

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

May 15, 2013

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

I. **CALL TO ORDER:** Ms. Shubert-Kwock called the meeting to order at 9:31 a.m., with a quorum present.

MEMBERS PRESENT:

- Chu Lan Shubert-Kwock
- Howard Lum
- Kyoko Kimura
- Anthony Borge
- Mary Alice Evans

ABSENT MEMBERS:

- Barbara Bennett
- Leslie Mullens

STAFF: DBEDT

Dori Palcovich

Office of the Attorney General

Margaret Ahn

II. ELECTION OF A TEMPORARY CHAIR

Mr. Borge made a motion for Ms. Shubert-Kwock to be the Temporary Chair for today's board meeting. Mr. Lum seconded the motion, and the Board members unanimously agreed.

Temporary Chair Shubert-Kwock introduced and welcomed Mr. Craig Takamine as the newest member/nominee of this Board. Mr. Takamine stated that he is president of Takamine Construction, Inc, from the Big Island, and is looking forward to officially joining this board as a member.

III. APPROVAL OF MARCH 20, 2013 MEETING MINUTES

Ms. Kimura made a motion to accept the March 20, 2013 minutes, as amended. Mr. Borge seconded the motion, and the Board members unanimously agreed.

IV. OLD BUSINESS

- A. Small Business Statement After Public Hearing for Hawaii Administrative Rules (HAR) Title 17 Chapter 1443 Feeding Assistant Training Program, Title 17 Chapter 1444 Nurse Aide Training and Competency Evaluation Program, and Title 17 Chapter 1445, Recertification of Nurse Aides in State-Licensed or State-Certified Health Care Settings, and Repeal of HAR Chapter 1420 Homemaker Services for Community Long-Term Care Programs, HAR Title 17 Chapter 1438 Nursing Home without Walls, HAR Title 17 Chapter 1440 Home and Community-Based Services for Elderly Foster Family Community Care Program, HAR Title 17 Chapter 1441 Personal Care Services, HAR Title 17 Chapter 1442 HIV Community Care Program (DHS)

Ms. Evans stated that she hadn't had a chance to review the information carefully, but it looked as if there was a good turn-out at the public hearing. Chair Shubert-Kwock noted that because of the adjustment of the training hours in the feeding program, it will help those people in need of feeding assistance.

Ms. Evans made a motion for this Board to accept the after public hearing statement. Mr. Lum seconded the motion, and the Board members unanimously agreed.

B. Small Business Statement After Public Hearing for HAR Title 13 Chapter 54, Puako Bay and Puako Reef, Hawaii; Section 1 Definitions; Section 2 Prohibited activities; Section 3 Permitted activities; HAR Title 13 Chapter 57, Keauhou Bay, Hawaii, Section 1 Definitions; Section 2 Prohibited activities; Section 3 Permitted activities; and Map of Keauhou Bay Fisheries Management Area, Hawaii; the Management Area; Adoption of Title 13 Chapter 60.4, West Hawaii Regional Fishery Management Area, Hawaii; and Amendments to HAR Title 13 Chapter 75 Section 12.4 Lay nets (DLNR)

William Walsh, Ph.D., from DLNR's Division of Aquatic Resources, summarized the proposed rule changes and respective testimonies. He explained there was a two-month period where public hearings were held to hear the public's testimony. The resulting 1,200+ oral testimonies and 2,000 written comments were broken into different segments - in support, in opposition, neutral comments, and in geographical segments. Mr. Borge stated that the presentation and summary of the rules and testimonies were well done. However, he asked whether or not the ban on SCUBA/rebreather spear fishing was necessary given the need to keep the aesthetics and beauty of Hawaii's waters in-tact, and whether the rule restrictions regarding the gear-type was going too far. Dr. Walsh responded that there had previously been several citations of unreported catches, and that the natural refuges, which are very important to maintain fish balance, are being eroded by SCUBA spear fishing. DLNR looked to the scientific justification of SCUBA spear fishing in regards to the gear being used, noting that there are essentially two sectors, "commercial" and non-commercial spear fishing. Therefore, although the commercial spear fishing is minimal, it was determined that SCUBA spear fishing should be banned.

Mr. Borge made a motion to accept the following proposed rule changes after public hearing: 1) establishment of a list of 40 fish species permitted for aquarium take, only those fish on the white list could be collected live for aquarium use, and size and bag limits are proposed for three species on the White List; 2) prohibition of take or possession of nine species of inshore sharks and rays and two invertebrate crown-of-thorns predators; 3) establishment of a 1,500 foot section of Ka'ohē Bay (Pebble Beach), South Kona, as a Fish Replenishment Area where aquarium collecting and/or recreational fish feeding is prohibited; and to oppose the prohibition of SCUBA/rebreather spear fishing and/or possession of such gear with a spear or speared aquatic life until further notice of the impact; Ms. Kimura seconded the motion. Mr. Borge, Mr. Lum, Ms. Kimura, Acting Chair Shubert-Kwock voted in favor, and Ms. Evans abstained. As a result, the motion did not pass.

Mr. Mark Fox, Director of External Affairs at the Hawaii Chapter of the Nature Conservancy, introduced himself and thanked the board members for having such an in-depth discussion of these rules. He also wanted to acknowledge the challenges that DLNR and Mr. Walsh have faced to come up with the proposed rules. DLNR, over the past eleven years, has

worked closely with the community along the West Hawaii coast, as well as state-wide, in trying to come up with a rule package that has the least impact on the non-targeted behavior but also targets improper behavior.

The members extended an open invitation to Mr. Walsh to come back to this Board to discuss any progress and follow-up with regards to the proposed rules.

V. NEW BUSINESS

A. Proposed Amendments to HAR Title 12 Chapter 46 Hawaii Civil Rights Commission (DLIR)

Ms. Evans stated that all but one of the proposed administrative rules is mandated by federal law; in other words, nondiscretionary. She introduced Ms. Livia Wang, Acting Chief Counsel from the Hawaii Civil Rights Commission (HCRC) at DLIR, to discuss the proposed amendments. Ms. Wang explained that HCRC has a work share agreement with HUD to investigate and do hearings on housing discrimination cases. Part of that HUD contract requires state law to be substantially equivalent to federal law; if not, the state's federal funding will be lost. Ms. Wang noted that the one amendment that was made by the State's legislature prohibits sexual discrimination on gender identity expression; the statute that reflects this change is from 2005.

Ms. Evans made a motion to send the proposed set of rule changes that conform to the respective statutes to the Governor for his approval to go out to public hearing for public input. Mr. Borge seconded the motion, and the Board members unanimously agreed.

B. Proposed Amendments to HAR Title 13 Chapter 230 Part 1, Small boat Harbors and Other Boating Facilities, Chapter 230 General Provisions (DLNR)

Mr. Ed Underwood, Administrator at DLNR's Division of Boating and Recreation, explained that these rules and other related rules have been in the rule-making process for nearly a decade. However, because the overall rules are quite voluminous, the Land Board recommended that the rules be approved separately, chapter by chapter. Therefore, this first proposal is a generic set of rules that encompass general provisions. Ms. Kimura stated that while she found the changes in the definitions to be fine, she questioned the amount of fine, which is at the discretion of the Land Board. Mr. Underwood responded that the fines are consistent with the statute and no changes have been proposed.

Ms. Kimura made a motion to send the proposed rules to public hearing. Ms. Evans seconded the motion, and the Board members unanimously agreed.

C. Presentation on HAR Title 11 Chapter 164.1 Emergency Rules Relating to Examinations for Tuberculosis (DOH)

Dr. Glenn Wasserman, Chief at DOH's Communicable Disease Division, introduced DOH Deputy Director David Sakamoto, and provided a summary of the temporary rules. The agency is in the process of updating the existing administrative rules, which have not been amended since 2001. Since that time, there have been remarkable changes in screening and testing of tuberculosis (TB).

It was explained that several months ago, a problem arose when there became a nationwide shortage of Tubersol; this is a skin test examination used in TB screening. This shortage precipitated an emergency for those people who were in real need of the skin test but could not get it because of limited supplies. As a result of this, DOH temporarily suspended the TB clearance requirements that are mandated in the existing rules, Title 11 Chapter 164, for school personnel, students, food handlers, and workers in health care, daycare, and residential care facilities. The temporary suspension is in effect until the shortage has ended, or up to 120 days. Therefore, Dr. Wasserman's discussion was essentially a preview of the proposed amendments that would be forthcoming to this Board. Small businesses impacted by these rules would largely be private, independent physicians.

VI. LEGISLATIVE MATTERS

1. Governor's Message No. 792, Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Craig Takamine, for a term to expire June 30, 2016

Chair Shubert-Kwock stated that this measure was recommended by the Committee on Economic Development, Government Operations and Housing to "advise and consent to the nomination," and was confirmed on April 22, 2013. At this point, we are just waiting for the swearing in of Mr. Takamine's nomination.

VII. Administrative Matters

- A. Review of Board's proposed Brochure and Testimonial form

The members reviewed the proposed brochure and testimonial form, created by board member Barbara Bennett. Ms. Evans made a motion to defer action on this item until Ms. Bennett is able to attend; however, Chair Shubert-Kwock stated that the members can provide feedback to Ms. Bennett as she is waiting to hear of any changes in order for her to update the forms.

Chair Shubert-Kwock thought the concept of the testimonial form was good. One suggestion was to put "evaluation form" on the top of the form. Another suggestion was to modify the wording of #6, "Rate the professionalism of the members on the SBRRB," as it appears to be a very subjective request. Chair Shubert-Kwock thought this question may have referred to whether or not the members understood the issue at hand or if the exchange from the Board was helpful; and not necessarily whether the members were professional, but were working professionally and respectfully.

Several changes to the brochure were also suggested. Chair Shubert-Kwock suggested that a group picture of the members for the brochure and the annual report be taken. Ms. Palcovich will look into getting a photographer, will amend both forms, and provide them to Ms. Bennett for submission to the next board meeting.

A. Discussion of DBEDT staff's position description, responsibilities, and hours needed to accomplish tasks

Chair Shubert-Kwock explained this item is on the agenda because this Board would like DBEDT to understand how the Board can receive proper assistance in order to abide by the legislative intent as it applies to the board's governing statute. She said that Ms. Palcovich is this Board's administrative liaison from DBEDT and is to work with this board under its statutory mandate. Therefore, the board would like DBEDT staff to make sure that all the items required on the agenda are given to the members in sufficient time, at an administrative level. When Ms. Palcovich tells the board that she does not have time to provide this level of work, it impacts the board's effectiveness. This board was created to review the state's rules for small business impact, which ultimately impacts the whole economy of the state and is one reason why the members have volunteered their time to help the small businesses in the State of Hawaii. Deputy Attorney General Ahn noted that there is no statutory mandate that DBEDT actually pay for the board's expenses, such as the travel expenses for the neighbor island members. She also noted that during the past difficult economic times, many of the state statutory programs were not funded because of budget constraints.

Chair Shubert-Kwock requested that Ms. Palcovich summarize her responsibilities as a DBEDT employee, and to define them in terms of time and hours. In response, Ms. Palcovich stated that the majority of her work, right now, is for this Board, but she also does some work directly for DBEDT where she reviews rules and provides a "governor referral" for the director's office. As eighty to ninety percent of the work for this Board is clerical, she has requested clerical assistance from DBEDT on many occasions. Just recently, DBEDT has allowed her to use one of the temporary clerical assistants to help make copies; she has also asked another staff member to book the flights and car rentals for the neighbor island members and has sought assistance of clerical staff from other departments.

Ms. Palcovich stated how it took her approximately fifty hours to do a clerical function over a two-week period due to being unfamiliar with the task, making numerous mistakes, and due to inaccessibility of a copy machine; where it would likely have taken a qualified clerical staff member a few hours. She explained that she is quite stressed due to the workload and has become ill over it, but is doing the best she can with the limited clerical assistance. Upon hearing this, Chair Shubert-Kwock acknowledged that the number of hours she allots to clerical work is unproductive for a high-skilled employee to perform for this board; simply stated, Ms. Palcovich is unfamiliar, unqualified, and does not have the skill-set to perform many of the clerical functions.

Chair Shubert-Kwock noted that some of the actions that have recently taken place are unacceptable and cannot be repeated - 1) there was an issue with a State taxpayer claiming that DBEDT staff violated Sunshine law; this lead the Board to cancel a meeting; and 2) meeting minutes were provided to the members on the same day of the board meeting. While Ms. Palcovich spends about ten to twenty percent of her time doing the Board's administrative work, this Board does not need a

high-skilled employee to perform clerical work to arrange the members' itinerary and travel forms, rent cars, and make copies of the agenda packets. Ms. Palcovich explained that while the clerical work is not specifically in her position description, this work still must get done for this board to function. Chair Shubert-Kwock noted that what is critical to this board is for the liaison to communicate with the State departments, to get the material correct, to get the research done, and to inform the board members about changes. She does not believe she should go each month wondering if there will be a meeting because of Sunshine law violations, or because the work is not done on time; these are logistical nightmares, and the liaison must work in unison with this Board to be effective.

B. Evaluation of DBEDT's Staff member assigned to the Small Business Regulatory Review Board (An executive session may be called, pursuant to Section 92-5(a)(2), HRS)

Deputy Attorney General Ahn explained that in order to go into executive session, in this particular situation, it will be to evaluate an employee. Ms. Evans explained that because Ms. Palcovich is a civil service employee of DBEDT, the scenario is different than when an agency or a board governed by statute has the ability to hire and fire an employee.

Chair Shubert-Kwock believed that this discussion is intended to help understand the limitations involved and to work more effectively. It will be a chance to have Ms. Palcovich explain how she can assist this Board and DBEDT, to find ways to make things work better with the understanding of the limitations due to the board members' time involved to make this board successful, to make her job at DBEDT successful, and to make DBEDT look good, as well. Deputy Director Ahn, however, warned that if this is the purpose of the discussion, it will take the discussion out of the purpose of the executive session; she was also concerned about Ms. Palcovich's privacy, especially if there is going to be anything negative about her performance.

Chair Shubert-Kwock responded that it is understood that going into executive session will relate to her job performance with this Board. Although Ms. Palcovich is not an employee of this Board but of DBEDT, any input this board may have that affects her employment would not be inappropriate. Mr. Lum questioned where the responsibility falls in ultimately getting the work done; Chair Shubert-Kwock stated that this board would need to go to DBEDT and if that does not work, it would have to go to the next level. She also noted that going into executive session will bring about a transparency, to discuss openly, and to try to grapple with the problem at hand. It is currently stressful to work with Ms. Palcovich because of her own stress level regarding her responsibilities. When asked if Ms. Palcovich was okay with going into executive session, she stated affirmatively. Mr. Lum believed that Ms. Palcovich would likely be able to make some recommendations to improve upon the overall workload. She responded that this board is, and always has been, a high maintenance board. In response, DBEDT has always recognized and always provided this Board with clerical support, until now. She is essentially performing one and a half jobs right now, and although she has been very passionate about this

board and conscientious about her work, she is losing those traits; whatever help she can get from this board would be grateful.

A motion was made by Mr. Borge, seconded by Ms. Kimura, and passed unanimously to go into executive session under the provision of Section 92-5(a)(2), Hawaii Revised Statutes. The Board went into executive session at 12:14 p.m.; the executive session ended at 12:25 p.m.

After the executive session, Ms. Evans discussed with the members the reduction-in-force that occurred in 2009, explaining that it reduced DBEDT's staff by forty percent, and placed Ms. Palcovich in a completely different division where she was unable to utilize her business skills. She also explained the State's legislative process as it relates to request for a new position employee. Although not ideal, Ms. Palcovich has just recently been provided with some assistance from a temporary staff member and from a permanent staff member who will arrange the neighbor island members' flights; at least, until the legislative session begins again next year. While the members understood the reduction-in-force and legislative processes, the members were interested in the current situation at hand and how it can be improved, presently.

Mr. Takamine asked if it would be appropriate to request within the department a designated person to take on certain tasks each month; in response, it was explained that this is essentially being done now, however if a rush occurs the allocated person may need to work on other items. Chair Shubert-Kwock reiterated that this Board wants very much to work with DBEDT however there is currently a problem and it needs to be resolved. Thus, in the long range, a permanent clerical staff member will be requested by DBEDT to the Legislature; but for the time being, the board will need to identify how much time and how much help is required. Next month, the agenda will include a line item for the creation of an investigative task force/committee to create and compose a report to DBEDT regarding the Board's immediate clerical and budgetary needs to be submitted to the Governor and the Legislature.

VII. ELECTION 201M-5(d), HRS, ELECTION OF CHAIR, VICE CHAIR AND SECOND VICE CHAIR

This agenda item was deferred until the next board meeting.

IX. NEXT MEETING – Scheduled for 9:30 a.m., Wednesday, June 19, 2013, Conference Room 436, 250 South Hotel Street, Honolulu, HI.

X. ADJOURNMENT – Acting Chair Shubert-Kwock made a motion to adjourn the meeting at 12:54 p.m. Mr. Lum seconded the motion, and the Board members unanimously agreed.