

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

September 30, 2014

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 9:30 a.m. with a quorum present.

MEMBERS PRESENT:

- Anthony Borge
- Craig Takamine
- Barbara Bennett
- Kyoko Kimura
- Harris Nakamoto
- Wayne Tanaka
- Mark Ritchie

ABSENT MEMBERS:

- None

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Margaret Ahn

II. INTRODUCTION OF NEWLY APPOINTED BOARD MEMBER

Chair Borge welcomed and introduced Mr. Wayne Tanaka, this Board's newest board member.

III. APPROVAL OF AUGUST 20, 2014 MINUTES

Ms. Kimura made a motion to accept the August 20, 2014 minutes, as presented. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

IV. OLD BUSINESS

- A. Discussion and Action on the Small Business Statement After Public Hearing for Proposed Amendments of Hawaii Administrative Rules (HAR) Title 13 Chapter 233 Section 26, Changes for Parking, and HAR Title 13 Chapter 255 Section 16, Thrill Craft Operations; General Provisions, promulgated by the Department of Land and Natural Resources (DLNR)

Mr. Ed Underwood, Administrator at DLNR's Division of Boating and Ocean Recreation, stated that the proposed amendments will become effective November 10, 2014. Vice Chair Craig Takamine noted that the rules affect the Big Island directly, and confirmed with Mr. Underwood the requirement of only "one commercial" permit. Mr. Underwood explained that all those using horse power in his or her water vessels, pursuant to the rules, are required to take a thrill craft course for vessel education, which is clearly stated in the proposed rule

amendments. In regards to the public hearings, the largest attendance occurred in Kailua-Kona where nine testifiers voiced their concerns regarding the parking restrictions.

Vice Chair Craig Takamine noted that, in general, parking is limited; Mr. Underwood responded that DLNR does not presently have plans for “paid parking” requirements. DLNR set the parking fee to be equal to, or less than, the respective State or County rates currently in place. The term “thrill craft” refers to internal power with jet propulsion, generally less than feet in length, and capable of carrying more than one individual. Chair Borge added that parking is specially rated for employees, but he recognizes that structuring the rules takes a lot of planning and that not only does parking generate income but it must also be “user-friendly.” Mr. Underwood noted that DLNR does not receive any operating funds from the legislature, but solely from paid fees; these fees assist in maintaining the harbors.

Vice Chair Craig Takamine made a motion to recommend to the Governor to approve the two subject rule amendments. Second Vice Chair Bennett seconded the motion, and the Board members unanimously agreed.

V. NEW BUSINESS

A. Discussion and Action on Proposed Amendments to HAR Title 12 Chapter 15 Section 90, Workers’ Compensation Medical Fee Schedule, and the Workers’ Compensation Supplemental Medical Fee Schedule A, promulgated by the Department of Labor and Industrial Relations (DLIR)

Chair Borge introduced several DLIR staff members who assisted in the promulgation of the proposed amendments, including the workers’ compensation supplemental medical fee schedule; DLIR Director Dwight Takamine then thanked this Board for the opportunity to discuss the proposed medical fee schedule. He explained that during the 2013 legislature, under Act 97, SLH 2013, DLIR was tasked with establishing an improved methodology for creating the fee schedule, and required the State Auditor to assist the DLIR Director in this endeavor. In response to Ms. Kimura’s comment that she is aware that workers’ compensation, in general, is very controversial, he quoted the governing statute, Section 386-21, HRS, which states, “The rates or fees provided for in this section shall be adequate to ensure at all times the standard of services and care intended by this chapter to injured employees.”

DLIR Director Dwight Takamine stated that the medical services fee is the most important fee because there are consequences if the fees are delayed or denied. There are currently 1,088 different codes being proposed versus 1,067 codes from last year. The impact from last year’s cost impact was 1.6% and 3.2%, with workers’ compensation rates decreasing by 50%. Thus, even though individual code categories may be higher, the overall increase in the cost is only 1.3%. It was noted that Hawaii had the highest number of people in the workforce, approximately 660,000, which depicts a sign of economic recovery. There are no exact percentages showing the shortages of physicians by island, and it was noted that the Counties of Maui and Kauai have specialty areas. In response to the inquiry as to how Hawaii compares to other states’ workers’ compensation rates, Director Dwight Takamine did not have these figures with him, but would send them to the Board.

In response to the question as to where the actual increase is coming from, DLIR staff member Ms. Elie Yoshida explained that the State auditors developed a methodology report where carriers were asked about the most frequently used workers' compensation codes. A sampling of those codes over a three-year period assisted in considering the frequently used codes; this was a different methodology than what was used previously. It was also explained that the cost of physician services represented more than 50% of the total costs; in Hawaii, 48% of the medical expenses represent physician services costs.

Chair Borge commented that none of the physician organizations were noted in the small business impact statement as being consulted. It was explained that last year contact was made with the physicians because they are the small business operators impacted by the increase. This year, however, DLIR was required by law to work with the State Auditor's Office which assisted in surveying prepaid health care providers, such as HMSA, in regards to the charged fees.

Ms. Kimura made a motion that, in consideration that the proposed 1.3% increase in the workers' compensation fee is acceptable, the rule amendments should proceed to public hearing. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to HAR Title 11 Chapter 502, Asbestos-Containing Materials in Schools, and HAR Title 11 Chapter 504, Asbestos Abatement Certification Program, promulgated by the Department of Health (DOH)

Mr. Jeffrey Eckerd, Program Manager, and Mr. Tom Lileikis, Environmental Health Supervisor from DOH's Environmental Health Services Division, explained that the amendments for these two chapters were generated from federal regulations. In 2001 when the two chapters were first promulgated, the United States Environmental Protection Agency (EPA) was in agreement with the rules. However, over the past several years, not all of the State's rules have remained in concurrence with the EPA regulations.

Amendments to Chapter 502 include ensuring that asbestos-containing building materials are identified and properly managed in all schools (K to 12) in order to prevent unnecessary exposures to potential harmful effects of asbestos by students, faculty and staff. When finalized, the revisions to this chapter will enable the EPA to grant the Asbestos Hazard Emergency Response Act (AHERA) Waiver of Delegation to the State of Hawaii. This is expected to put the Hawaii Asbestos Program in the best possible place to continue to receive federal grant funds in order to implement and enforce asbestos in the rules.

Amendments to Chapter 504 entail crediting asbestos training providers, and certifies professionals in the asbestos abatement industry, which includes abatement workers, asbestos inspectors, management planners, project monitors and project designers. A bulk of the amendments are intended to provide clarity, correct typographical errors, and enhance the program's enforceability to be "as stringent" as the federal AHERA's Asbestos in Schools rules, from which the rules were developed. There are no fees involved in either of the chapters.

Mr. Nakamoto made a motion to send the proposed amendments for Chapter 502 and Chapter 504 to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Amendments to HAR Title 5 Chapter 11, Notaries Public, promulgated by the Department of the Attorney General

Chair Borge stated that the Department of the Attorney General has not increased notary fees since 1998. He noted that while the fees, across the board, are not very large amounts the actual increases are sizeable; however, it is also a very good service for the business community. Ms. Shari Wong, Deputy Attorney General, explained that there are currently 18,493 notaries in Hawaii; this does not include people who resigned or abandoned their positions.

The proposed rule changes will directly affect notaries public and their employers, which include financial institutions, law firms, mortgage companies, title and escrow companies and real estate companies. The term of a notary is four years and the actual increase in the fees pursuant to the rules range from \$10 to \$20 for the application of a new commission and from \$40 to \$100 for the issuance of a notary commission. Ms. Wong noted that these fees were not considered unreasonable when compared to other states' fees and the period of time for which they cover.

Chair Borge made a motion to send the proposal to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

D. 1) Discussion and Action on Proposed Amendments to HAR Title 18 Chapter 231, Section 91-01 through Section 100-01, Cash Economy Enforcement; Citations promulgated by the Department of Taxation (DoTax)

Mr. Jacob Herlitz, DoTax Administrative Rules Specialist, explained that DoTax previously came before this Board with the same rule proposals for temporary approval. Since then, comments from DoTax's deputy attorney general and the public resulted in several changes to the temporary rules, which is what is being presented today.

Ms. Alicia Burnham, DoTax Supervisor from DoTax's Special Enforcement Section (SES), explained that the subject rules would directly impact small business as well as large business. This is because the Act that implemented the rules requires DoTax to ensure all business segments of Hawaii's economy pay their fair share of taxes. SES is authorized to educate and civilly investigate the business clients, and will investigate reported or suspected violations of tax laws with a specific emphasis on cash-based businesses. Enforcement is initially procured with a warning letter and then through the use of "cease and desist" citations that carry a monetary fine. Fines range from \$500 to \$2,000; however, Ms. Burnham noted that it is easier to get \$500 worth of taxes paid than \$500 in fines paid. Chair Borge noted that the enforcement being handled by DoTax is very productive and proper.

Chair Borge made a motion to recommend to accept the proposed rules and to send them to the Governor for public hearing. Vice Chair Craig Takamine seconded the motion, and the Board members unanimously agreed.

2) Discussion and Action on Proposed Amendments to HAR Title 18 Chapter 231
Section 3-10 (a), Compromises, promulgated by DoTax

Mr. Herlitz stated that the proposed rules allow DoTax to consider a compromise in situations where the compromise would promote effective tax administration. If the proposed offer is denied by DoTax, if it goes to court and the judge approves an offer for less than what was offered, DoTax would receive nothing. Mr. Ritchie emphasized that this rule is “business-friendly” as all businesses would likely benefit.

Second Vice Chair Bennett made a motion to send the proposal to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

3) Discussion and Action on Proposed Amendments to HAR Title 18 Chapter 235,
Section 1.14, Substantial Gainful Business or Occupation, promulgated by DoTax

Mr. Herlitz stated that the rules provide certain general excise tax benefits to persons who are disabled, such as those who are blind, deaf or totally disabled. The proposed rules also delete a provision that refers to a presumption that an individual whose earned income is greater than \$30,000 for a taxable year is engaged in a substantial gainful business or occupation, and replaces it with a provision that the determination will be made by a physician; Mr. Ritchie believed the changes in the rule are very positive as the prior rule provision appeared arbitrary.

Mr. Nakamoto made a motion to send the proposed amendments to public hearing. Chair Borge seconded the motion, and the Board members unanimously agreed.

VI. ADMINISTRATIVE MATTERS

- A. Review and Discussion of proposed draft templates for State Agencies and Counties to use when submitting proposed new and amended administrative rules for the following: 1) Small Business Impact Statement, pursuant to Section 201M-2, Hawaii Revised Statutes (HRS), and 2) Small Business Statement after Public Hearing, pursuant to Section 201M-3, HRS

Chair Borge explained that the proposed templates are intended for the rule-drafting agencies to be consistent, to expedite the rule review process, and to bring the statements up-to-date with the statute. He emphasized that it was important for all the agencies to utilize the same standardized document. Mr. Ritchie suggested that the comment “the availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules” on the small business impact statement might need to be better defined. Deputy Attorney General Ahn stated that although the actual statute does not give additional information, the Board may provide examples; she also described the changes that were made from the prior statements.

The proper protocol in providing these documents to the state agencies and counties was discussed but was not decided upon. DBEDT staff suggested that the format of the statements be made in fillable templates. Chair Borge requested that any recommended changes to the statements be sent to DBEDT staff.

B. Review and Discussion of the proposed revision of the Board's internal "Standard Operating Guidelines and Procedures," regarding the Submission of Rules and Correspondence to this Board

DBEDT staff stated that the Guidelines were created more than ten years ago and are used internally; Chair Borge noted that the changes are housekeeping.

Chair Borge made a motion to amend and approve the proposed changes to the Board's Standard Operating Guidelines and Procedures. Vice Chair Craig Takamine seconded, and the Board members unanimously agreed.

C. Overview of a recent Meeting held with the Hawaii State Procurement Office (SPO) and discussion of how SPO can improve upon its procurement process by utilizing the functions and role of this Board

Chair Borge explained that he recently attended a meeting with Ms. Sarah Allen, Administrator, and her staff from the Hawaii State Procurement Office (SPO). The meeting entailed discussing a small business procurement program that was created by statute in 2006, during Governor Lingle's Administration. The statute charges SPO with setting aside government contracts for goods and services for small business. As such, a small business utilization council was created through 18-month, temporary rules made up of personnel from the counties and state agencies. The program has since "fallen by the wayside" as the rules had not been extended.

As SPO is planning to start the program up again, the meeting entailed fact-finding as to what this Board does, and how it may be utilized with regards to the small business set-aside program. It had been discussed that Ms. Allen would come in front of this Board and explain what SPO may be looking for. Chair Borge introduced Ms. Hokulei Lindsey from SPO, who was in attendance at the meeting. She stated and confirmed that the statute creates a small business set-aside program and charges the State Procurement Policy Board with creating administrative rules. Further, Ms. Allen would like to put together an Advisory Group that will create a competitive and useful environment to stimulate small business. In general, the Board members were receptive to listening to Ms. Allen.

D. "Final" update from existing Investigative Task Force regarding the sustainability of this Board and the possibility of transferring this Board to another suitable State Department

Chair Borge stated that the purpose of the task force was to find out if this Board still had a purpose, still had the support from the originators of this Board, and whether the Board achieved the goals it was set out to perform. If not, it would not make sense for the members to devote their time to small business with regards to regulations.

The task force met twice and the feedback that it received from the chamber, the small business community, and trade agencies was favorable. Support was somewhat lacking from DBEDT, partly because there are currently seventeen boards under DBEDT; this Board is just another one. The meeting Chair Borge scheduled with Senator Baker, who initiated a bill to

repeal this Board this past legislative session, was cancelled a second time. Even so, he still wants to know what was the purpose of her intent and why she wanted this Board repealed. Second Vice Chair Bennett added that the lack of DBEDT providing support during the legislative session also prompted the creation of the task force.

Overall, it was explained that the task force had determined that this Board should continue to exist, and that it is important to advocate to the business community what this Board does, its purview and how it can help small business.

E. Discussion and Action on the Disbandment of the “existing” Investigative Task Force and creation of a “new” investigative task force for fact-finding purposes regarding the sustainability of this Board and the possibility of transferring this Board to another suitable State department

Based on the discussion (above) in Section VI. D., Ms. Kimura made a motion to disband the existing investigative task force that was created for fact-finding purposes regarding the sustainability of this Board and the possibility of transferring this Board to another suitable state department. Second Vice Chair Bennett seconded the motion, and the Board members unanimously agreed.

In regards to the creation of a new task force, Chair Borge stated that with the upcoming election of a new Governor, there will likely be a new Administration; as such, a new director from DBEDT may have a different opinion on where the proper place for this Board may be. Therefore, the creation of a new task force is not necessary at this point in time. Chair Borge did announce however that DBEDT agreed to support a budget request from this Board for fiscal years 2016 and 2017.

F. Review and Discussion of the Board’s 2004 Outreach Program

Chair Borge expressed his satisfaction with the Board’s power point presentation and believed that it is a very good working tool and reference material for the Board’s outreach program. He requested that each member review the presentation and provide any suggested changes to DBEDT staff for updating. Mr. Ritchie suggested that the power point be amended to include that the Board provides “technical advice.”

In regards to the *Pacific Business News*’ “People on the Move” segment, Second Vice Chair Bennett requested that all of the members’ pictures be sent out announcing they are members of this Board; this suggestion was well received; DBEDT staff will follow-up with this request. In addition, Chair Borge requested that Mr. Ritchie assist this Board’s outreach efforts through the Hawaii Chamber of Commerce.

VII. NEXT MEETING – The next meeting is scheduled for Wednesday, October 15, 2014, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii.

VIII. ADJOURNMENT – Ms. Kimura made a motion to adjourn the meeting and Mr. Tanka seconded the motion; the meeting adjourned at 12:05 a.m.