

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

June 21, 2006

No. 1 Capitol District Building 250 South Hotel Street – Conference Room 410

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
- Jeanette O. Chang
- Michael Yee
- Dorvin Leis
- Charles Au
- Richard Schnitzler

ABSENT MEMBERS:

- George Handgis
- Don Dymond

STAFF:

<u>DBEDT</u>	<u>Office of the Attorney General</u>
Dori Palcovich	Margaret Ahn
Mike Norris	
Thomas Smyth	

GUESTS:

Susan Kusunoki, Consultant, PMCI Hawaii
 Jeff Conners, Director, Norwegian Cruise Line
 Tom Heberle, President, Hawaii Pilots Association
 Scott Cunningham, Honolulu Harbor Master, Harbors Division, Department of Transportation (DOT)
 John Corbin, Program Manager, Aquaculture Development Program, Department of Agriculture (DOA)
 Ron Boyer, Policy Analyst, Governor's Office
 Patrick Shaw, Consultant, North West CruiseShip Association (NWCA)
 Linda Rosehill, Consultant, Rosehill & Associates
 Paula Arcena, Executive Director, Hawaii Medical Associates
 Phyllis Dendle, Director of Government Affairs, Kaiser Permanente of Hawaii
 Edward McCain, Manager, Marine Operations, Hawaiian Tug & Barge, Young Brothers
 James Hardway, Assistant to the Director, Department of Labor and Industrial Relations (DLIR)
 Sterling Kaya, President, Hana Da'a Hawaii
 David Sakamoto, Administrator, State Health Planning and Development Agency, Department of Health (DOH)

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Minutes of the May 17, 2006 Board meeting were approved as presented.

III. **INTRODUCTION OF NEW BOARD MEMBER, AGENCY ASSIGNMENTS & CONFLICT OF INTEREST CONCERNS:** Chair Woods introduced and welcomed the Board's newest member, Mr. Richard Schnitzler, who will represent the Big Island. Chair Woods explained to Mr. Schnitzler the Board's process of reviewing administrative rules both before public hearing and after public hearing.

Mr. Schnitzler will be assigned as the discussion leader for Department of Agriculture and Department of Business, Economic Development and Tourism, Mr. Yee will remain as back-up discussion leader for Department of Land and Natural Resources, Mr. Dymond will be discussion leader for Department of Defense, Mr. Au will be discussion leader for Department of Hawaiian Homelands, and the remaining agencies that are currently unassigned, Department of Transportation and Department of Public Safety, will remain open.

Ms. Ahn reviewed the State's general ethics rules on conflict of interest concerns to alert the members to specific issues in the event they may be in a situation that may pose a conflict. She explained that Board members cannot take an official action that directly or specifically affects a business or other undertaking in which the member has a substantial financial interest. An official action includes any action or inaction which involves the use of discretionary authority. Financial interest entails an ownership, directorship or officership in a business, creditor interest, debtor

interest, ownership in real or personal property, or an employment interest, and extends to the member's spouse or dependent children.

Chair Woods clarified that each member is on this Board because they have an expertise in an industry and therefore to some degree, the Board is dependent on those members to request that certain rules be brought forward that may affect their industry.

IV. OLD BUSINESS

A. Review and discussion of post public hearing statement, HAR Chapter 4-11, "Aquaculture Special Fund" (DOA) – Mr. John Corbin, Program Manager of the Aquaculture Development Program, indicated that the purpose of these post public hearing amendments is to establish an Aquaculture Development Special Fund used to implement statewide aquatic disease management programs and industry assistance activities by DOA. The rules will also support selected research and development programs and activities relating to the expansion of the Hawaii aquaculture industry. He explained that four individuals testified at the public hearings, with specific reference made to the proposed \$50 fee for a health document to export Specific Pathogen Free; three were in favor of the fee and one opposed. The department, however, recommended no changes from the original proposal as it was determined that the \$50 fee is nominal and would ultimately save farmers money by saving crops in the event of a disease. Mr. Corbin also discussed the rules' flexibility which allows farmers to request a fee waiver in the event of a hardship. Additional discussions related to shrimp, off-shore farms, and the permit process. He stated that the major shrimp growing countries are Thailand, Indonesia, Malaysia and the United States. Mr. Leis recommended that the rules proceed to the Governor's Office for adoption; the Board unanimously agreed.

B. Re-review and discussion of HAR Chapter 19-42, "Vessel and Harbor Controls" (DOT) – Chair Woods noted that these rules were reviewed and deferred from the April and May Board meetings. Mr. Jeff Conners, Director of Norwegian Cruise Line (NCL), testified that the NCL pilots do not believe they need a tugboat in Hilo Harbor; the cost per day for a tugboat is approximately \$14,000, which amounts to about \$2.1 million per annum, resulting in little value and a tremendous cost. He stated there are approximately 2,000+ passengers that are brought into Hilo three times a week, and that these rules would post a huge financial impact on the small businesses.

Mr. Tom Heberle, President of Hawaii Pilots Association, testified on behalf of the pilots. He indicated that the pilots are State-licensed and pilot all foreign flag vessels in and out of all commercial harbors in the State as well as most U.S. flag vessels. To the pilots, these rules represent a marine safety issue. The Port of Hilo is an important port in Hawaii and was built several years ago when there wasn't as much traffic going through the ports as there is today. The pilots believe that a major accident may cause severe damage to the Port which would result in an economic impact on the Town of Hilo as well as potential physical harm to individuals. Mr. Heberle discussed the history of the proposed rules and explained that a pilot maneuvers the vessel and is in contact with the tugboat via radio; the pilot directs the tugboat or acts as stand-by when necessary in the event something goes wrong. In regards to NCL, he stated that there is a crew aboard and licensed to serve as "pilot" on the vessels. Up to this point, a tugboat has not been utilized in Hilo.

Mr. Edward McCain, Manager of Marine Operations at Hawaiian Tug & Barge, Young Brothers, indicated that Hawaiian Tug & Barge provides "assist" tugboats to service the vessels, and Young Brothers operates tugboats in and out of Hilo. Cargo ships and cruise line ships are assisted by both a barge and a tugboat, and that the State is mandating the use of the tugboat for the larger vessels, i.e., cruise liners, in the neighbor island ports.

Mr. Scott Cunningham, Honolulu Harbor Master at DOT's Harbors Division, indicated that the changes since last month's Board meeting largely included streamlining the rule's verbiage. He explained that the primary issue is that of a "one tug boat minimum" for the neighbor island ports with the Port of Hilo being the point of contention. He mentioned that while, in general, the harbor in Hilo is very "benign," the weather can become turbulent on occasion, and indicated that there are several documented "near misses/near incidents" regarding the cruise lines.

After much discussion, Ms. Chang recommended that the Board support the proposed rules to proceed to public hearing, and that the merchants in Hilo be individually notified of the hearing; it was additionally recommended that before the results of the public hearing are presented to this Board, a copy of the “near incidents” report be requested from the Coast Guard as well as data on the economic impact on businesses in the Town of Hilo if the cruise lines no longer went into the Hilo Harbor; the Board unanimously agreed. Chair Woods extended an invitation to the individual testifiers to report back to this Board after public hearing.

- C. Follow-up on the discussion of HAR Chapter 6-73, “Installation, Operations, and Maintenance of Overhead and Underground Electrical Supply and Communications Lines” (PUC) – Chair Woods indicated that since the last Board meeting, the smaller utility providers were contacted and requested their opinion as to whether or not the rules had any business impact upon their everyday operations. All three utilities subsequently responded, indicating that the proposed rules would not have a negative business impact. Mr. Leis recommended that the rules proceed to public hearing; the Board unanimously concurred.

Additionally, Ms. Ahn noted that at the last Board meeting, PUC requested that the members waive their approval to require PUC from attending and presenting the rules to this Board after the public hearing if the three utility companies found no business impact. As this was in fact the case, Mr. Au recommended that the proposed rules not be required to be reviewed after the public hearing but to proceed directly to the Governor for adoption; however, the Board will request a post public hearing statement for its records; the Board unanimously agreed.

V. NEW BUSINESS

- A. Review and discussion of HAR Chapter 12-5, “Hawaii Employment Security Law” (DLIR) – Mr. James Hardway, Assistant to the Director at DLIR, indicated that the proposed rules will mostly conform to federal standards. The overall basis of the rule amendments are intended to permit the proper and consistent application of Chapter 383, Hawaii Revised Statutes, for purposes of determining eligibility for unemployment insurance benefits and coverage of services performed by workers. Mr. Au recommended that the proposed rule amendments proceed to public hearing; the Board unanimously agreed.
- B. Review and discussion of the HAR Chapter 12-15, “Workers’ Compensation Medical Fee Schedule, and Exhibit A, Workers’ Compensation Supplemental Medical Fee Schedule” (DLIR) – Ms. Paula Arcena, Executive Director of Hawaii Medical Association, explained that the Association’s members are in support of the proposed rule changes. She stated that access to medical care by injured workers is impeded by a medical fee schedule that is set at 110% of Medicare, and that more than fifty percent of Hawaii’s physicians do not accept workers’ compensation patients as fees are not adequate to cover the cost of providing the care and the burden of paperwork required for workers’ compensation patients. As such, the proposed rules will ultimately eliminate the barrier to patient care by increasing the fee for particular medical treatments. Because this process is not for across the board increases, the Association believes that the fee increases will be offset as they will ultimately increase the number of physicians who accept workers’ compensation; in particular, experienced specialists.

Ms. Phyllis Dendle, Director of Government Affairs at Kaiser Permanente, supported the proposed rule changes. She explained that under the current fee schedule, health care providers are being paid less than the cost of care for services provided to injured workers in the workers’ compensation system. The proposed rule changes would create a modest increase of 4.2 percent to the cost of workers’ compensation but the benefit would ultimately outweigh the cost.

Mr. James Hardway indicated that the proposed rule changes are in response to the community’s request to raise workers’ compensation medical fees and services for certain billing codes. The overall changes are meant to ensure that Hawaii’s law references the most recent Medicare Fee Schedule adopted by the United States federal government. Ms. Chang recommended that the rule amendments proceed to public hearing; the Board unanimously agreed. Chair Woods further requested that all business associations, and in particular all neighbor island associations, be notified of the upcoming hearing given that public hearings may not be held on each island.

- C. Review and discussion of HAR Chapter 12-46, "Hawaii Civil Rights Commission" (DLIR) – Mr. James Hardway indicated that the proposed rule changes are intended to bring Hawaii's rules regarding employer's liability on sexual and racial harassment in the workplace consistent with the Federal Equal Employment Opportunity Commission. The changes were precipitated by the request of Hawaii Employers Council. Under the current rules, an employer is held "absolutely liable" for all sexual harassment by its employees, regardless of whether the employer has taken reasonable steps to prevent and correct the harassing behavior, and regardless of whether the employee failed to complain to the employer about such behavior. It is therefore proposed that certain language be deleted from these rules, which will in effect, allow an employer to raise an affirmative defense in certain sexual harassment cases.

Under the rule changes, an employer will not be held liable for sexual or racial harassment by supervisors where the harassment does not consist of a "tangible employment action," where the employer exercised reasonable care to prevent and correct the harassing behavior, and where the alleged victim failed to take advantage of any preventive or corrective opportunities provided by the employer. Ms. Chang applauded DLIR for proposing these amendments as there are currently no rules in place to protect an employer. Ms. Chang recommended that the proposed rule amendments proceed to public hearing; the Board unanimously agreed.

VI. UPDATE AND OUTCOME OF STRATEGIC PLAN

- A. Voting of prospective member(s) and Board officers – Mr. Sterling Kaya was introduced by Ms. Pang as a prospective Board member. He is president and owner of Hana Da'a Hawaii, which is a fishing supply store, and is also a magazine publisher and a T.V. producer. He is very familiar with the State's fishing and commercial boating regulations and assists DLNR on a regular basis. Ms. Pang recommended that Mr. Kaya be submitted to Governor Lingle as a nominee to this Board; the members unanimously agreed.

Ms. Pang also referred Ms. Elvira N. Lo as a prospective member. Born in Hong Kong, Ms. Lo has resided in Hawaii since 1978, and is a small business advocate and strong community leader. She founded several companies, Hibiscus Aloha Corporation, Elvira Chocolat of Hawaii and Hawaii Monarch Chocolate. She received the Hawaii Small Business Exporter of the Year Award in 2001, the Governor's Exporter of the Year Award in 2000, and the Outstanding Young American Award in 1997. Mr. Schnitzler indicated that he knows Ms. Lo and highly recommends her as a member. Ms. Pang recommended that Ms. Lo be submitted to Governor Lingle as a nominee to this Board; the members unanimously agreed.

Mr. Au recommended that Mr. Yee be nominated as Second vice Chair; Ms. Chang recommended that Second Vice Chair Pang be nominated as Vice Chair; Ms. Pang recommended that Chair Woods be re-nominated as the Chairperson; the Board unanimously agreed to all three recommendations.

- B. Discussion and voting of establishing a special marketing trust fund – Chair Woods explained that Mr. Leis has agreed to donate a sum of money to assist this Board in their marketing efforts. At the suggestion of DBEDT Director Ted Liu, Chair Woods spoke with a representative at Hawaii Community Foundation in their Community Links Program who was eager to assist the Board in setting up and monitoring a special trust account. The Foundation will work directly with a designated representative from DBEDT, pay all the bills and charge a 9% fee of the total amount of the fund; Chair Woods will attempt to renegotiate the 9% fee. Mr. Yee recommended that a task force be established to design a proposal and a statement of purpose, a marketing budget and a "voice" of the Board, with the task force comprising of Chair Woods, Mr. Au and Mr. Schnitzler; the Board unanimously agreed.
- C. Discussion of proposed Administrative Directive and related Small Business Impact Statement Checklists – Mr. Ron Boyer, Policy Analyst at the Governor's Office, indicated that he has been working with Ms. Palcovich and Mr. Smyth to establish a new Administrative Directive that would replace the existing Administrative Directive 99-02. In doing so, the Governor's Policy office solicited comments from several agencies for input. Upon review by the Attorney General's office and the Governor, a new Directive will become effective. Chair Woods asked the members to review the proposed Small Business Impact Statements, including both the "Rule Making

Checklist” and the “After Public Hearing Checklist,” and to notify Ms. Palcovich with any recommended changes.

VII. 201M-7 RULE REVIEW

A. HAR Chapter 11-186, “Hawaii State Health Planning and Development Agency Certificate of Need” – Chair Woods recommended that these rules be reviewed by the Board because of their perceived tremendous business impact. Mr. David Sakamoto, Administrator at the State Health Planning and Development Agency at DOH, discussed the rule’s history and purpose, but explained that he was under an ex parte prohibetum and therefore was unable to discuss specific information relating to existing applications. He explained that the process for a certificate of need is complex; the applicant is required to prepare a comprehensive business plan and must have a thorough understanding and wherewithal of the business. Chair Woods indicated that she will review the rules and at the next board meeting will provide any recommendations she may have. She extended an invitation to Mr. Sakamoto to attend the next Board meeting to review those recommendations.

VIII. REPORT FROM THE CHAIR – Chair Woods reminded the members that one of the items discussed at the strategic planning session in October 2005 was to turn the “Bill of Rights” into a brochure. Because Mr. Dymond was on the initial task force to establish the “Bill of Rights” bill, he will be asked to establish such a brochure. Chair Woods also mentioned that in a discussion with Director Liu, she explained that, going forward, the Board will not pursue nor discourage any efforts for another “Bill of Rights” bill.

IX. REPORT AND UPDATE FROM BOARD MEMBERS – Nothing was presented.

X. ANNOUNCEMENTS – Second Vice Chair Pang explained that she received a complaint from a small business owner regarding a form letter from the State’s Professional and Vocational Licensing Division at the Department of Commerce and Consumer Affairs, informing them that their application to renew their nurse aide certification would not be approved. She requested that the small business owner file a formal complaint to this Board; when it is received, the Board will review it

XI. NEXT MEETING - Wednesday, July 19, 2006, No. 1 Capitol Building, Conference Room 410.

XII. ADJOURNMENT – Chair Woods adjourned the meeting at 1:40 p.m.