cost of certification and re-certification not only impacts the employers and the certified nurse aides but also impacts Hawaii residents as well. There is a concern of the possibility of decreasing the number of certified nurse aides due to the high costs of the re-certification. The end result would be a shortened list of certified nurse aides and a small pool to choose from; with fewer certified nurse aides, a higher pay would be demanded. Ms. Lani Akee, president of Adult Foster Home Association representing 700 individuals, testified that she is in agreement with the prior testifiers. The certified nurse aide’s re-certification is a financial burden for foster homes because not only is it difficult to find certified nurse aides to work, it costs approximately \$2,100 per nurse aide, which includes class hours, travel time, gas and the examination itself. State Representative John Mizuno, vice chair for the committee on health, scheduled House Bill 71 for its very first hearing during legislature and the bill was passed. He supports the bill’s intent, which is consumer safety however he is sensitive to the concerns that were brought up by the prior testifiers. He noted that the care home operators relayed to him that there not a very good dialogue between the operators and the three agencies when the statute was created. He requested that this Board not pass this rule in order to come up with a better solution regarding training and certification.

Ms. Yokouchi explained that the twenty-four hour training requirement is not referenced in DCCA’s rules but merely makes reference to DHS’s provisions for the evaluation in DHS’s impact statement. Ms. Johnson confirmed that DHS is the agency that sets this standard, not DCCA. Mr. Au juxtaposed that the DHS requirement for the 100-hour training and 24-hour proficiency evaluation in the impact statement was to bring attention to the reader and not DCCA’s mandate. After much discussion, Mr. Au recommended that the proposed rules proceed to public hearing and that this Board correspond with DHS to indicate that based on today’s testimony, there is strong opposition and grave concern to the 100-hour training and 24-hour proficiency evaluation, that the Board understands that there may be other more feasible alternatives, and that this Board encourages DHS to work with the stakeholders in an attempt to modify this mandate as it is the belief of this Board that this mandate reaches beyond the federal requirements; the Board unanimously agreed.

IV. NEW BUSINESS

- A. Review and discussion of proposed amendments to HAR Chapter 17-1424, “Licensing of Adult Day Care Centers,” Repeal of HAR Chapter 17-1441, “Personal Care Services,” and Adoption of new chapter HAR Chapter 17-1455, “Background Check” (DHS) – Mr. Derrick Ariyoshi, Assistant Program Administrator**

from DHS's Adult and Community Care Services Branch, explained that the proposed amendments are for the purposes of clarity and consistency which includes the establishment of a new rule section entitled, "Background Checks," and also a new section for minimum fire safety requirements. Because City ordinances require adult day care centers, that serve six or less clients to have fire inspections, the State opted to include only minimum requirements in the rules such as having fire drills and requiring one fire extinguisher per floor. The agency is also requesting the repeal of HAR Chapter 17-1441, "Personal Care Services" because this chapter currently provides services that are no longer covered, such as waivers. In addition, HAR Chapter 17-1455 requires criminal background checks for the establishment of reputable and responsible characters of the providers and volunteers, perpetrator checks for the first two years, and criminal name checks bi-annually. Vice Chair Pang indicated that the rules are very well written and that many of the areas that were of great concern to adult day care centers are now addressed in the rules. Vice Chair Pang recommended that the proposed amendments, repeal and new chapter proceed to public hearing; the Board unanimously agreed.

- B. Review and discussion of proposed amendments to HAR Chapter 11-44, "Radiologic Technology Board/Radiologic Technology Rules" (DOH) – Mr. Russell Takata, Chief of DOH's Indoor and Radiological Health Branch, explained the history, background and purpose of the proposed rule amendments. Changes to the rules include repealing the section entitled "transition from annual to biennial license renewal period," adding an increase in the licensing fee, and adding a new section relating to unprofessional conduct that entails a \$2,000 fine for each separate offense. He stated that the small businesses that may be impacted by the rule amendments are small clinics or an individual professional such as a radiologist who may employ a few employees. Second Vice Chair Yee recommended that the amendments proceed to public hearing and that the 1,500 licensees are notified of the hearing; the Board unanimously agreed.
- C. Review and discussion of proposed amendments to HAR Chapter 13-1, "Rules of Practice and Procedure" (DLNR) – Mr. Bin Li, DLNR's Administrative Processing Coordinator, provided the members with an overview of the proposed rules entailing DLNR's new strategic action plan which includes a new subchapter and modifications that will update and clarify existing procedures. This plan is intended to strengthen and streamline DLNR's enforcement actions by creating a Civil Resource Violations System (CRVS). The adoption of Subchapter 7 will allow DLNR to streamline DLNR's activities, standardize the procedure, and enforce against violations in a timely manner and at lower costs. It is also expected to allow alleged violators to go through a simple process, help promote public awareness, and help to change the community's attitude toward the use and protection of DLNR's resources. This chapter will authorize DLNR to issue a citation for an alleged civil resources violation, assess an administrative penalty pursuant to a schedule that will be prescribed by the Land Board, and allow for the respondent to answer a citation, and participate in a contested case hearing conducted by a Board-appointed hearings officer.

It was indicated that CRVS will not supersede the criminal process and that criminal action may be taken if a violator fails to cooperate or comply. Most minor or purely civil violations will go to CRVS, as the major cases can still be directly brought up to the Land Board. Mr. Li noted that the intended benefits for using the CRVS process are expected to be simpler and less stressful as well as saving on time from traveling to and from court. He further noted that any potential impact on small business would not cause a direct and significant economic burden upon a small business and that the rules are more procedural rather than substantive. Second Vice Chair Yee voiced concerned regarding the fine schedule which is not included as part of the administrative rules and stated that while the fine schedule is developed by DLNR's Administrative Proceedings Office Committee and approved by the Land Board, the actual fines are unknown to the violators. Upon review, Vice Chair Yee recommended that the proposed amendments proceed to public hearing and Mr. Dymond recommended that a draft of the prospective fines regarding the preliminary enforcement of the rules be made available at the public hearing; the Board unanimously agreed.

V. Discussion of Board's Fiscal 2009 Goals and Recommendation(s) of Task force(s), if necessary, for the following projects:

- A. RegAlert Project – Deferred until next Board meeting.
- B. Administrative Assistant Position – Deferred until next Board meeting.

C. Public Outreach Project – Deferred until next Board meeting.

D. Bill of Rights/Impact Statement – HB 2781, “Relating to Small Business” – Deferred until next Board meeting.

VI. **Announcements:** No announcements were made.

IX. **NEXT MEETING(S)** – Wednesday, August 20, 2008, 250 South Hotel Street, Honolulu, HI, Conference Room 410 – 10:30 a.m., and Wednesday, August 20, 2008, 250 South Hotel Street, Honolulu, HI, Conference Room 410 from 2:00 p.m. to 4:30 p.m.

X. **ADJOURNMENT** – Vice Chair Pang adjourned the meeting at 3:15 p.m.