

CONCURRING OPINION BY ACOBA, J.

I agree with the result reached in this case. I also concur that an agency's findings and conclusions must be reasonably clear. Majority opinion at 15, 52; see Iqawa v. Koa House Restaurant, 97 Hawai'i 402, 412, 38 P.3d 570, 580 (2001) (Acoba, J., concurring) ("Findings and conclusions by an administrative agency must be reasonably clear to enable the parties and the court to ascertain the basis of the agency's decision."); Nakamura v. State, 98 Hawai'i 263, 47 P.3d 730, (2002) (Acoba, J., concurring and dissenting) ("An agency's finding must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.") (Quoting Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App 227, 230, 751 P.2d 1031, 1034 (1988).)). "The purpose behind findings is 'to assure reasoned decision making by the agency and enable judicial review of agency decisions.'" Id. (Acoba, J., concurring and dissenting) (quoting In re Application of Hawaii Elec. Light Co., 60 Haw. 625, 642, 594 P.2d 612, 623 (2002)).

With all due respect, I do not agree, however, that after the adoption of HRS § 91-14(g),¹ we "review the Water

¹ HRS § 91-14 entitled "Judicial Review of Contested Cases," provides in relevant part that:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the

(continued...)

Commission's action 'pursuant to the deferential abuse of discretion standard.'" Majority opinion at 9 (quoting Paul's Elec. Serv., Inc. v. Befitel, No. 23800, slip op. at 17 (Jun. 10, 2004) (emphasis added). It is not clear how a "deferential" abuse of discretion standard differs from the "abuse of discretion" standard as listed in HRS § 91-14(g). See majority opinion at 16. Similarly, it is not apparent how affording "deference" adds anything more to the fact that the agency must make clear findings of fact and conclusions of law. See majority opinion at 16.

The fact that such deference is not listed in HRS § 91-14(g) is not accidental. See Paul's Elec. Serv., Inc., No. 23800, concurring op. at 2 (Acoba, J., concurring).

The grounds set forth in HRS § 91-14(g) establish the authority of the appellate courts to remand, reverse, or modify an agency decision "if the substantial rights of the petitioners may have been prejudiced[.]" This authority proceeds from specific standards referable to agency action. For example, judicial intervention is permitted if the agency exceeded statutory authority, engaged in "unlawful procedure," committed "error of law," was "clearly

¹(...continued)

administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphases added.)

erroneous" in view of the substantial evidence, or was "arbitrary and capricious." HRS § 91-14(g).

Id. (emphasis added).

In light of these grounds, there is little gain in applying a "deferential abuse of discretion standard" to agency decisions, see majority opinion at 10, in terms other than that expressly defined and stated in HRS § 91-14(g). See Paul's Elec. Serv., Inc., No. 23800, concurring op. at 2. "The 'deference' to be given agency decisions already inheres in the specific enumerated grounds." Id.