

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

December 7, 2011

Conference Room 436 - No. 1 Capitol District Building, Honolulu, Hawaii

- I. **CALL TO ORDER:** Chair Pang called the meeting to order at 10:37 a.m. with a quorum present.

MEMBERS PRESENT:

- Sharon L. Pang
- Charles Au
- Richard Schnitzler
- David De Luz, Jr.
- Howard West
- Chu Lan Shubert-Kwock

ABSENT MEMBERS:

- Bruce Bucky
- Peter Yukimura

STAFF: DBEDT

Mary Alice Evans
Dori Palcovich

Office of the Attorney General

Margaret Ahn

II. **INTRODUCTION OF NEW BOARD MEMBER CHU LAN SHUBERT-KWOCK**

The members welcomed Ms. Chu Lan Shubert-Kwock as the Board's newest member; Chair Pang introduced Ms. Shubert-Kwock to each of the members.

III. **APPROVAL OF OCTOBER 5, 2011 MINUTES**

Vice Chair Au made a motion to accept the October 5, 2011 minutes as amended. Second Vice Chair Schnitzler seconded the motion, and the Board members unanimously agreed.

IV. **OLD BUSINESS**

A. HAR Chapter 16-71, Relating to Certified Public Accountants and Public Accounts / Discussion of October 10, 2011 letter from Hawaii Association of Public Accounts (Department of Commerce and Consumer Affairs)

Mr. John Roberts introduced himself to the members as a CPA, a principal of a CPA firm and president of Hawaii Association of Public Accountants (HAPA). He explained that HAPA is a state-wide trade association for CPA's, with its members primarily CPAs and owners of small CPA firms. Mr. Roberts believes that specific actions by the Hawaii Board of Public Accountancy violated Hawaii's Small Business Bill of rights. He explained the actions of the Board of Accountancy as outlined in his letter of October 10, 2011, to this Board.

Mr. Nelson Lau, a member of the Board of Public Accountancy, stated that he had a copy of the October 10, 2011 letter from Mr. Roberts. In response, Mr. Lau explained that written

testimony was provided to the Board of Public Accountancy members prior to the October 7, 2011 meeting. During Mr. Lau's testimony to this Board, he responded to the three sections outlined in the subject correspondence, which stated that "important procedures at the Hawaii Board of Public Accountancy board meeting violated the Bill of Rights:" 1) "failure to read into the record or even acknowledge any of the written testimony received at the hearing;" 2) "failure to address the objections that were raised in both written and oral testimony;" 3) "failure to make available written copies of the testimony received except through a formal Office of Information Practices request."

Mr. Lau indicated that, in the course of that meeting, the members were also provided additional written and oral testimonies. Upon review of all the testimonies and the proposed rules, each member had provided their individual positions. The board then went into an executive session, which is its typical practice, where consultation with the State's deputy attorney is conducted. After the executive session, he explained that the members continued to conduct its regular meeting along with discussing the testimonies, the concerns that were raised, and a vote ensued. He further explained that during the next scheduled meeting, which was in November 2011, the members went through additional testimonies received which acknowledged and provided a more detailed discussion of the items that were raised.

Much discussion ensued. While it was discussed that Mr. Roberts' concern may not necessarily encompass any small business impact, it was asked whether the Board of Accountancy would consider deferring the administrative rules that were approved at the October 7, 2011 meeting, and continue to dialogue with the stakeholders due to the perception that additional outstanding issues may need to be addressed. Chair Pang noted that this Board cannot act as a referee, and while that the Board of Accountancy and the stakeholders should be on the same playing field, they are not. Further, there appeared to be a serious communication problem with the Board of Accountancy and the stakeholders; it was recommended that the Board of Accountancy make a good faith effort to work on the issues at hand.

Ms. Laureen Kai, Executive Officer for the Board of Public Accountancy, indicated that what was driving the Board of Accountancy to seek the rule change is that there is an effective date of January 1, 2012. As of this date, there would be no repeal of Hawaii Administrative Rule, Subsection 16-71-21(e). She explained that because the Board of Accountancy made its decision at the October 7, 2011, meeting, it compels her to proceed with the process and ask the Governor to approve the adoption of the rules after the public hearing.

Mr. De Luz, Jr., recommended that despite not receiving a "small business statement after public hearing" pursuant to Chapter 201M-3, HRS, a letter be sent to the Governor expressing the Board members' disappointment with the Board of Accountancy's handling of the rule review process, and that in the future there be more cooperation and collaboration between the stakeholders and the Board of Accountancy. Ms. Shubert-Kwock seconded, and the Board members unanimously agreed.

B. Re-review of proposed new Chapter 17-1445, "Recertification of Nurse Aides in State-Licensed or State-Certified Health Care Settings" (Department of Human Services (DHS))

Chair Pang indicated that the agencies' small business impact statement is well written but there are some inconsistencies in the proposed rules. As the draft rules had not been provided to the industry nor had the Attorney General's Office received them, it was suggested that the proposed rules should be sent back to DHS in order to submit them to the industry and to Representative John Mizuno. It was also suggested that DHS re-submit to this Board a "final" draft of the rules after meeting with the stakeholders, Representative Mizuno, and receiving approval from the Attorney General's Office.

During the discussion, Deputy Attorney General Ahn confirmed with Chair Pang that the rules were requested by this Board, and that DHS's letter to this Board stated that it had not yet gone out to public hearing. She indicated that, normally in the process, the proposed rules would come before this Board when an agency is ready to go out to public hearing. Because the rules have not yet gone to the Attorney General's Office for review, they are unable to proceed to public hearing. However, Chair Pang stated that an agency representative spoke with her and requested that this Board approve the proposal to go to public hearing. After much discussion, it was determined that there is some confusion as to what DHS was requesting this Board to do at this point in time. As a result, this agenda item was deferred until the January 2012 meeting.

Upon discussion, Mr. De Luz, Jr., recommended that the proposed rules be re-submitted to the rule-drafting agency, that the agency provide the rules to the Attorney General's Office for review and confirmation, that it submit the rules to the industry's stakeholders as well as Representative John Mizuno, that it be relayed in the Governor's letter that this Board would like to see interaction between the stakeholders and Representative Mizuno's office, and that the agency's rule-drafting representative attend the next Board meeting upon completion of these recommendations. Mr. Schnitzler seconded and the Board members unanimously agreed.

C. Post public hearing statement on HAR Chapter 11-20, "Rules Relating to Potable Water Systems" (Department of Health)

Chair Pang noted that these rules have been adopted by the Governor; no action from the Board is required.

D. HAR Chapter 11-218, "Communication Access Services for Persons who are Deaf, Hard of Hearing and Blind Deaf" (Department of Health)

Chair Pang noted that these rules have been adopted; no action was taken from the Board.

E. Decision on Ms. Stacie Thorlakson's application to become a Small Business Regulatory Review Board member

Each member voiced their personal opinions regarding Ms. Thorlakson's application to become a member of this Board. While it was agreed that Ms. Thorlakson has a most impressive background and is an accomplished individual, it was determined that this Board's

current needs do not appear to fit Ms. Thorlakson's background. Mr. De Luz, Jr., recommended that Ms. Thorlakson be nominated as a member of this Board. Ms. Shubert-Kwock seconded the motion and the motion did not pass as follows: the no's were Ms. Shubert-Kwock, Vice Chair Au, Second Vice Chair Schnitzler and Mr. West; the yes's were Mr. De Luz, Jr., with reservations, and Chair Pang abstained. No action was taken.

V. NEW BUSINESS

A. HAR Section 3-120-4, "Procurements Exempt from Chapter 103D," HAR Chapter 3-124, "Preferences, Subchapter 1, Hawaii Products," and HAR Section 3-125-13, "Price Adjustment in Construction Contracts" (Department of Accounting and General Services)

Ms. Ruth Yamaguchi, Assistant Administrator from the State Procurement Office briefed the board members on the proposed rule amendments for submission to public hearing. She indicated that Chapter 3-120, "General Provisions," is intended to implement the statutory requirements pursuant to Act 175 that were passed in 2009, which repealed exemptions from the preference codes; specifically, "fresh meats and products" and "animal and plants." The changes to Chapter 3-124 are also to implement statutory requirements pursuant to Act 175, which changed Hawaii products to two classifications, Class I and Class II. When a bidder bids on Class I products, a 10% preference over non-Hawaii products is given. On Class II products, a 15% preference is given to non-Hawaii products is given. In addition, Ms. Yamaguchi explained that changes to Chapter 3-125 are to correct language within the rules.

Upon review, Mr. De Luz, Jr., recused himself from participating on this agenda item due to a conflict of interest. As a result, there were an insufficient number of board members present to take any official action on this item. A memorandum from the Board will be submitted indicating no action was taken.

B. HAR Chapter 4-72, "Plant and Non-Domestic Animal Quarantine, Plant Intrastate Rules," HAR Section 4-72-12, Restrictions on Coffee, etc." (Department of Agriculture (DOA))

Ms. Leslie Iseke, Plant Import Specialist from the Plant Quarantine Branch at the DOA, stated that the Board of Agriculture preliminarily approved rule amendments authorizing restrictions on intrastate movement of coffee from areas that are infested with the coffee berry borer. It was noted that the emergency rules, which were for only one year, had just expired; however, those rules are still being adhered to by the industry. Ms. Iseke noted that although there is a sense of urgency, there is also a current policy in place so the State's inspectors are aware of how to proceed. Therefore, if the coffee beans are roasted, they can proceed intrastate; it is very important that the process continues to be done. Second Vice Chair Schnitzler indicated that while enforcement is currently a problem and that for the Big Island it slows down commerce and it is costly, most businesses recognize that the process has to be done.

Ms. Iseke also stated that the cost of treatments is the largest impact upon small business. However, there are alternatives to treatments such as cold treatment where the State would provide freezers for smaller quantities of coffee; and she noted that the rules do not cover direct export. It was further explained that the restrictions on movement of coffee from the

Big Island, stated in the proposed amendments, are very similar to the requirements of the interim rules. Any subsequent price increase is not expected to be substantial.

Upon review, Mr. Schnitzler recommended that the proposed rules proceed to public hearing. Mr. West seconded the motion and the board unanimously agreed.

C. Kauai Department of Water's Proposed Amendment to Part IV of the Rules and Regulations of the Kauai County Department of Water (Department of Water / County of Kauai)

Mr. David Craddick, Manager and Chief Engineer with the County of Kauai's Department of Water, stated that the department was proposing a four-year rate increase of 11.2 percent. The proposed rule amendment would apply to all current and prospective consumers of the County's water service and would not necessarily or directly affect or benefit only businesses. Thus, any small business that is a department of water consumer would be required to comply with the proposed rules. He explained that there will be an overall increase in the general and agricultural use charges and the monthly service charges for all consumers. The actual cost impact for a specific customer would depend on that customer's water use, meter size and customer class; i.e., agricultural or general use.

Mr. Craddick explained that the department borrowed much of the money for its current projects, which cannot be continued, as the debt service payments equal the department's depreciation; it ultimately equates to a \$2 million increase in debt service. He stated that 70% of the current projects are "reoccurring projects," of which funds are needed. In addition, during 2012, the department is expected to increase its facilities. He also explained that this Board was not presented with the full proposal as it includes a 40-page analysis. Therefore, the information provided to this Board is not the information that will be presented at the public hearing.

Mr. West stated that he reviewed the department's information and noted that a study was performed that advised the department that an increase in revenues was needed. Based on his calculations, the rate will increase over 53%, which would be parceled out over a period of four years. Thus, upon performing his own calculation, he believed there was a discrepancy in the proposed rate increases as he unable to get a handle on the study to support the survey's conclusion. In essence, he indicated that the information provided does not support the department's rate increase. Mr. De Luz, Jr., stated that due to the manner in which this proposal came to this Board, it is difficult to determine the justification of the proposed rate increase. Mr. West concurred and stated that in order to evaluate the need for the rate increase, because it impacts small business, the proposed information should include data that supports the rate increase. Mr. Craddick believed that he was not in front of the board today in an attempt to justify the rate increase but to discuss whether the rules had a disparate impact on small business.

Upon discussion, Mr. West recommended that the proposed rules proceed to public hearing, that full, supporting financial documentation and requirements to the proposed rules be provided to the Board members, and that Mr. Craddick provide and present a "small business statement after public hearing" to this Board after the Department of Water's public hearing. Mr. De Luz, Jr., seconded the motion and the board members unanimously agreed. During the discussion, it was noted that these rule amendments are

not subject to approval by the Mayor but by the Board of Water Supply; thus, this Board's response will be submitted directly to the Board of Water Supply.

D. HAR Chapter 12, Subtitle 8, "Hawaii Occupational Safety and Health" (Department of Labor and Industrial Relations (DLIR))

Ms. Doreen Miyaki, Program Specialist from Hawaii Occupational Safety and Health Division (HIOSH), explained that when HIOSH was first created, even though there were federal rules in place, the State created State-specific rules for Hawaii. Since the mid-1990's, the State has been incorporating the Federal standards with any rules that were specific to Hawaii added into the rules.

It was explained that the current proposed amendments will delete all of Hawaii's state-specific chapters and incorporate all of the Federal standards. The amendments will also create one section where Hawaii will have its own itemized State-specific standards. Specifically, the existing differences, which include definitions to the construction standards, will remain the same, with new definitions for dwelling, dwelling unit, residential construction, townhouse, as well as clarification to the definitions of employee, employer, and others. It was also explained that the changes are either identical to or at least as effective as the Federal standards except for the crane standard where Federal standards allow for trainees to have a trainer go on break where the trainee continues operating; Hawaii removed this. Another difference is where accidents or a death or hospitalization of a worker must be reported; in this section, Hawaii added a \$25,000 equipment damage provision.

Upon review, Second Vice Chair Schnitzler recommended that the proposed amendments move forward to public hearing. Mr. David De Luz, Jr., seconded the motion, and the Board members unanimously agreed.

VI. LEGISLATIVE MEASURES

A. Discussion of Department of Business, Economic Development and Tourism's Proposed 2012 Legislation, "Relating to the Small Business Regulatory Review Board"

Deputy Director Mary Alice Evans explained that the department has included in its legislative bill package a recommendation to transfer the Small Business Regulatory Review Board from the Department of Business, Economic Development and Tourism to the Department of Commerce and Consumer Affairs. This bill was introduced several times during previous sessions and there are no major changes in the past versions; therefore, many of the current members on this Board have seen this bill before.

A budget analyst from the Department of Budget and Finance contacted Chair Pang for financial information on the Board. Deputy Director Evans stated that, in regards to the process, all proposed administrative bills are routed to the Department of Budget and Finance and the Attorney General's Office for review as a standard process. When asked if this bill would be heard during the 2012 legislative session, she explained that the Governor's office does not make final decisions on what bills will be included in its "administrative bill" package until around January 25, 2012.

B. Discussion of Representative John Mizuno's Proposed House Bill "Relating to Health"

This agenda item was deferred until the January 2012 board meeting.

VII. BOARD ADMINISTRATIVE MATTERS

A. Approval of draft 2010 Annual Report Summary

Deputy Director Evans explained to the members the State agencies' internal process of providing an annual report to the legislators via the Governor. During the discussion, it was suggested that, going forward, quarterly reports be submitted to the members throughout the year. Mr. De Luz, Jr., requested an electronic version of this report upon its finalization.

Upon review, Mr. West recommended that the proposed 2010 annual report be approved with the recommended minor changes. Second Vice Chair Schnitzler seconded, and the Board members unanimously agreed.

B. Approval of draft 201M-7, Periodic Review; Evaluation Report, 2010

In discussing the purpose of the 201M-7 report for 2010, Mr. De Luz, Jr., commented that the Board Chair and Vice Chair work with staff in drafting a new request to the agencies for the 2012 report.

Upon review, Mr. West recommended that the proposed 2010 Periodic Review; Evaluation Report is approved. Second Vice Chair Schnitzler seconded and the Board members unanimously agreed.

C. Approval of draft 2011 Annual Report Summary

Upon review, Mr. De Luz, Jr., recommended that the 2010 annual report be approved with the recommended minor changes. Mr. West seconded the motion and the Board members unanimously agreed.

D. Discussion of Board's proposed 201M-7 Periodic Review; Evaluation Report for 2012

This agenda item has been deferred until the next board meeting.

C. Review of Discussion Leader Assignments

The Board reviewed and made the following changes to the existing discussion leader assignments:

1. Department of Accounting and General Services – Discussion leader will be Vice Chair Au; Back-up discussion leader will be Mr. De Luz, Jr.

2. Department of Budget & Finance – Discussion leader will be Ms. Shubert-Kwock
3. Department of Commerce & Consumer Affairs – Discussion leader will be Ms. Shubert-Kwock
4. Department of Defense – Back-up discussion leader will be Ms. Shubert-Kwock
5. Department of Labor & Industrial Relations – Back-up discussion leader will be Ms. Shubert-Kwock
6. Department of Land and Natural Resources – Back-up discussion leader will be Mr. West

D. Discussion of Strategic Planning Session

This agenda item was deferred until the January 2012 board meeting.

E. Discussion of Hawaii Medical Service Association's (HMSA's) rate hikes 3:54:01

Ms. Shubert-Kwock explained that she is concerned with HMSA's rate hikes and would like to dialogue with the Department of Commerce and Consumer Affairs (DCCA) about these hikes. She believes this issue might be something that this Board could review as it affects small businesses. In response, it was explained to Ms. Shubert-Kwock that administrative rules do not govern insurance rate hikes, but it is within the DCCA's Insurance Commissioner's purview. It was also explained that administering insurance rates is highly technical and this Board would not be the appropriate body to act on this issue.

VIII. REPORT FROM CHAIR

A. Administrative Rule Amendments with No Specific Business Impact

1. HAR Chapter 17-676, "Relating to the Income Family Assistance Programs;" HAR Sections 17-656.2 "Other Family Assistance Programs;" and 17-676.55, "Earned Income disregard reimbursement to reward work in the TANF program" (Department of Human Services)

This item was not taken up at the meeting.

2. HAR Chapter 16-23, "Motor Vehicle Insurance Law" (Department of Commerce and Consumer Affairs)

This item was not taken up at the meeting.

3. HAR Chapter 17-2021, "Grievance Procedure" (Department of Human Services) – This item was not taken up at the meeting.

4. Post public hearing statement on HAR Chapter 13-5, "Conservation District" – (Department of Land and Natural Resources)

This item was not taken up at the meeting.

5. Post public hearing statement on HAR Chapter 11-60.1, "Air Pollution Control"
Section 11-60.1-15, "Open Burning" (Department of Health) - This item was not taken up at the meeting.

- IX. **ANNOUNCEMENTS** – Deputy Attorney Ahn explained that Mr. Roland Sagum is no longer a member of this Board. Although she was unsure whether he tendered his resignation to the Governor, she noted that it was not required. Therefore, as it was involuntary on Mr. Sagum's part to resign from this Board due to his becoming a Federal civil service employee, he has been disqualified from sitting on this Board. This is pursuant to the Board's statute as no state, federal or county employee is authorized to sit on this Board.
- X. **NEXT MEETING** – Scheduled for Tuesday, January 17, 2011, 250 South Hotel Street, Honolulu, HI, Room 410.
- XI. **ADJOURNMENT** – The meeting adjourned at 2:32 pm.