

## Small Business Regulatory Review Board

### MEETING MINUTES

August 18, 2022

- I. **CALL TO ORDER:** Chair Cundiff called the meeting to order at 10:05 a.m., with a quorum present, which was open to the public.

**MEMBERS PRESENT:**

- Robert Cundiff, Chair
- Mary Albitz, Vice Chair
- Jonathan Shick, 2<sup>nd</sup> Vice Chair
- Garth Yamanaka
- Dr. Nancy Atmospera-Walch
- James (Kimo) Lee
- Mark Ritchie
- Taryn Rodighiero
- William Lydgate
- Tessa Gomes
- Sanford Morioka

**ABSENT MEMBERS:**

**STAFF: DBEDT**

Dori Palcovich  
Jet'aime Ariola

**Office of the Attorney General**

Alison Kato

**II. APPROVAL OF March 10, 2022 MINUTES**

Dr. Nancy Atmospera-Walch motioned to accept the June 16, 2022 meeting minutes as presented. Garth Yamanaka seconded the motion. Ten members voted in support and Tessa Gomes abstained.

**III. OLD BUSINESS – After Public Hearing**

- A. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 12 Chapter 43, Rules of Practice and Procedure Before the Hawaii Labor Relations Board, promulgated by Department of Labor and Industrial Relations (DLIR)

Mr. Marcus Oshiro, Chairperson of Hawaii Labor Relations Board, states the main purpose of the proposed adoption of Hawaii Administrative Rules (HAR) Chapter 43 is to streamline the procedure for contested case hearings before the HRLB. Combining the rules of practice and procedure in HAR Chapters 41 and 42 into one coherent and internally consistent new HAR Chapter 43 has been an ongoing effort by the Hawaii Labor Relations Board (HLRB) and its staff members over a number of years. The proposed draft is designed to provide all parties

appearing before HLRB a clear understanding of how to navigate the process of contested case hearings.

HLRB is a quasi-judicial three-member body and functions as an appellate board; the HLRB adjudicates complaints between public employers, unions and employees involving prohibited practices. The current rules in chapter 41 and 42 have not been amended since 1981 and 1983, respectively.

In 2002, the Hawaii legislature transferred cases from Hawaii Occupational, Safety and Health (HIOSH) under Chapter 396 from the Labor and Industrial Appeals Board to HLRB; however, the legislature did not direct the promulgation of any rules. Since that time, HLRB has reviewed hundreds of HIOSH cases under the existing Chapters 41 and 42. Thus, the main purpose of proposed Chapter 43 is to streamline the procedure of contested case hearings in front of HLRB by incorporating Chapters 41 and 42 which has been an on-going process over the past several years.

Mr. Oshiro also explained that there is no apparent small business impact based on the proposed rules nor are there any imposed fees or indirect costs that would impact small businesses. In October of 2021, seven months prior to the public hearing, HLRB involved small business in the development of the proposed HAR Chapter 43 draft by posting the draft on its website and inviting comment from the public and private sectors. HLRB also wrote to the entities that may be covered under HRS Chapters 89, 377, or 396 and thus may be considered “stakeholders”:

After receiving formal approval to proceed to public hearing from the SBRRB on March 2, 2022, and the Office of the Governor on April 14, 2022, HLRB published the Public Hearing Notice in the statewide newspapers on May 4, 2022. The public hearing was held on June 13, 2022, at HLRB’s office and via Zoom.

At the public hearing held on June 13, 2022, there were no testifiers or written comments submitted. After the public hearing, HLRB reviewed its earlier responses to the comments received in November and December of 2021, and the sole comment received from UH. HLRB incorporated some, but not all, recommendations into the proposed rules from stakeholders who submitted comments.

Vice Chair Albitz motioned to pass the rules onto the governor for adoption. Mr. Yamanaka seconded the motion. Ten members voted in support of the motion and Tessa Gomes abstained.

B. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 11 Chapter 94.2, Nursing Facilities, promulgated by Department of Health (DOH)

Vice Chair Albitz stated that DOH is repealing three chapters and replacing them to be align mostly with federal regulations.

Mr. Keith Ridley, Chief Officer at DOH’s Office of Health Care Assurances, explained that DOH has the responsibility of conducting inspections on all health care facilities within the

state from a state licensing standpoint. Inspections are also procured through Medicare for Medicare certification purposes. The facilities under DOH's jurisdiction include hospitals, nursing facilities, adult residential care homes, assisted living facilities, clinical laboratories, hospices, home health agencies, etc.

The subject rules and the two rules noted below are in the process of being repealed and amended and new rules are being created; two of the rules are aligned with Medicare; Chapter 11-103.1 in Section III. A. C. is the only rule not being aligned with Medicare.

Chapter 94.2 Nursing Facilities specifically will allow DOH to accept accreditation or certification of one's facilities by other nationally recognized accreditation and/or certification agencies for purposes of renewing state licensure. It was noted that Medicare requirements are much for stringent than state requirements; as such, DOH is aligning the state rules towards the federal rules. This is very beneficial to DOH on a workload and resource allocation standpoint because it allows DOH to conduct only one inspection rather than two or more.

The rule changes will also update requirements for emergencies including but not limited to natural disasters. Mr. Ridley clarified that only the larger institutions such as hospitals would be governed by both federal Medicare and state laws whereas the home health care facilities are only state operated and governed.

Vice Chair Albitz motioned to pass the rules onto the governor for adoption. Mr. Yamanaka seconded the motion, nine members voted in support of the proposal with Dr. Nancy Atmospha-Walch recusing herself and Tessa Gomes abstaining.

C. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 11 Chapter 97.1, Home Health Agencies, promulgated by DOH

Mr. Keith Ridley, Chief Officer at DOH's Office of Health Care Assurances, explained that these rules are similar to the nursing home rules (above) in terms of being aligned with the federal Medicare. However, there is one difference. Congress recently passed a law that for the Veteran's Administration (VA) doctors who are in the VA system, regardless as to what state he or she is licensed in, can continue to do work in his or her host state and provide services to VA beneficiaries even when it relates to services being referred to the private sector.

For example, under the current rules a physician or an APRN has to be licensed in the state of Hawaii in order to provide referrals to home health agencies. Licensed home health agencies can only accept referrals from physicians or APRNs who are licensed in Hawaii. This, of course, becomes a problem for the VA when they treat a patient in Hawaii and send them into the community as the VA does not have a robust home health agency system statewide. Thus, it becomes an issue for Hawaii licensed home health agencies to accept these VA beneficiaries.

Thus, the law that Congress recently passed is being incorporated into the rules that would allow a home health agency to accept a referral from a VA physician who is licensed in

another state for the VA patient who is being referred for home health services.

Vice Chair Albitz motioned to pass the rules onto the governor for adoption. Mr. Yamanaka seconded the motion, nine members voted in support of the proposal with Dr. Nancy Atmosphera-Walch recusing herself and Tessa Gomes abstaining..

D. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 11 Chapter 103.1, Licensure and Certification Fees for Health Care Facilities and Agencies, promulgated by DOH

Mr. Keith Ridley, Chief Officer at DOH's Office of Health Care Assurances, indicated that these rules relate to state licensing fees only; there is no alignment with federal fees as the federal government does not charge a fee for certification. The proposed rule changes reflect updating and increasing the fees only; the fees are for providers that DOH license and certify. There are a number of facilities that would be considered small businesses such as adult residential care homes and community care foster family homes.

The fee increase will be for the initial or brand-new licenses as well as for renewals. The fee changes, which hadn't been increased since 2017, depends on the term of license. While most facilities are licensed and renewed every year, there are also a few facilities that are licensed every two years. The percentage increase for these facilities mostly ranges between 10 to 25 percent.

The Bureau of Labor Statistics and the Consumer Price Index over the past few years were reviewed and used as guides for establishing the proposed fees. DOH is expecting a lot of testimony at the public hearing from operators of adult residential care homes where the change in the fees will be 13 percent; this equates to \$225 per year from \$200 per year. Assisted living facilities will be imposed a 25 percent increase, hospitals will be imposed a 20 percent increase, and clinical laboratories a 33 percent increase.

Vice Chair Albitz motioned to pass the rules onto the governor for adoption. Mr. Lee seconded the motion, nine members voted in support of the proposal with Dr. Nancy Atmosphera-Walch recusing herself and Tessa Gomes abstaining.

E. Re-review and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 13 Chapter 256, Ocean Recreation Management Rules and Areas, promulgated by Department of Land and Natural Resources (DLNR)

Chairperson, Robert Cundiff, explained this is a re-review of the proposed rules and that there was a map that was excluded from the original submission back in June of 2021.

Mr. Todd Tashima, General Professional from DLNR's Division of Boating and Ocean Recreation (DOBOR), states a public hearing will be held on Hawai'i Island although final approval was given at the June 17, 2021 SBRRB meeting. There are no other changes being made. One technical change was made to remove a reference to Kamoia Point because it was incorrectly stated in the map.

Discussion Leader and 2<sup>nd</sup> Vice Chair, Jonathan Shick, motioned to move the proposed amendments to public hearing once more. Mr. Yamanaka seconded the motion, ten members voted in support of the motion and Tessa Gomes abstained.

#### **IV. NEW BUSINESS** – Before Public Hearing

##### A. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing for HAR Title 11 Chapter 55, Appendices A, D, H, I, and M, Water Pollution Control, promulgated by DOH

Mr. Darryl Lum, Engineering Section Supervisor, Mr. Alec Wong, Program Manager, and Mr. Matthew Kurano, Enforcement Supervisor at DOH's Clean Water Branch, are introduced by Discussion Leader Nancy Atmospera-Walch.

Mr. Lum explains that the water pollution permits in Hawaii are part of the federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES). The NPDES is a permit system required by Section 402 of the CWA that authorizes certain types of point source discharges, as well as some storm water discharges, to surface waters such as streams, lakes, or oceans. The Department of Health (DOH) has been authorized by the U.S. Environmental Protection Agency (EPA) to issue NPDES permits in Hawaii. NPDES permits in Hawaii are governed by Hawaii's Water Pollution statute, Hawaii Revised Statutes (HRS), Chapter 342D, and HAR Chapter 11-55 Water Pollution Control.

HAR Chapter 11-55 describes the policies and requirements for the NPDES program. The NPDES General Permits are incorporated into the HAR Chapter 11-55 as appendices. General Permits are issued as rules in the HAR and not specifically to any individual owner or operator. Each General Permit authorizes a category of discharges for a group of similar types of activities or facilities (e.g., once-through cooling water for air-conditioning systems or storm water discharges from construction activities) and contain requirements to minimize pollutants from being discharged to State waters. An owner or operator may request to be covered under an applicable General Permit, if eligible, by submitting a Notice of Intent (NOI) to the DOH. By submitting an NOI, an owner or operator thereby agrees to comply with all requirements of the applicable General Permit.

If a General Permit is available (i.e., for the specific category of discharge), the processing of coverage under the General Permit can be obtained more expeditiously than if coverage were to be processed under an Individual NPDES Permit. Coverage under an NPDES Individual Permit is processed on a case-by-case basis and requires the CWB to develop permit conditions and solicit public comment. More than 75% of the authorizations issued by DOH are for coverage under a General Permit. Appendix A of HAR Chapter 11-55 is the list of standard general permit conditions that are applicable to all of the General Permits.

Appendix D of HAR Chapter 11-55 authorizes the discharge of treated effluent from leaking underground storage tank remedial activities to a State receiving water from the cleanup (or remedial action) of underground storage tanks that have leaked petroleum hydrocarbons. Currently there is only one permittee, The United States Navy.

Appendix H of HAR Chapter 11-55 authorizes discharges of treated process wastewater associated with petroleum bulk stations and terminals to a State receiving water.

Treated process wastewater effluent includes tank water draws, product displacement process wastewater, wash down and fire hydrant system test waters, service station tank draws, recovered groundwater, and contaminated storm water runoff from the product storage and handling areas.

Appendix I of HAR Chapter 11-55 authorizes discharges of treated process wastewater associated with well drilling activities to a State receiving water. Treated process wastewater associated includes well drilling slurries, lubricating fluids wastewaters, and well purge wastewaters.

The last General Permit that DOH is proposing to amend is in Appendix M of HAR Chapter 11-55 which authorizes point source discharges from the application of pesticides (including insecticides, herbicides, fungicides, rodenticides, and various other substances to control pests) to a State receiving water.

Early Stakeholder Outreach on the proposed revisions to HAR 11-55 and the general permits were conducted from July 11, 2022 through August 1, 2022. The CWB sent 585 emails to notify current permittees and organizations and to solicit comments. The CWB does not expect the updated draft general permits to impose more stringent requirements than the drafts provided for stakeholder review.

The rule change is primarily to issue the Appendices D, H, I, and M before they expire. The rule change also updates the main body of HAR 11-55 and Appendix A to conform with current implementation practices and to address any needed clarifications and revisions that were deemed necessary since the last substantive revision.

Mr. Lum states Appendices D, H, and I do not impact small businesses, so there should be no adverse impact from revisions. Appendix M primarily impact government agencies and municipalities. Although there may be contractors or sub-contractors that are small business that are hired for these projects, there should be no adverse impact. These revisions to Appendix M only clarify existing submittal and compliance requirements and are required to comply with Federal regulations. Revisions to HAR 11-55 and Appendix A potentially affect other NPDES permittees, however, most changes are clarifications of current rules, and changes to the field citation penalties don't affect permittees who are in compliance with their permit.

Mr. Lydgate seeks clarification on Appendix M which authorizes point source discharges from the application of pesticides to a State receiving water. And he notes that it seems increasing the fees is the only change and there is no real impact. Mr. Lum responds that DOH is keeping the filing fees the same which is \$500 and that the only increase is the field citation fee. These revisions to Appendix M only clarify existing submittal and compliance requirements and are required to comply with Federal regulations.

Chair Cundiff adds comments regarding DOH's Clean Water Branch and their professionalism and amount of outreach. Chair Cundiff asks how many citations DOH has issued that created the motivation to increase these penalties.

Mr. Kurano, Enforcement Supervisor, claims that there are roughly around 1200 permittees, on average 35-45 field citations a year. There is a growing group particularly in the construction type industry where they rather pay a fine than go through the more costly compliance costs. There has been an increase in non-compliance with certain sub-groups. There is a reasonable amount of non-compliant businesses to have to double the field citation penalties moving forward.

Mr. Yamanaka, motioned to move the proposed amendments to public hearing. Mr. Lee seconded the motion, ten members voted in support of the motion and Tessa Gomes abstained.

## **V. ADMINISTRATIVE MATTERS**

### **A. Update on the Board's Proposed Phase II Website Project**

Mr. Ritchie indicated that the website taskforce is doing a great job working with NIC on a weekly basis to improve upon the Board's website activity and allowing the public to be more engaged with the Board. Involving Small Business and Government Agencies in the rule making process and assist in tracking rules has been the focus. The new version will look very similar but the improvements will be very organized.

Ms. Palcovich adds that the website should be up live within the next month. Mr. Ritchie notes that NIC will be assisting in the final product presentation once completed.

Chair Cundiff comments on how the taskforce has been very engaged and provided great comments and input. It will be very user friendly, and the new version of the website will address the outreach that the board is trying to accomplish. A press release will be sent out once the website is launched.

### **B. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS**

Mr. Ritchie states that DBEDT has partnered with the SBA and will be hosting the Hawai'i Small Business Fair on Saturday, September 17, 2022, at Leeward Community College. Small Businesses will be able to hear from speakers and exhibitors on how to start or grow a business. The Fair will provide actionable information for small businesses recovering from economic hardships caused by the COVID-19 pandemic. Expert speakers will present step-by-step methods and concrete examples to help you grow and strengthen a business. Business resource providers will speak one-on-one with business owners and entrepreneurs about specific challenges and provide actionable advice for any specific business needs. Small Businesses will be able to connect with financial institutions to discuss SBA-guaranteed loans and other financing.

Also, the SBRRB will have a table set up at the fair to feature the board. Ms. Ariola will be available to answer questions and speak on behalf of the SBRRB.

Chair Cundiff acknowledges Mr. Ritchie as DBEDT Manager of the Year, and he also recognizes Ms. Palcovich and her 20 years of service with DBEDT.

**VI. NEXT MEETING** - Thursday, September 15, 2022 at 10:00 a.m.

**VII. ADJOURNMENT** – Chair Cundiff made a motion to adjourn the meeting and Mr. Yamanaka seconded the motion; the meeting adjourned at 11:47 a.m.