

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

March 21, 2012

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

- I. **CALL TO ORDER:** Chair Pang called the meeting to order at 10:31 a.m. with a quorum present.

MEMBERS PRESENT:

- Sharon L. Pang
- Charles Au
- David De Luz, Jr.
- Bruce Bucky
- Peter Yukimura
- Howard West
- Chu Lan Shubert-Kwock

ABSENT MEMBERS:

- Richard Schnitzler

STAFF: DBEDT
Mary Alice Evans
Dori Palcovich

Office of the Attorney General
Margaret Ahn

II. APPROVAL OF February 3, 2012 MINUTES

Vice Chair Au made a motion to accept the February 3, 2012 minutes as presented. Mr. West seconded the motion, and the Board members unanimously agreed.

III. OLD BUSINESS

A. Small Business Statement After Public Hearing for the proposed amendments to HAR Title 4 Chapter 72, Plant Intrastate Rules (Department of Agriculture)

Upon reviewing the statement after public hearing, Vice Chair Au commented that the branch chief seems to have the discretion to approve new treatments such as “freeze treatment.” Mr. West explained that it was his understanding that if the rules are too specific it would create problems, and that it was the department’s attempt to build some flexibility into the rules in order not to be too specific.

Mr. De Luz, Jr., recommended that the proposed amendments proceed to the Governor for adoption. Mr. West seconded, and the Board members unanimously agreed.

B. Small Business Statement After Public Hearing for the proposed amendments to HAR Title 12 Chapter 46, Subchapter 9, Disability Discrimination (Department of Labor and Industrial Relations)

Chair Pang stated that this rule was signed off by the Governor and adopted on March 5, 2012. Mr. De Luz, Jr., noted that the Board had not required the agency to come back to a board meeting after public hearing; thus, no action was taken.

C. Kauai Department of Water's Proposed Amendment to Part IV of the Rules and Regulations of the Kauai County Department of Water – Section I – General Use Rates; Section III – Agricultural Rates; Section V – Private Fire Service Charges; Section VI – Public Fire Service Charges; Section X – Cost of Power Adjustment Clause and Schedule A, Anticipated Unit Power Costs (Department of Water - County of Kauai)

Chair Pang explained that the Board had recommended that the Kauai Department of Water return to this Board after public hearing with a detailed report. Mr. West read the report and found it very interesting; noting that the Department listened very closely to the comments this Board made, and discussed those comments within the meeting. In the report, it stated there was a \$2 million discrepancy in the initial report submitted to this Board with the reason having to do with paying off debt obligations. The final report stated that although the Department was not legally required to come back to this Board after public hearing, the small business statement after public hearing was required.

Upon review of the report, Mr. West noted that he was satisfied that everything this Board discussed with Mr. Craddick was addressed. Although no one showed up at the public hearing, the Department went to fourteen different community groups and presented its findings to address the Board's comments. Mr. Yukimura stated that the fee increase was not singling out businesses but was an "across the board" charge to all consumers, and that the increased fees will be used to upgrade the water system and put in more infra-structure which is very much needed.

Mr. Yukimura recommended that the proposed amendments proceed for adoption, and that a letter be sent thanking the Department for its hard work and acknowledging the receipt and review of the final report that incorporated this Board's recommendations. Mr. Bucky seconded and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Proposed amendments to HAR Title 17 Chapter 1700 Overview; HAR Title 17 Chapter 1721, Medical Assistance to Aged, Blind or Disabled Individuals; HAR Title 17 Chapter 1721.1 QUEST Expanded Access; HAR Title 17 Chapter 1727, Hawaii Health QUEST; Title 17 Chapter 1728, QUEST-Net; Title 17 Chapter 1728.1, QUEST-ACE; HAR Title 17 Chapter 1732, Coverage of Blind or Disabled Pregnant Women and Children; HAR Title 17 Chapter 1735, General Provisions for Fee for Service Medical Assistance; HAR Title 17 Chapter 1737, Scope and Contents of the Fee for Service Medical Assistance Program (Department of Human Services)

Ms. Kookie Moon-Ng, Medical Assistance Program Officer from DHS's Med-QUEST Division explained that the proposed amendments of all the chapters are the result of a tremendous shortfall within the division to support the Medicaid program. Therefore, earlier this year, DHS sought community input via public forums for assistance as to how the State can serve the public's needs within the reduced available funds in order to align itself with a \$150 million budget reduction for the next year. Thus, several overriding decisions were

made to reduce a single person's eligibility requirements for Medicaid, as well as benefit cuts related to the QUEST program that services families. DHS also reviewed all services that were not critical or that were previously utilized. As a result, benefits for in-patient hospital and behavior health were reduced. Specifically, optometry (including glasses and vision appliances) and rehab services, as well as speech, physical and occupational therapy were completely eliminated. QUEST-Net and QUEST-Ace programs were reviewed and found that individuals under these programs over-utilized hospital emergency room services largely because they did not have other medical coverage, resulting in these programs being modified by raising the medical coverage. Overall, DHS is upgrading some of the programs offered by expanding eligibility and complying with some of the new federal standards.

Ms. Moon-Ng recognized that while not all of the rule amendments directly impacted small business, it was DHS's intent to show this Board with the greatest transparency where the changes were made that actually impacted small business. While there is going to be some impact such as in the elimination of optometry services, occupational, speech and physical therapy services (noted above), it is believed that with the increase in the coverage for QUEST-Net and QUEST-Ace programs, for those adults who had never received these benefits and services before but will now be receiving them with the amendments, it will balance out and provide the business providers with better transparency.

Ms. Moon-Ng also noted that while Medicare has always been very complicated for the providers, it is also very complicated for the State employees who work with this program. Therefore, it is DHS's challenge to make it as simple as possible for providers to know how and what services to bill. As a result, DHS is attempting to streamline the different Medicare programs. The Federal government has already approved DHS's request to reduce the total Medicare package. DHS is now seeking approval from the federal government to approve the increase in the QUEST-Net and QUEST-Ace programs, which is believed that it will. The proposed changes to the programs would be effective July 1, 2012.

Mr. De Luz, Jr., complimented DHS for the noted transparency and the indirect impact these rules would have on some of the small business providers. Chair Pang concurred with Mr. De Luz, Jr., and added that the greatest question the providers have relates to the reimbursement of funds from the Medicare programs. She also complimented DHS for the flexibility in the targeted groups and appreciated that DHS anticipated the transition of the future of medical care to be implemented in 2014; therefore, the State needs to be prepared to handle the targeted groups so that there is less confusion. Ms. Moon-Ng explained that while the reimbursement of funds is not currently in the rules, DHS is working on the semblance of the reimbursement.

Mr. De Luz, Jr., recommended that the proposed amendments proceed to public hearing and to submit the small business statement after public hearing but not physically come back. Mr. Yukimura seconded and the Board members unanimously agreed.

B. Proposed new rules, Sunshine Market Rules (County of Kauai)

Chair Pang stated that this is the first time she reviewed rules for "markets" and that they affect and involve all small businesses. Mr. Yukimura explained that the amendments

include value-added products made by local businesses. He noted that there are many types of markets around the Island of Kauai, however, the proposed rules require only Kauai-grown products; he believes it is good for the island. The issue of insurance requirements was raised as the rules require vendors to carry product liability insurance in the amounts of \$1 million and \$300,000, naming the County as an additional insured on the policy. It was noted that this may result in problems for small businesses but it will protect the County. The issue of requiring a completed sales report was also discussed and it was questioned as to what type of information would be included in the report.

Mr. Yukimura recommended that a letter be sent to the Office of Economic Development at the County of Kauai recommending that the proposed amendments proceed to public hearing and that the small business statement after public hearing be submitted after the hearing. Vice Chair Au seconded and the Board members unanimously agreed. When the small business statement after public hearing is received by this Board, Mr. Yukimura will review it and determine if any follow-up with the County of Kauai is required.

C. Proposed amendments to Title 8, Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, and Title 8 Chapter 102, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui (County of Maui Liquor Commission)

Ms. Shubert-Kwock provided the Board members with a history and summary of the proposed rules. She explained that there are four counties with four separate liquor commissions and that each county can follow federal or state rules, whichever is stricter. Overall, she believed that most of the proposed rule changes would serve the community well because they are in-line with the statutes or are housekeeping in nature. Ms. Shubert-Kwock noted, however, that there are a few controversial amendments that relate to public safety and efficiency.

For example, the rules provide for a new provision relating to special licenses to help with fundraising for politicians and 501c3 designated entities. She believes that the proposed rule requirements are too restrictive if the goal is to help the community, as one does not have to be a 501c3 to be a nonprofit. Also, not every volunteer group can afford to incorporate as a 501c3. She also believes that the Liquor Commission needs to be told that any nonprofit groups that are qualified; i.e., have a general excise tax or IRS number, should qualify to do business. She explained that the only difference in a 501c3 and a regular business is that a non-501c3 would not be qualified to receive a reduction or exemption from the donation. As a result, she recommended that the Liquor Commission should, at its discretion, permit non-profits to fundraise through block parties and street closures with the sale of liquor for their events. Further, as it takes quite a bit of time and money to receive a 501c3 designation, such stringent requirements defeat the intent and purpose of special licenses to help community efforts. In addition, she noted that special one- and three-day licenses for non-profit charitable, educational and political purposes should not require a 501c3 requirement since many small community groups might be unable to have block parties/festivals to raise money for their causes. Thus, such stringent requirements defeat the intent and purpose of special licenses to help community efforts.

Another controversial aspect of the rule relates to Kihei Kalana Village and the noise from the entertainment area. Ms. Shubert-Kwock noted that although it is difficult to determine the level and degree of noise as well as where the noise is exactly coming from, the proposed amendments include a noise curfew at 10:00 p.m. She believed this proposal is anti-business because although bad behavior can be legally stopped, it is not a good idea to stop good business from going beyond 10:00. She recommended that this provision not be made permanent. Instead, she suggested that to lessen the small business impact that the restriction only extends to three months. After three months, the Commission would then have ample time to monitor and review the noise in order to understand where the noise came from; as a result, it may then restrict certain offending licensees instead of the entire area.

In addition, she believes that the “cabaret license transfer” is controversial and anti-business. This rule provides that any licensee receiving a license after June 30, 2000 is not allowed to be transferred. Although these types of businesses are strip clubs, there is an adverse small business impact on them. Only those bar owners that received licenses prior to June 30, 2000 are allowed to transfer their licenses. After speaking with the Maui Liquor Commission, Ms. Shubert-Kwock believes that this amendment may be legally challenged due to the loss of value if licenses have no violations. Even so, Maui Liquor Commission would still have the discretion to approve, deny, or restrict any transfer.

Ms. Shubert-Kwock stated that section 08-101-24, “temporary licenses” provides for 120 days with an extension. Normally, temporary licenses are obtained when one has an existing liquor license and sells it to a new owner. In general, the transfer of a new license takes about four to five months. Ms. Shubert-Kwock found this proposed provision in the rule to be satisfactory.

The proposed rules also attempt to help the smaller retailers by not requiring them to prove they have insurance. Mr. Shubert-Kwock stated that some small businesses, such as bars and restaurants, carry a higher insurance coverage that is more expensive, the “mom and pop” shops that generally do not serve liquor on the premises would be exempted from proving insurance; she believes this is good for small businesses. She also believed that the Class 16, “winery license” is satisfactory. In addition, Class 15 “condominium hotel license” comprehensively defines the services and appears to be a protection to minors.

Ms. Shubert-Kwock believes that the processing of licenses in a timely manner where the Commission will get back to the applicant within 120 days rather than the existing 240 days is business-friendly. No refund to applicants when a license is denied makes sense because of the time spent processing and holding hearings is fair in regards to the services provided. Additionally, lifting the ceiling of hostess bars from twelve is also business friendly particularly if there is no community opposition.

During the discussion of these rules, Chair Pang noted that while the public hearing was scheduled for March 14th, this Board is not reviewing the rules until a week later, March 21st. Therefore, she questioned if it is for a Board member to contact a department prior to this Board meeting and discuss the rules with the department. Deputy Attorney General Ahn stated that while there has been past practice where a board member has posed questions

to a department about the rules, that member cannot make a decision on behalf of the Board.

Ms. Shubert-Kwock recommended that the proposed rules proceed to public hearing, that a message be sent to the Maui Liquor Commission indicating that had a representative from the Liquor Commission attended that the comments included in the correspondence would have been provided to them at the meeting, that in the future a small business impact statement be included with the draft rules prior to public hearing, that after public hearing this Board is to be provided with a "small business statement after public hearing," and that a representative be invited to come to the board meeting to share the findings of the public hearing with this Board. Mr. Yukimura seconded the motion, and the Board members unanimously agreed.

V. LEGISLATIVE MATTERS

A. Senate Bill 2739 SD2, Relating to the Small Business Regulatory Review Board

Chair Pang stated that this bill authorizes the small business regulatory review board to require an agency to conduct another public hearing on a rule change when the rulemaking agency declines to make changes requested at the first hearing and the agency's small business statement, submitted after the hearing, indicates inconsistency with its earlier determination or does not address the public's concerns.

Effective March 15th, this measure was passed on by the House.

B. House Bill 2268 HD2, Relating to Small Business

This measure, which is the companion of Senate Bill 2739 SD2 (see above) was pulled by the Senate.

C. Governor's Message No. 521, Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Howard West

Chair Pang stated that a hearing has not yet been scheduled.

Mr. Yukimura recommended that this Board provide support on behalf of Mr. West to be appointed as a member of this Board when the hearing is scheduled. Mr. De Luz, Jr., seconded and the Board unanimously agreed.

D. Governor's Message No. 520, Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Chu Lan Shubert-Kwock

Chair Pang stated that a hearing has yet been scheduled. However, Ms. Shubert-Kwock indicated that she was contacted by Senator Fukunaga's office which is trying to schedule a hearing in early April.

Mr. Yukimura recommended that this Board provide support on behalf of Ms. Shubert-Kwock to be appointed as a member of this Board when the hearing is scheduled. Mr. De Luz, Jr., seconded and the Board unanimously agreed.

E. Senate Bill 2737 SD1 Relating to Public Meetings

Chair Pang stated that this measure allows a public meeting to be conducted by audio communication alone and requires a meeting to be terminated if audio communication cannot be maintained at all meeting locations where a board member is physically present. On March 15th, this measure was passed on.

F. Senate Bill 2234 SD2 Relating to Electronic Information

This measure requires all state and county Sunshine Law boards to electronically post agendas and eliminates the need to file hard copies, requires state (but not county) boards to electronically post, within 30 days after a public meeting, the board's minutes and written materials that were presented at the meeting, and allows for a meeting notification by e-mail. This measure passed its first reading in cross-over.

VI. BOARD ADMINISTRATIVE MATTERS

A. Report from Board members on discussions with Governor's Office, State legislators, and small business community regarding Board's role and duties under Chapter 201M, HRS

Chair Pang, Vice Chair Au, and Messrs. Schnitzler and De Luz, Jr., went to the Governor's office and met with Mr. Bruce Coppa, the Governor's Chief of Staff, after last month's board meeting. Chair Pang's perception was that it was not a positive meeting regarding the exchange of communication as the message inferred was that this Board might sunset. However, Mr. Coppa indicated that he will announce at the Governor's next Cabinet meeting that the Board would like the support of the State and the agencies. It was Mr. De Luz's perception that this Board needs to make its own actions purposeful. Vice Chair Au stated that this Board needs to be more specific about what it is asking for and that the Board provides value to the State.

Chair Pang announced that "introduction" letters were sent to eleven of the State agencies with copies to the discussion leaders for follow-up meetings. Chair Pang personally approached some of the House representatives and Senators to ask for their support and reminded them that this Board is a tool for the legislature and can be beneficial in their quest to have small business built-up within the community. She noted that during a conversation with Representative John Mizuno, it was suggested that this Board participate in a filmed forum which is offered on any Monday or Thursday from 8:00 a.m. to 11:00 a.m.; where, for example, this Board would be presented in a positive way to show how it can be used an effective tool within the small business community.

Ms. Shubert-Kwock stated that because of her friendship with House Speaker Calvin Say, she approached him, explaining she was appointed as a member of this Board, although not speaking on behalf of this Board. She indicated to him that this Board was created to support a majority of the businesses in Hawaii and questioned the legislature's intent of the

Board and what can be done, collectively, to support it. In response, House Speaker Say told Ms. Shubert-Kwock that he would create a resolution during the legislative session. She requested at least \$250,000 to pay for clerical staff, a business advocate, travel and other incidentals. She personally believes the Board should be attached to the Ombudsman's office; this is because while the Ombudsman represents the consumer, this Board represents small business, and with both services combined, it would achieve a common good. As a result of her conversation, House Speaker Say initiated two separate resolutions, which have recently been introduced into the legislature; he also promised to introduce a bill next year. She told House Speaker Say that there is valuable talent in the Board members but it is not being utilized.

Chair Pang introduced Mr. Tim Lyons, President of Hawaii Business League, who discussed a historical perspective of this Board. Subsequently to the Federal government passing the Regulatory Flexibility Act, it was decided that Hawaii would model a similar act. Twelve individuals worked on such a bill. After the first few years, several agencies pleaded with Governor Cayetano not to veto it, it was signed into law. Subsequently, a Governor's Administrative Directive was introduced outlining the rule review process that includes this Board within the process.

Mr. Lyons provided the members an example where this Board was instrumental in making changes to proposed rules. A few years ago, the Department of Health proposed certain rules; this Board recommended changes to the rules, and the department refused. After working closely with the Governor's office, the Board prevailed. In fact, Mr. Lyons stated that he was told that the Governor told the department's director that she had to make the recommended changes. However, based on the current comments made by the agencies, he believes this Board needs to recast itself in some way so that it can be seen as a benefit to the agencies. The Board should also be able to review the rules in a timely manner as opposed to being viewed as one more stumbling block, which is its current perception.

Chair Pang next welcomed Ms. Barbra Pleadwell of Hastings and Pleadwell, a communications company. Ms. Pleadwell was asked to attend, listen to the meeting, and provide feedback regarding the Board's administrative matters. She explained that this Board needs to do a better job telling the community what the Board has done, what case studies are worth repeating, and what was the benefit to the community. This is because this Board's track record is either unknown or known by opinions that are adverse to this Board's purview. In order to recast itself under a new Administration, there needs to be some way the Board can position itself to be helpful to the community rather than a hindrance. The bottom line is that this Board needs to be of service to the Administration. She posed the question, "Who are the best ambassadors for this Board and how can they help shift the way the Administration sees this group?"

Although Ms. Pleadwell believes that the resolution introduced by House Speaker Say was a good, first step, the Administration will likely not help the Board unless the Board "show cases" why it is a good resolution, which goes back to – "what has this Board done to make Hawaii a better place?." This would ultimately allow agency directors to not want to be seen as the director that does not want to work with this Board, but actually invited the collaboration. Taking media out of the scenario, the collaboration could be hinged on a

number of items, such as whether this Board goes to a different department, what Board members are recruited, or whether the Board shifts the way this Board does its work. Whatever it is, the Administration should be part of this so it is a “win” that they can claim. Mr. Bucky suggested that as a follow-up to the “introduction” letters sent to the agencies, each discussion leader meet with the directors and sell the Board to them and befriend them and be a politician. In closing, Ms. Pleadwell stated that the Board cannot build up its media presence or go out on the presentation circuit until the internal issues with the agencies are fixed.

Chair Pang confirmed that the Board needs to concentrate on its “internal” relationships right now thereby meeting with the agency directors and introducing themselves. Because of the director’s busy schedule, Mr. De Luz, Jr., suggested that the board members reach out and call the department heads. Chair Pang requested that staff send out to the board members a packet of information regarding performing presentations. In future board meetings, the members will provide an update on the progress in meeting with the agencies. Mr. De Luz, Jr., noted that we have not yet asked this Administration and DBEDT how this Board can assist in the Governor’s “A New Day in Hawaii” plan.

Deputy Director Evans noted that since both Senate and House bills proposing to transfer this Board to DCCA have been amended, it looks as if this Board will stay at DBEDT, at least for the next year. Right now, the Administration’s focus is on improving the economy by creating as many projects as possible within the construction industry. It is believed that this would have a positive effect on small business by creating jobs such as suppliers and general types of services. Therefore, right now the focus is on creating jobs, which is a way this Administration is looking to improve upon the economy; however, that is not this Board’s focus. This Board’s focus is on where rules create an unreasonable burden to small business. She believes that it has clearly been identified that with the agencies currently understaffed, the effort is to get the rules out expeditiously as rules provide transparency, clarity and accountability; statutes cannot provide all the details.

Deputy Director Evans also noted that DBEDT is in no position to request more positions or more funding than the original plan. Mr. De Luz, Jr., recommended that DBEDT provide this Board with a list of how DBEDT believes it supports the Board, and then from there, the members can be better able to determine how it can manage itself with the available resources in an attempt to understand what it has to work with.

B. Update and Status of the RegAlert project

Mr. De Luz, Jr., updated the Board on the status of the RegAlert project. It was noted that RegAlert need not have to be domiciled out of DBEDT, but may be assumed and hosted by an organization such as the Hawaii Chamber of Commerce. Deputy Director Mary Alice Evans stated that the support for the Board is currently maxed out, and thus, will in all likelihood be unable to manage the RegAlert project; at least, at this point in time.

C. Discussion of recruiting potential new Board members, pursuant to Chapter 201M-5(b), HRS

It was noted that the board packet included old applications from individuals who were interested in becoming a member of this Board. Ms. Shubert-Kwock stated that she spoke with Joe Suki and asked if he would be able to provide names of potential board members from Maui.

After reviewing Mr. Frederick Atkins' March 2006 application, Mr. Yukimura recommended that DBEDT staff get in touch with Mr. Atkins to see if he would be interested in registering with the Governor's Board and Commissions office as a member of this Board. Mr. De Luz, Jr., seconded the motion, and the Board members unanimously agreed.

After reviewing Mr. Terry O'Halloran's October 2003 application, Mr. De Luz, Jr., recommended that DBEDT staff approach Mr. O'Halloran to see if he would be interested in registering with the Governor's Board and Commissions office as a member of this Board. Vice Chair Au seconded the motion, and the Board members unanimously agreed.

VII. ANNOUNCEMENTS

Chair Pang indicated that this Board has been receiving quite a bit of information from Ms. Dale Evans, president of Charley's Taxi. Evidently, there have been numerous fees imposed on the taxicab drivers as they move to and from the airport. Chair Pang will review the information and bring it up at the next board meeting if the concerns are under this Board's purview.

VIII. NEXT MEETING – Scheduled for Wednesday, April 18, 2012, 250 South Hotel Street, Honolulu, HI, Room 436.

IX. ADJOURNMENT – The meeting adjourned at 1:41 p.m.