

TITLE 8. PUBLIC PROCEEDINGS AND RECORDS

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CHAPTER 91 ADMINISTRATIVE PROCEDURE

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Cross References

Small business regulatory flexibility act, see chapter 201M.

Attorney General Opinions

Because this chapter provides for a decision in a contested case to be rendered by an agency, a decision rendered by an official who is not within that agency would be the exception and not the rule. This chapter does not require a hearings officer from outside the department for administrative hearings. Att. Gen. Op. 98-6.

Law Journals and Reviews

Sandy Beach Defense Fund v. City and County of Honolulu: The Sufficiency of Legislative Hearings in an Administrative Setting. 12 UH L. Rev. 499.

The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991. 14 UH L. Rev. 119.

Residential Use of Hawai'i's Conservation District. 14 UH L. Rev. 633.

Case Notes

Statutory authority is necessary for administrative body to reconsider prior quasi-judicial decisions on its own initiative. 54 H. 621, 513 P.2d 1001.

Under doctrine of necessity, official otherwise disqualified can act if jurisdiction is exclusive and substitution is not provided. 54 H. 621, 513 P.2d 1001.

University rules do not have force of law unless Hawaii administrative procedure act is complied with. 56 H. 680, 548 P.2d 253.

Rehearings before administrative bodies are addressed to their own discretion and only the clearest abuse of discretion could sustain an exception to rule. 60 H. 166, 590 P.2d 524.

Where health department did not have rules adopted under this chapter governing the standards of emissions of hydrogen sulfide into the air as required by §342B-32 (1991) at the time geothermal well developer was issued permit, department was required to refuse the issuance of the permit. 73 H. 56, 828 P.2d 801.

Department did not violate Hawaii administrative procedure act when it circulated a memorandum interpreting "sole source" provisions of Hawaii purchasing law to other state agencies. 76 H. 332, 876 P.2d 1300.

Giving precedential effect to prior commission decisions does not constitute rule-making. 81 H. 459, 918 P.2d 561.

Public utilities commission did not violate Hawaii administrative procedure act by not promulgating rules to establish when transmission lines will be placed underground. 81 H. 459, 918 P.2d 561.

Public utilities commission's reliance on adjudication to develop underground transmission line policy not abuse of discretion where commission did not circumvent requirements of Hawaii administrative procedure act and appellants did not suffer undue hardship relying on past commission policy. 81 H. 459, 918 P.2d 561.

A water management area designation is not the product of a contested case hearing, under this chapter, from which a direct appeal to the supreme court may be brought under §174C-60. 83 H. 484, 927 P.2d 1367.

Where administrative rules failed to set forth the method by which department determined general assistance amounts, and the method used by department to determine amounts was adopted without compliance with this chapter, administrative rules contravened statutory mandate of §346-71(f) (1996) and were thus void and unenforceable. 88 H. 307, 966 P.2d 619.

Where a public hearing pertaining to the issuance of a liquor license was statutorily required under §§281-52 and 281-57, and petitioner's legal rights, duties, and privileges were determined based on the public hearing regarding the decision to grant or deny a liquor license to petitioner, the public hearing was a "contested case" hearing governed by this chapter; thus, (1) petitioner was entitled to judicial review under §91-14, (2) §91-11 applied to proceedings on petitioner's application for liquor license, and (3) the liquor commission did not comply with §91-11. 118 H. 320, 189 P.3d 432.

Planning and permitting department's policy of refusing to publicly disclose developer's engineering reports prior to their approval constituted a "rule"; as this policy was not "published or made available for public inspection" nor did plaintiff have actual knowledge of the policy prior to its initial request for the reports, department did not comply with this chapter and was proscribed from invoking this policy; thus, department violated this chapter by refusing to publicly disclose any unaccepted engineering reports and written comments, and all of department's files, including developer's file, were public records that could be examined upon request. 119 H. 90, 194 P.3d 531.

Section 52D-8 provides officers with a constitutionally protected property interest - the right to legal representation for acting within the scope of their duty; due process thus entitles an officer to a contested case hearing under this chapter before an officer can be deprived of this interest. 89 H. 221 (App.), 971 P.2d 310.

Right to appeal from administrative agency's decision is limited by this chapter. 9 H. App. 298, 837 P.2d 311.

In the context of parole hearings, the Hawaii paroling authority does not "adjudicate contested cases" because a Hawaii paroling authority parole proceeding is not a "contested case" as defined under this chapter. 93 H. 298 (App.), 1 P.3d 768.

Since the addition of two extra hunting days to each week of the hunting season concerned "conditions for entry into game management areas, and public hunting areas designated by the department of land and natural resources" and "open seasons" for hunting, the express language of §183D-3 mandated that in order to add the two weekdays for bird hunting, the department had to amend Hawaii administrative rule 13-122-4 pursuant to this chapter. 117 H. 16 (App.), 175 P.3d 126.

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§91-1 Definitions. For the purpose of this chapter:

(1) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

(2) "Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

(3) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.

(4) "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

(5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

(6) "Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14. [L 1961, c 103, §1; Supp, §6C-1; HRS §91-1]

Law Journals and Reviews

The Protection of Individual Rights Under Hawai'i's Constitution. 14 UH L. Rev. 311.

Case Notes

Agency.

Generally. 55 H. 538, 524 P.2d 84.

Administrative agency is not a "person" under Civil Rights Act, 42 USCA 1983. 396 F. Supp. 375.

City council is not subject to the procedural requirements of Hawaii administrative procedure act when acting in either a legislative or nonlegislative capacity. 70 H. 361, 773 P.2d 250.

Executive director of Hawaii civil rights commission was not an "agency" because the director neither made rules nor adjudicated contested cases. 104 H. 158, 86 P.3d 449.

County of Hawai'i department of finance was an "agency" within the meaning of chapter 91, and was not a "person" entitled to appeal under §91-14 (prior to 1993 amendment). 77 H. 396 (App.), 885 P.2d 1137.

Agency hearing.

Hearing concerning transfer of prisoner to mainland prison not an "agency hearing". 63 H. 138, 621 P.2d 976.

Hearing before zoning board of appeals was properly denominated as the "agency hearing", as contemplated by the definition of "contested case" in paragraph (5), where appellant temple was permitted to introduce relevant evidence and cross-examine witnesses. 87 H. 217, 953 P.2d 1315.

Contested case.

Generally. 55 H. 538, 524 P.2d 84.

A hearing "required by law" includes those required by due process. 55 H. 478, 522 P.2d 1255.

"Contested case" construed. 56 H. 680, 548 P.2d 253.

Hearing "required by law" includes constitutional and statutory law. 58 H. 386, 570 P.2d 563.

Public hearing conducted pursuant to public notice has been deemed a contested case. 65 H. 506, 654 P.2d 874.

"Fair hearing" regarding the reduction of welfare benefits was a "contested case". 66 H. 485, 666 P.2d 1133.

Evidentiary hearing under PURPRA was contested case rather than rulemaking. 66 H. 538, 669 P.2d 148.

Granting of special management area permit did not involve a "contested case". 69 H. 81, 734 P.2d 161.

Because the subject matter of the underlying hearing did not involve the homestead lessees' property interests, the Hawaiian homes commission hearing that transpired was not required by law

and therefore was not a contested case as defined by paragraph (5). 76 H. 128, 870 P.2d 1272.

Public hearings held by department were "contested cases". 77 H. 64, 881 P.2d 1210.

Revocation of mooring permit not contested case. 3 H. App. 91, 641 P.2d 991.

In the context of parole hearings, the Hawaii paroling authority does not "adjudicate contested cases" because a Hawaii paroling authority parole proceeding is not a "contested case" as defined under this chapter. 93 H. 298 (App.), 1 P.3d 768.

Rules.

Generally. 55 H. 538, 524 P.2d 84.

Defendant's approval of use of wood preservative for treating structural lumber in Hawaii, together with defendant's conditions of approval, would appear to be rulemaking. 939 F. Supp. 746.

"General applicability;" "implement law or policy;" "internal management." 55 H. 478, 522 P.2d 1255.

Manual of instructions to personnel of department of social services and housing covering welfare fraud investigations dealt only with "internal management". 58 H. 94, 564 P.2d 1271.

Policy decisions governing transfer of prisoners from state to federal prison do not require publication. 58 H. 386, 570 P.2d 563.

Internal management; rule covering dress standards of visitors to prison. 59 H. 346, 581 P.2d 1164.

Hawaii administrative procedure act held not applicable to advisory functions of the county planning commission. 60 H. 428, 591 P.2d 602.

"Descriptive words and phrases" distributed by department to unemployment compensation appeals referees are rules. 62 H. 286, 614 P.2d 380.

Contract in which board of land and natural resources rented excess transmission capacity in Molokai Irrigation System is not a rule. Concerned only internal management because it dealt with a matter within the custodial management of the board. 62 H. 546, 617 P.2d 1208.

Internal management. 63 H. 117, 621 P.2d 957.

Agency's requirement that no-fault claimants submit to insurer-

ordered medical exams is a "rule". 67 H. 148, 682 P.2d 73.

Approval of use of specific breath testing apparatus was not rulemaking. 67 H. 451, 691 P.2d 365.

State hospital's bylaws regarding corrective action against a doctor are not "rules". 68 H. 422, 717 P.2d 1029.

Circular was sent only to other state agencies and did not command or prohibit any action by any member of the public or any public employee; by the clear language of paragraph (4), therefore, Hawaii administrative procedure act did not apply, and conclusion of law stating that circular was not a rule or regulation, but was merely a guideline and was not subject to provisions of Hawaii administrative procedure act was not wrong. 76 H. 332, 876 P.2d 1300.

Water resource management commission's distinctive treatment of "nonagricultural uses", such as golf course irrigation, in its water use permit and policy decision did not constitute "illegal rulemaking" where commission did not propose any general rules automatically applicable in all circumstances, but instead devised a principled solution to a specific dispute based on "facts applied to rules that have already been promulgated by the legislature". 94 H. 97, 9 P.3d 409.

Planning and permitting department's policy of refusing to publicly disclose developer's engineering reports prior to their approval constituted a "rule"; as this policy was not "published or made available for public inspection" nor did plaintiff have actual knowledge of the policy prior to its initial request for the reports, department did not comply with this chapter and was proscribed from invoking this policy; thus, department violated this chapter by refusing to publicly disclose any unaccepted engineering reports and written comments, and all of its files, including developer's file, were public records that could be examined upon request. 119 H. 90, 194 P.3d 531.

Where city appraiser's unwritten methodology for determining imparted value fell within definition of a rule for purposes of paragraph (4), city needed to follow rulemaking procedures set forth in §91-3 prior to applying imparted value deductions toward golf course assessments. 89 H. 381, 974 P.2d 21.

Agency's decision not a "rule" where it was made in a contested hearing that was accusatory in nature; distinction between rulemaking and adjudication discussed. 4 H. App. 463,

667 P.2d 850.

Police department regulation establishing procedures aimed at prescribing officers' activities regarding sobriety roadblocks was internal department regulation. 9 H. App. 98, 825 P.2d 1068.

Hawai'i county police department's field sobriety testing procedures are not "rules" subject to Hawaii administrative procedure act's rulemaking requirements. 9 H. App. 406, 844 P.2d 679.

Where Kauai police department's general order establishing authority and procedures at sobriety checkpoints concerned only the internal management of an agency and did not affect the private rights of or procedures available to the public, the general order was not required to be promulgated pursuant to this chapter. 111 H. 59 (App.), 137 P.3d 373.

Hawaii Legal Reporter Citations

Issuance of building permit. 79 HLR 79-0579.

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§91-2 Public information. (a) In addition to other rulemaking requirements imposed by law, each agency shall:

(1) Adopt as a rule a description of the methods whereby the public may obtain information or make submittals or requests.

(2) Adopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency.

(3) Make available for public inspection all rules and written statements of policy or interpretation formulated, adopted, or used by the agency in the discharge of its functions.

(4) Make available for public inspection all final opinions and orders.

(b) No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required, except where a person has actual knowledge thereof.

(c) Nothing in this section shall affect the confidentiality of records as provided by statute. [L 1961, c 103, §2; Supp, §6C-2; HRS §91-2]

Case Notes

"Actual knowledge" referred to in section cannot give effect to rules not adopted in conformity with §91-3 and §91-4. 55 H. 478, 522 P.2d 1255.

Planning and permitting department's policy of refusing to publicly disclose developer's engineering reports prior to their approval constituted a "rule"; as this policy was not "published or made available for public inspection" nor did plaintiff have actual knowledge of the policy prior to its initial request for the reports, department did not comply with this chapter and was proscribed from invoking this policy; thus, department violated this chapter by refusing to publicly disclose any unaccepted engineering reports and written comments, and all of its files, including developer's file, were public records that could be examined upon request. 119 H. 90, 194 P.3d 531.

Cited: 904 F. Supp. 1098.

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[\$91-2.5] Fees for proposed and final rules. (a)

Notwithstanding any law to the contrary, each agency may charge up to a maximum fee of ten cents per page, plus the actual costs of mailing, for the reproduction of paper copies of the following:

- (1) Proposed and final rules, whether new rules, amended rules, or repealed rules, in any format; and
- (2) Notices of proposed rulemaking actions pursuant to section 91-3(a)(1).

This section shall not apply to the reproduction by the office of the lieutenant governor of other agencies' rules, kept in the general collection of the office of the lieutenant governor. Charges for the reproduction of paper copies of rules in the general collection of the office of the lieutenant governor shall be as stated in section 92-21.

(b) Informational or educational publications that are produced by agencies for noncommercial use and which contain copies of state statutes, proposed or final rules, or both, shall be subject to the same fees as specified in subsection (a).

(c) The fees specified in subsection (a) shall not include any charges for searching, identifying, or segregating rules in preparation for reproduction. Agencies may charge separate fees for these activities in accordance with rules adopted by the office of information practices. [L 1999, c 301, pt of §2(1)]

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[\S91-2.6] Proposed rulemaking actions and rules; posting on the lieutenant governor's internet website. (a) Beginning January 1, 2000, all state agencies, through the office of the lieutenant governor, shall make available on the website of the office of the lieutenant governor each proposed rulemaking action of the agency and the full text of the agency's proposed rules or changes to existing rules. The internet website shall provide instructions regarding how to download the information regarding proposed rulemaking actions and the full text of the agency's proposed rules.

(b) Each state agency, to the greatest extent feasible, shall:

(1) Ensure that all information pertaining to that agency that is contained on the lieutenant governor's website is current and accurate; and

(2) Advise individuals contacting the state agency of the availability of the proposed rulemaking actions and the full text of the agency's proposed rules on the lieutenant governor's website. [L 1999, c 301, pt of §2 (1)]

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§91-3 Procedure for adoption, amendment, or repeal of rules. (a) Except as provided in subsection (f), prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(1) Give at least thirty days' notice for a public hearing. The notice shall include:

(A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and

(B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fees for the copy and the postage, if any, together with a description of where and how the requests may be made;

(C) A statement of when, where, and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be reviewed in person; and

(D) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, given at least once statewide for state agencies and in the county for county agencies. Proposed state agency rules shall also be posted on the Internet as provided in section 91-2.6; and

(2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons

for and against its determination.

(b) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals, or to livestock and poultry health, requires adoption, amendment, or repeal of a rule upon less than thirty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing, including posting the abbreviated notice and hearing on the Internet as provided in section 91-2.6, as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(c) The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor of the county. This subsection shall not apply to the adoption, amendment, and repeal of the rules of the county boards of water supply.

(d) The requirements of subsection (a) may be waived by the governor in the case of the State, or by the mayor in the case of a county, whenever a state or county agency is required by federal provisions to adopt rules as a condition to receiving federal funds and the agency is allowed no discretion in interpreting the federal provisions as to the rules required to be adopted; provided that the agency shall make the adoption, amendment, or repeal known to the public by:

(1) Giving public notice of the substance of the proposed rule at least once statewide prior to the waiver of the governor or the mayor; and

(2) Posting the full text of the proposed rulemaking action on the Internet as provided in section 91-2.6.

(e) No adoption, amendment, or repeal of any rule shall be invalidated solely because of:

(1) The inadvertent failure to mail an advance notice of rulemaking proceedings;

(2) The inadvertent failure to mail or the nonreceipt of requested copies of the proposed rule to be adopted, the proposed rule amendment, or the rule

proposed to be repealed; or

(3) The inadvertent failure on the part of a state agency to post on the website of the office of the lieutenant governor all proposed rulemaking actions of the agency and the full text of the agency's proposed rules as provided in section 91-2.6.

Any challenge to the validity of the adoption, amendment, or repeal of an administrative rule on the ground of noncompliance with statutory procedural requirements shall be forever barred unless the challenge is made in a proceeding or action, including an action pursuant to section 91-7, that is begun within three years after the effective date of the adoption, amendment, or repeal of the rule.

(f) Whenever an agency seeks only to repeal one or more sections, chapters, or subchapters of the agency's rules because the rules are either null and void or unnecessary, and not adopt, amend, or compile any other rules:

(1) The agency shall give thirty days' public notice at least once statewide of the proposed date of repeal and of:

(A) A list of the sections, chapters, or subchapters, as applicable, being repealed; and

(B) A statement of when, where, and during what times the sections, chapters, or subchapters proposed to be repealed may be reviewed in person;

(2) The agency shall post the full text of the proposed sections, chapters, or subchapters to be repealed on the Internet as provided in section 91-2.6; and

(3) Any interested person may petition the agency regarding the sections, chapters, or subchapters proposed to be repealed, pursuant to section 91-6.

This subsection does not apply to the repeal of one or more subsections, paragraphs, subparagraphs, clauses, words, phrases, or other material within a section that does not constitute the entire section to be repealed. [L 1961, c 103, §3; am L 1965, c 96, §139a; Supp, §6C-3; HRS §91-3; am L 1973, c 13, §1; am L 1979, c 64, §1; am L 1985, c 68, §2; am L 1989, c 64, §2; am L 1998, c 2, §§27, 28; am L 1999, c 301, §2(2); am L 2000, c 283, §6]

Cross References

Additional requirements for publication of notice of public hearings, see §92-41.

Attorney General Opinions

The "General Requirements and Covenants" of public works contracts are rules as defined by section 91-1 and any amendments require notice and a public hearing. Att. Gen. Op. 66-10.

Section is limited to rules having the force and effect of law; AG Opinion 66-10 superseded. Att. Gen. Op. 72-5.

State agency required by subsection (a)(1) to publish notice of hearing must in addition comply with publication requirements of section 92-41. Att. Gen. Op. 73-12.

Board cannot adopt "policy" which would have the effect of amending a rule, without following HAPA requirements. Att. Gen. Op. 81-11.

Notices are not required to be in the legal section of a newspaper. Att. Gen. Op. 89-4.

Substantial changes in proposed rules made after public hearing require additional hearing where material is included on subject not covered in original notice or change was not advocated or discussed at original hearing. Att. Gen. Op. 91-05.

For the repeal of rules, this section and §92-41 did not require individual notice to all property owners potentially affected by the change in the rules but only notice by publication, and a mailing to those persons who requested advance notice of department's rulemaking proceedings. Att. Gen. Op. 97-4.

Case Notes

Where defendant did not give notice and hold public hearing pursuant to subsection (a) before issuing approval of use of wood preservative, defendant's approval, together with defendant's conditions of approval, would appear to be rulemaking. 939 F. Supp. 746.

Department provided adequate notice under this chapter of its intent to hold public hearings on proposed amendments to its administrative rules; nothing in chapter or case law requires that notice of public hearings on proposed amendments be published only after the effective date of the statute authorizing such amendments. 88 H. 307, 966 P.2d 619.

Where city appraiser's unwritten methodology for determining imparted value fell within definition of a rule for purposes of §91-1(4), city needed to follow rulemaking procedures set forth in this section prior to applying imparted value deductions toward golf course assessments. 89 H. 381, 974 P.2d 21.

Changes may be made in a rule between the original proposed and presented at a public hearing and as finally adopted. Substantial change in a rule after a public hearing may require another public hearing. 50 H. 156, 434 P.2d 516.

Notice should fairly apprise interested parties of what is being proposed so they can formulate and present rational responses to the proposal. 64 H. 389, 642 P.2d 530.

"Substance" of proposed rules defined. 64 H. 389, 642 P.2d 530.

Rule enabling insurance commissioner to prescribe endorsements did not give carte blanche authority to sidestep the independent requirements of chapter 91. 67 H. 148, 682 P.2d 73.

Adoption by reference of future amendments unlawful. 67 H. 451, 691 P.2d 365.

No waiver of notice and hearing requirements allowed where agency had discretion to interpret federal provisions as to required rules. 68 H. 80, 705 P.2d 17.

Inadequate notice, discussed. 70 H. 135, 764 P.2d 1233.

Notice of public hearing met all requirements of this section; no merit to points on appeal that court erroneously dismissed claims that proposed hearing room was too small and that separate hearings should be held on neighbor islands. 10 H. App. 210, 863 P.2d 344.

Sections 183D-22 and 183D-10.5 provided the authority for the department of land and natural resources to require payment of a fee for a hunting-related article such as a stamp; however, since game bird hunting was an activity permitted under chapter 183D, the department was required under §183D-3 to adopt a rule pursuant to this section when setting the stamp fees for

hunting. 117 H. 16 (App.), 175 P.3d 126.

Since the addition of two extra hunting days to each week of the hunting season concerned "conditions for entry into game management areas, and public hunting areas designated by the department of land and natural resources" and "open seasons" for hunting, the express language of §183D-3 mandated that in order to add the two weekdays for bird hunting, the department had to amend Hawaii administrative rule 13-122-4 pursuant to chapter 91. 117 H. 16 (App.), 175 P.3d 126.

Hawaii Legal Reporter Citations

Public hearing necessary before rules can be adopted. 77-2 HLR 77-793.

Substance of proposed rules. 78-2 HLR 781.

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§91-4 Filing and taking effect of rules. (a) Each agency adopting, amending, or repealing a rule, upon approval thereof by the governor or the mayor of the county, shall file forthwith certified copies thereof with the lieutenant governor in the case of the State, or with the clerk of the county in the case of a county. In addition, the clerks of all of the counties shall file forthwith certified copies thereof with the lieutenant governor. A permanent register of the rules, open to public inspection, shall be kept by the lieutenant governor and the clerks of the counties.

(b) Each rule hereafter adopted, amended, or repealed shall become effective ten days after filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties.

(1) If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty days after the filing of the rule as provided herein.

(2) An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with the provisions of subdivisions (1) and (2) of section 91-3(a), if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals. The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed. The agency shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of the rule. [L 1961, c 103, §4; am L 1965, c 96, §139b; Supp, §6C-4; HRS §91-4]

Note

Validity of rules filed. L 1989, c 64, §§3 to 5, 7.

Revision Note

In subsection (a), provision requiring approval of rule by the chairman of the board of supervisors, has been deleted as obsolete.

Case Notes

Approval of rules as required is necessary for their validity. 51 H. 673, 466 P.2d 1009.
Agency's resolution of a dispute was quasi-judicial and did not establish a rule. 70 H. 585, 779 P.2d 868.

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§91-4.1 Rulemaking actions; copies in Ramseyer format.

Each state agency adopting, amending, or repealing a rule shall prepare a certified copy of the rule changes according to the Ramseyer format. Each state agency shall maintain a file of the copies in the Ramseyer format and shall make the file available for public inspection and copying at a cost as specified in section 91-2.5. [L 1979, c 216, pt of §2; am L 1994, c 279, §5; am L 1999, c 301, §2(3)]

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§91-4.2 Rule format; publication of index. The revisor of statutes shall:

(1) Prescribe a single format for the publication, filing, and indexing of rules by all state agencies. Among other things, the revisor shall provide for the manner and form, including size, in which the agency rules shall be prepared, printed, and indexed, to the end that all rules, compilations, and codifications shall be prepared and published in a uniform manner at the earliest practicable date. The format shall provide that each rule published shall be accompanied by a reference to the statutory authority pursuant to which the rule is adopted, the statutory section implemented by the rule, if any, and the effective date of the rule; and provide that whenever possible rules should incorporate any applicable sections of the Hawaii Revised Statutes by reference and not print the section in the rule. The stipulated format shall also provide for access by the public to all of the rules with an index, both of which shall be located in the office of the lieutenant governor.

(2) Compile and publish an index to all rules required to be filed with the lieutenant governor with annual supplements. [L 1979, c 216, pt of §2; am L 1980, c 67, §1]

Note

"Rules and Regulations Governing the Filing of Rules and Regulations by State and County Officers in the Office of the Lieutenant Governor as Required by Law", effective December 27, 1961, are superseded. L 1980, c 67, §2.

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[\$91-4.3] Price. (a) The lieutenant governor shall sell the Hawaii administrative rules index and its supplements at prices which as nearly as practicable will reimburse the State for all costs incurred for printing, publication, and distribution.

(b) All money received from the sale of the Hawaii administrative rules index and its supplements shall be deposited in the state general fund. [L 1979, c 216, pt of §2]

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[\$91-4.4] Form of publication. The revisor of statutes shall determine the form in which the Hawaii administrative rules index and its supplements shall be published. Either or both of the publications may be issued in units, in bound or loose-leaf form, separately or in combination, at the same or different times, as the revisor considers most economical and best adapted to make the index available to interested persons and the public. [L 1979, c 216, pt of §2]

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§91-5 Publication of rules. (a) Each agency shall compile, index, and publish, in the manner prescribed by the format established by the revisor of statutes under section 91-4.2(1), all rules adopted by the agency and remaining in effect. Compilations shall be supplemented as often as necessary and shall be revised at least once every ten years.

(b) Compilations and supplements shall be made available free of charge upon request by the state officers in the case of a state agency and by the county officers in the case of a county agency. As to other persons, each agency may fix a price to cover mailing and publication costs as specified in section 91-2.5. Each state agency adopting, amending, or repealing a rule shall file a copy with the revisor of statutes. [L 1961, c 103, §5; Supp, §6C-5; HRS §91-5; am L 1979, c 216, §5; am L 1994, c 279, §6; am L 1999, c 301, §2(4)]

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§91-6 Petition for adoption, amendment or repeal of rules. Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for the petitions and the procedure for their submission, consideration, and disposition. Upon submission of the petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for the denial or initiate proceedings in accordance with section 91-3. [L 1961, c 103, §6; Supp, §6C-6; HRS §91-6]

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§91-7 Declaratory judgment on validity of rules. (a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) herein by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. The action may be maintained whether or not petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. [L 1961, c 103, §7; Supp, §6C-7; HRS §91-7]

Attorney General Opinions

Agency rule adopted under former version of statute without authority upon statute's amendment. Att. Gen. Op. 85-13.

Case Notes

Plaintiff required to exhaust remedy under this section before resorting to federal court to attack regulation as unconstitutional. 252 F. Supp. 223.

Rules not adopted in compliance with chapter 91 are invalid. 55 H. 478, 522 P.2d 1255.

Dismissal of complaint for declaratory judgment for failure to join indispensable parties held erroneous. 58 H. 292, 568 P.2d 1189.

"Interested persons." 63 H. 166, 623 P.2d 431.

Plaintiff had standing under "injury in fact" test to bring action under this section where plaintiff alleged injury by insurer's denial of medical treatment, injury fairly traceable to agency's rules, and decision precluding use of rule would likely provide plaintiff relief. 82 H. 249, 921 P.2d 169.

A water management area designation under chapter 174C may not be challenged in an original action pursuant to this section. 83 H. 484, 927 P.2d 1367.

A plaintiff seeking "a judicial declaration as to the validity of an agency rule", pursuant to this section, must "reside or have its principal place of business" in the county in which the adjudicating circuit court sits; initiating an action under this section in the wrong circuit is a defect of jurisdiction mandating dismissal. 114 H. 87, 157 P.3d 526.

For purposes of declaratory actions brought pursuant to subsection (a), the circuit court of the plaintiff's domicile is the only circuit court that may exercise jurisdiction over the subject matter. 114 H. 87, 157 P.3d 526.

Under this section, court authorized to order ancillary, affirmative relief. 5 H. App. 419, 697

P.2d 43; 6 H. App. 160, 715 P.2d 813.

Cited: 939 F. Supp. 746.

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§91-8 Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders. [L 1961, c 103, §8; Supp, §6C-8; HRS §91-8]

Case Notes

Hawaii public employment relations board was empowered to make declaratory ruling regarding whether violation of collective bargaining agreement is a prohibited practice. 60 H. 436, 591 P.2d 113.

Where an agency employee's only interest in obtaining a declaratory ruling from that agency stems from his or her work as an agency employee, that interest is insufficient to satisfy this section's standing requirements; where executive director's interest in filing the petition stemmed from the director's work as executive director, the Hawaii civil rights commission did not have jurisdiction to issue a declaratory order on the petition. 104 H. 158, 86 P.3d 449.

Orders disposing of petitions for declaratory rulings under this section are appealable to the circuit court pursuant to §91-14; thus, circuit court had proper jurisdiction to review Hawaii labor relations board order. 107 H. 178, 111 P.3d 587.

As both the title and the pertinent text make clear, the declaratory ruling procedure of this section is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person; it was not intended to allow review of concrete agency decisions for which other means of review are available. 114 H. 184, 159 P.3d 143.

Where department of planning and permitting director's declaratory ruling--that surfing instructor's use of hotel shop was a proper change in nonconforming use so long as that use remained within certain limits--was reasonably based on the evidence before the director, and constituted a reasonable application of the applicable zoning ordinance and the

department's previous interpretation of that ordinance, director's ruling was not an abuse of discretion. 119 H. 452 (App.), 198 P.3d 715.

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[\$91-8.5] Mediation in contested cases.

(a) An agency may encourage parties to a contested case hearing under this chapter to participate in mediation prior to the hearing subject to conditions imposed by the agency in rules adopted in accordance with this chapter. The agency may suspend all further proceedings in the contested case pending the outcome of the mediation.

(b) No mediation period under this section shall exceed thirty days from the date the case is referred to mediation, unless otherwise extended by the agency.

(c) The parties may jointly select a person to conduct the mediation. If the parties are unable to jointly select a mediator within ten days of the referral to mediation, the agency shall select the mediator. All costs of the mediation shall be borne equally by the parties unless otherwise agreed, ordered by the agency, or provided by law.

(d) No mediation statements or settlement offers tendered shall be admitted into any subsequent proceedings involving the case, including the contested case hearing or a court proceeding.

(e) No preparatory meetings, briefings, or mediation sessions under this section shall constitute a meeting under section 92-2. Any mediator notes under this section shall be exempt from section 92-21 and chapter 92F. Section 91-10 shall not apply to mediation proceedings. [L 2003, c 76, §1]

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§91-9 Contested cases; notice; hearing; records. (a)

Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of the statutes and rules involved;
- (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;
- (5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings and exceptions;
- (5) Report of the officer who presided at the hearing;

(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein. [L 1961, c 103, §9; Supp, §6C-9; HRS §91-9; am L 1980, c 130, §1; gen ch 1985; am L 2003, c 76, §2]

Case Notes

Provision for waiver of any procedure includes procedural requirements of §91-11. 54 H. 10, 510 P.2d 358.

Subsection (c) applied. 55 H. 538, 524 P.2d 84.

There were no statutes which required that the prisoner be given a hearing on transfer from state to federal prison. 58 H. 386, 570 P.2d 563.

Full hearing, what constitutes. 60 H. 166, 590 P.2d 524.

State did not have to follow contested case procedures in canceling a lease of state land. 66 H. 632, 672 P.2d 1030.

Particularized notice of methodology used by public utilities commission in its ratemaking determinations not required. 67 H. 425, 690 P.2d 274.

Where board of land and natural resources improperly consulted outside sources, the violation was cured by the subsequent rehearing proceeding. 76 H. 259, 874 P.2d 1084.

Appellant failed to show that board of medical examiners violated subsection (g), where appellant contended that board violated subsection (g) by taking testimony from hearing officer during a hearing before the board en banc about matters not contained in the record. 78 H. 21, 889 P.2d 705.

Receiving a letter from party and taking a view of the premises after the public hearing was closed were irregularities leading to reversal. 2 H. App. 43, 625 P.2d 1044.

Not violated by agency's order that parties not make any further comments unless specifically requested. 4 H. App. 633, 675 P.2d 784.

Cited: 904 F. Supp. 1098.

Hawaii Legal Reporter Citations

Right to counsel. 77-1 HLR 76-295.

Contested case hearing. 79 HLR 79-0651.

No rules. 80-1 HLR 800114.

Hearing required. 80-1 HLR 800249; 83-1 HLR 830473.

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[§91-9.5] Notification of hearing; service. (a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(b) Unless otherwise provided by law, if service by registered or certified mail is not made because of the refusal to accept service or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing. [L 1976, c 100, §1]

Case Notes

For purposes of conducting a public hearing on a liquor license application, the notice provisions of §281-57 control over those in this section. 118 H. 320, 189 P.3d 432.

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§91-10 Rules of evidence; official notice. In contested cases:

(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;

(4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1; am L 2003, c 76, §3]

Case Notes

Agencies are to admit any and all evidence, limited only by considerations of relevancy, materiality, and repetition. 54 H. 479, 510 P.2d 89; 5 H. App. 59, 678 P.2d 576.

Commissioner's "view" of premises in a land use boundary case without proper notice to party violated par. (4). 55 H. 538, 524 P.2d 84.

Paragraph (3) applied. 55 H. 538, 524 P.2d 84.

Mere admission of irrelevant or incompetent evidence not reversible error. 59 H. 388, 583 P.2d 313; 5 H. App. 59, 678 P.2d 576.

Acceptance of certain mathematical calculations not subject to cross-examination or rebuttal testimony. 65 H. 293, 651 P.2d 475.

Party was properly assigned burden of proof. 66 H. 538, 669 P.2d 148.

Agency properly disallowed rebuttal testimony involving no new evidence or argument. 67 H. 425, 690 P.2d 274.

Zoning board of appeals did not exceed its statutory authority by hearing evidence and considering documents verifying that appellants were permitting zoning violation to continue on their property; rules of evidence in administrative hearings allow admission of hearsay evidence. 77 H. 168, 883 P.2d 629.

Appellant had not met burden of demonstrating a violation of paragraph (3) by board of medical examiners; board did not err in admitting evidence of judgment of conviction and police reports. 78 H. 21, 889 P.2d 705.

Where unlikely that cross-examination of witnesses on appeal would have unearthed anything of particular value regarding legal arguments or subjective feelings of witnesses who had already testified before hearings officer, right to cross-examine witnesses not unduly infringed by department of land utilization's two-tiered mechanism of review. 87 H. 217, 953 P.2d 1315.

Agency properly disallowed repetitious testimony. 4 H. App. 633, 675 P.2d 784.

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§91-11 Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [L 1961, c 103, §11; Supp, §6C-11; HRS §91-11]

Case Notes

Deviation from requirement that proposed decision be presented where the officials rendering the decision have not heard and examined all the evidence is not permissible. 52 H. 221, 473 P.2d 573.

Procedural requirements of section may be waived pursuant to §91-9(d). 54 H. 10, 501 P.2d 358.

Requirement that officials who are to render the decision personally consider the whole record or portions thereof cited by the parties is satisfied where the officials considered exceptions to the proposed decision and heard arguments thereon. 54 H. 10, 501 P.2d 358.

Submission of proposed decision is required whether a single official or a majority of the officials have not heard the evidence. 54 H. 134, 504 P.2d 1214.

"Final decision" construed. 57 H. 535, 560 P.2d 1292.

Person filing timely exceptions is entitled to opportunity to present written and oral arguments, and to have exceptions considered on merits based on record. 65 H. 257, 650 P.2d 574.

Under circumstances, board was not required to issue proposed decision. 65 H. 404, 652 P.2d 1143.

Transcript of hearing conducted by hearing officer not required for hearing on exceptions held pursuant to this section. 65 H. 411, 652 P.2d 632.

Where record reflected that the commissioner heard and

examined all the evidence, and appellants pointed to no new evidence that the commissioner overlooked, the commissioner did not violate this section by amending hearing officer's recommended order, powers granted commissioner under Hawaii administrative rule §16-201-46, by failing to provide appellants yet another opportunity to repeat their previous arguments. 112 H. 90, 144 P.3d 1.

As it is possible to give effect to §281-59 and this section insofar as a public hearing on a license application must be regarded as a contested case subject to the requirements of chapter 91, this section does not conflict with §281-59. 118 H. 320, 189 P.3d 432.

Public hearings on liquor license applications held by the liquor commission are contested case hearings such that this section requires any commissioner who is not present at any stage of the public hearing to become familiar with the record before voting on a liquor license application, unless the application is automatically rejected pursuant to §281-59(a). 118 H. 320, 189 P.3d 432.

The liquor commission's failure to comply with this section, requiring that all commissioners personally consider the entire record before voting on a liquor license application, was not a "failure to act" such as would trigger the automatic approval provision of §91-13.5 where the liquor commission voted, albeit ineffectively, within the fifteen day period prescribed by §281-59. 118 H. 320, 189 P.3d 432.

Where a public hearing pertaining to the issuance of a liquor license was statutorily required under §§281-52 and 281-57, and petitioner's legal rights, duties, and privileges were determined based on the public hearing regarding the decision to grant or deny a liquor license to petitioner, the public hearing was a "contested case" hearing governed by chapter 91; thus, (1) petitioner was entitled to judicial review under §91-14, (2) this section applied to proceedings on petitioner's application for liquor license, and (3) the liquor commission did not comply with this section. 118 H. 320, 189 P.3d 432.

Phrase "officials of the agency who are to render the final decision" refers to all members of the agency. 2 H. App. 672, 638 P.2d 1386.

Board met minimum requirements of section by receiving briefs

and hearing oral arguments. 5 H. App. 59, 678 P.2d 576.

Question not preserved for appeal when party failed to object to denial of claim in agency's proposed order. 5 H. App. 533, 704 P.2d 917.

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Opportunity to file exceptions. 77-1 HLR 77-63.

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§91-12 Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record. [L 1961, c 103, §12; Supp, §6C-12; HRS §91-12; am L 1980, c 232, §4; gen ch 1985]

Case Notes

Order of agency must conform to decision as reflected in agency minutes. 52 H. 221, 473 P.2d 573.

Although each proposed finding by a party must be ruled upon, a separate ruling on each proposed finding is not indispensable and the agency may incorporate its findings and rulings in its decision. 54 H. 134, 504 P.2d 1214; 4 H. App. 633, 675 P.2d 784.

Section applies to decision of criminal injuries compensation commission. 54 H. 294, 506 P.2d 444.

Agency must make its findings reasonably clear. 54 H. 663, 513 P.2d 1376.

A separate ruling on each proposed finding is not necessary. 57 H. 535, 560 P.2d 1292.

Findings merely summarizing testimony of witness do not constitute findings of basic fact. 57 H. 535, 560 P.2d 1292.

Sufficiency of particularity of ruling on proposed findings. 57 H. 535, 560 P.2d 1292.

Agency's findings of ultimate facts must be supported by findings of basic facts which must be supported by the evidence in the record. 60 H. 625, 594 P.2d 612.

Does not limit board's power to order union to implement staffing of essential positions. 66 H. 461, 667 P.2d 783.

Where commissioner followed all relevant administrative requirements in issuing cease and desist order, holding hearings, responding to exceptions, and scheduling oral arguments, and there was no indication that nine-month period between oral argument and the final order was caused by an unjustified agency decision to postpone resolution of the matter, commissioner's action in issuing final order nine months after oral argument was not "characterized by an abuse of discretion or a clearly unwarranted exercise of discretion" or "made upon unlawful procedure". 112 H. 90, 144 P.3d 1.

Labor and industrial relations appeals board should generally state whether or not it has applied

presumption that claim is for a covered work injury. But failure to do so in instant case did not prejudice appellant's substantial rights. 1 H. App. 77, 613 P.2d 927.

Does not require notices of tax assessment be accompanied by findings of fact and conclusions of law. 6 H. App. 260, 718 P.2d 1122.

Labor department's decision vacated where decision did not comply with this section's requirement that decision be accompanied by separate findings of fact and conclusions of law as decision did not decide whether employee's stated reasons for quitting constituted good cause for terminating employment. 81 H. 84 (App.), 912 P.2d 581.

Cited: 9 H. App. 240, 833 P.2d 93.

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§91-13 Consultation by officials of agency. No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law. [L 1961, c 103, §13; Supp, §6C-13; HRS §91-13]

Attorney General Opinions

A division chief acting as a hearings officer must comply with this section, and may not consult any person in or outside of the division on any issue of fact, with the exception of ex parte matters authorized by law. Att. Gen. Op. 98-6.

Case Notes

Where director's violation of this section by consulting materials and individuals outside the record did not prejudice appellant's substantial rights, harmless error. 87 H. 217, 953 P.2d 1315.

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§91-13.1 Administrative review of denial or refusal to issue license or certificate of registration. Except as otherwise provided by law, any person aggrieved by the denial or refusal of any board or commission subject to the jurisdiction of the department of commerce and consumer affairs, to issue a license or certificate of registration, shall submit a request for a contested case hearing pursuant to chapter 91 within sixty days of the date of the refusal or denial. Appeal to the circuit court under section 91-14, or any other applicable statute, may only be taken from a board or commission's final order. [L 1986, c 181, §1; am L 1994, c 279, §7]

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§91-13.5 Maximum time period for business or development-related permits, licenses, or approvals; automatic approval; extensions. (a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.

(b) All such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.

(c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved; provided that a delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

(d) Notwithstanding any other law to the contrary, any agency that reviews and comments upon an application for a business or development-related permit, license, or approval for a housing project developed under section 201H-38 shall respond within forty-five days of receipt of the application, or the application shall be deemed acceptable as submitted to the agency.

(e) The maximum period of time established pursuant to this section shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.

(f) This section shall not apply to:

(1) Any proceedings of the public utilities commission; or

(2) Any county or county agency that is exempted by county ordinance from this section.

(g) For purposes of this section, "application for a

business or development-related permit, license, or approval" means any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P. [L 1998, c 164, §3; am L 2005, c 68, §1; am L 2006, c 217, §3 and c 280, §2; am L 2007, c 249, §43]

Case Notes

The liquor commission's failure to comply with §91-11, requiring that all commissioners personally consider the entire record before voting on a liquor license application, was not a "failure to act" such as would trigger the automatic approval provision of this section where the liquor commission voted, albeit ineffectively, within the fifteen day period prescribed by §281-59. 118 H. 320, 189 P.3d 432.

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§91-14 Judicial review of contested cases. (a) Any

person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) *[L 2004, c 202, §8 amendment repealed June 30, 2010. L 2006, c 94, §1.]* Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

- (1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
- (2) Irreparable damage to the subject person will result if a stay is not ordered;
- (3) No irreparable damage to the public will result from the stay order; and
- (4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(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 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.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp, §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1; am L 1979, c 111, §9; am L 1980, c 130, §2; am L 1983, c 160, §1; am L 1986, c 274, §1; am L 1993, c 115, §1; am L 2004, c 202, §8]

Note

L 2004, c 202, §82 provides:

"SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

Rules of Court

Appeal to circuit court, see HRCF rule 72; appeal to appellate courts, see Hawaii Rules of Appellate Procedure.

Attorney General Opinions

Cost of record transmitted to the reviewing court is borne by the agency. Att. Gen. Op. 64-4.

Law Journals and Reviews

Standing to Challenge Administrative Action in the Federal and Hawaiian Courts. 8 HBJ 37.

Appellate Standards of Review in Hawaii. 7 UH L. Rev. 273. (See also 7 UH L. Rev. 449.)

An Analysis of the Standing and Jurisdiction Prerequisites for Direct Appeal of Agency Actions to the Circuit Court Under the Hawaii Administrative Procedure Act After Bush v. Hawaiian Homes

Commission and Pele Defense Fund v. Puna Geothermal Venture. 17 UH L. Rev. 375.

Hawai'i Appellate Standards of Review Revisited. 18 UH L. Rev. 645.

Case Notes

Section contained appropriate statute of limitations for State to file action in federal court under Education For All Handicapped Children Act. 695 F.2d 1154.

Plaintiff's 42 U.S.C. §1983 action against dental board barred by res judicata as plaintiff failed to seek state court judicial review of dental board's order failing plaintiff on dental exam. 60 F.3d 626.

Review of decision of civil service commission is on the record. 48 H. 278, 398 P.2d 155.

Question whether provision for appeal of preliminary ruling overrides provisions of specific statutes governing administrative agencies, raised but not decided. 50 H. 22, 428 P.2d 411.

Procedure applicable to grant of summary judgment after appeal to circuit court. 50 H. 169, 434 P.2d 312.

Subsection (g) referred to: 50 H. 426, 442 P.2d 61.

Where zoning variance is granted after public hearing, owner of land adjoining the property subject to variance is "person aggrieved." 52 H. 518, 479 P.2d 796.

"Person aggrieved", to be entitled to judicial review, must have been involved in the contested case. 53 H. 431, 495 P.2d 1180.

"Person aggrieved." 56 H. 260, 535 P.2d 1102; 64 H. 451, 643 P.2d 73.

Test under "clearly erroneous" standard is whether appellate court has a firm and definite conviction mistake was made. 56 H. 552, 545 P.2d 692; 4 H. App. 26, 659 P.2d 77.

Test under "clearly erroneous" standard is whether appellate court has a firm and definite conviction mistake was made. 56 H. 552, 545 P.2d 692; 4 H. App. 26, 659 P.2d 77.

Where tenure hearing not required, application did not create "contested case". 56 H. 680, 548 P.2d 253.

"Clearly erroneous" standard applies to review of labor and

industrial relations appeals board decisions. 57 H. 296, 555 P.2d 855.

Nature of appeal to circuit court under this section discussed. 58 H. 292, 568 P.2d 1189.

Appeal from decision of administrative agency acting without jurisdiction confers no jurisdiction on appellate court. 60 H. 65, 587 P.2d 301.

Paragraph (g) cited as authority to remand a cause to the public utilities commission to make appropriate findings to support its order. 60 H. 166, 590 P.2d 524.

"Clearly erroneous" standard of review discussed. 60 H. 166, 590 P.2d 524; 66 H. 401, 664 P.2d 727; 67 H. 212, 685 P.2d 794; 2 H. App. 421, 633 P.2d 564.

Final order means an order ending the proceedings. Appellee's actions were not clearly erroneous or arbitrary and capricious where appellant's filing of a grievance was untimely. 60 H. 513, 591 P.2d 621.

Standard of review under subsection (g) for decisions of administrative agencies acting within sphere of expertise. 60 H. 625, 594 P.2d 612; 5 H. App. 71, 678 P.2d 584.

Organization opposing reclassification of properties and which is composed of members who live in vicinity of properties is a "person aggrieved" under subsection (a). 61 H. 3, 594 P.2d 1079.

"Participation in contested case" discussed. 61 H. 3, 594 P.2d 1079.

Timely appeal. 61 H. 3, 594 P.2d 1079.

Mere failure to include name of agency (which rendered decision being appealed) in caption of notice of appeal does not render appeal defective. 62 H. 444, 616 P.2d 1368.

Finality of order, what determines. 63 H. 85, 621 P.2d 361.

So long as requirements of subsection (a) are met, the circuit court is vested with jurisdiction to hear appeal. 63 H. 85, 621 P.2d 361.

Land use commission. Final order. 63 H. 529, 631 P.2d 588.

Court did not abuse discretion in refusing to allow expert witnesses to testify in court, or refusing to require transcript of oral comments before agency. 64 H. 27, 636 P.2d 158.

Decision of administrative agency was clearly erroneous. 65 H. 146, 648 P.2d 1107.

Department of education was not a "person" with standing to

appeal administrative action. 65 H. 219, 649 P.2d 1140.

Granting of special management area permit by county planning commission. 65 H. 506, 654 P.2d 874.

Agency's decision to reduce welfare benefits is reviewable only by appeal under this section and not by declaratory judgment action. 66 H. 485, 666 P.2d 1133.

Agency's procedural irregularities did not prejudice appellant's substantial rights. 67 H. 342, 686 P.2d 831.

Board's denial of a motion for reconsideration is a "final order". 67 H. 603, 699 P.2d 26.

Police chief is a "person" with a standing to appeal civil service commission's ruling. 68 H. 432, 718 P.2d 1076.

Apprenticeship committee was not "person aggrieved" by labor director's rejection of its recommendation; apprentice denied back wages and attorney's fees and costs upon reinstatement was "person aggrieved". 68 H. 605, 723 P.2d 753.

Unincorporated association was "person aggrieved" by decision to grant special management area permit, but association did not participate in a "contested case". 69 H. 81, 734 P.2d 161.

Judicial review of an agency determination must be confined to issues properly raised in the record of the administrative proceedings. 69 H. 135, 736 P.2d 1271.

Does not give administrative agencies the right to take an appeal from an administrative action, but the agency may support an appeal taken by an aggrieved party. 71 H. 545, 798 P.2d 442.

Standard used by appellate court when reviewing circuit court's review of agency decision. 74 H. 599, 851 P.2d 311; 78 H. 21, 889 P.2d 705; 79 H. 154, 900 P.2d 161; 9 H. App. 198, 828 P.2d 1284.

Subsection (g)(1) applied under right/wrong standard in review of circuit court's review of employees' retirement system declaratory order, where issue presented to circuit court concerned a question of statutory interpretation. 75 H. 42, 856 P.2d 1227.

Without a statutory, rule-based, or constitutional mandate for a hearing, the Hawaiian homes commission hearing that took place was not required by law and therefore did not constitute a contested case for the purposes of obtaining appellate review pursuant to subsection (a); consequently, judicial review by circuit court of commission's denial of appellants' request for

a contested case hearing as well as review of commission's approval of third-party agreements was unattainable due to lack of subject matter jurisdiction. 76 H. 128, 870 P.2d 1272.

Supreme court could not conclude that board of land and natural resources' findings regarding application for conservation district use permit were clearly erroneous. 76 H. 259, 874 P.2d 1084.

Circuit court properly concluded that it was vested with appellate jurisdiction pursuant to subsection (a). With respect to issue of standing, certain appellees demonstrated sufficient participation and potential injury in fact to seek judicial review of agency decision; other appellees who did not sufficiently participate in contested case were precluded from seeking judicial review under subsection (a). 77 H. 64, 881 P.2d 1210.

"Clearly erroneous" standard applies to appeals from findings in decisions of labor and industrial relations appeals board. 77 H. 100, 881 P.2d 1246.

Appeal to circuit court of zoning board of appeals' final decision and order was timely, and circuit court properly exercised jurisdiction over the matter. 77 H. 168, 883 P.2d 629.

Supreme court lacked appellate jurisdiction where there was no final decision with respect to claimant's workers' compensation benefits for incident which labor and industrial relations appeals board determined to be compensable. 77 H. 305, 884 P.2d 368.

Circuit court's appellate jurisdiction proper where planning commission rendered its final view, appellant was involved "in" the contested case and sufficiently demonstrated standing to participate. 79 H. 425, 903 P.2d 1246.

A water management area designation is not the product of a contested case hearing, under this chapter, from which a direct appeal to the supreme court may be brought under §174C-60. 83 H. 484, 927 P.2d 1367.

Where director's violation of §91-13 by consulting materials and individuals outside the record did not prejudice appellant's substantial rights, harmless error. 87 H. 217, 953 P.2d 1315.

Where county planning director's decision that developer's proposed action was inconsistent with community plan did not meet any of the standards for reversal under subsection (g),

circuit court erred in reversing decision. 88 H. 108, 962 P.2d 367.

Where no express procedure provided in Maui charter or Maui special management area rules for appeal of Maui planning director's decision on a minor permit application to the Maui planning commission, and commission delegated authority to render final decision on minor permit applications to director pursuant to §205A-22, director's decision not to process developer's application was a final decision equivalent to a denial of the application and was thus appealable under subsection (a). 88 H. 108, 962 P.2d 367.

A decision that finally adjudicates the matter of medical and temporary disability benefits under §§386-21, 386-31(b), and 386-32(b) is an appealable final order under subsection (a), even though the matter of permanent disability benefits under §§386-31(a) and 386-32(a) has been left for later determination. 89 H. 436, 974 P.2d 1026.

Where entitlement to permanent disability or disfigurement benefits is the right of the claimant that remains undetermined and is the matter for which jurisdiction is retained by the labor director, a decision of the labor and industrial relations appeals board that otherwise finally adjudicates the matters of medical and temporary disability benefits is an appealable final order under subsection (a). 89 H. 436, 974 P.2d 1026.

Where county board of appeals at no time questioned or disclaimed planning director's action, and director could not have issued denial of appeal on director's own authority, director acted on behalf of board when director summarily rejected plaintiffs' appeals as untimely; thus, director's denial constituted a "final decision" by the board under subsection (a), which circuit court had jurisdiction to review on appeal. 90 H. 384, 978 P.2d 822.

Where plaintiffs' members, as native Hawaiians who exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes, sufficiently demonstrated injury to their interests for purposes of appeal under this chapter, the trial court properly concluded that plaintiff had standing to invoke judicial resolution of the land use commission's decision. 94 H. 31, 7 P.3d 1068.

Where plaintiffs sufficiently demonstrated an "injury in fact"

by alleging facts to show that its members were recreational users of the petition area and that land use commission's action would "diminish" such use, and also asserted their interests in protecting West Hawaii's scenic, aesthetic, historic, and biological resources, they were "persons aggrieved" within the meaning of this section and trial court did not err in concluding plaintiff had standing to seek judicial review of the commission's decision. 94 H. 31, 7 P.3d 1068.

An order regarding the award or denial of attorney's fees and costs with respect to §386-93(b) is a final order under subsection (a) for purposes of appeal; this final order rule applies prospectively to prevent injustice; §386-93(b) allows assessment of attorney's fees and costs against an employer if the employer loses the final appeal. 104 H. 164, 86 P.3d 973.

A contested case hearing pursuant to subsection (a) was not required in the determination by the labor director to register an apprenticeship program pursuant to §372-4. 104 H. 275, 88 P.3d 647.

District family courts may not exercise judicial review of administrative proceedings conducted pursuant to the Individuals with Disabilities Education Act. 105 H. 38, 93 P.3d 1145.

The agency-specific appellate procedure prescribed in §232-17 precluded appellants' resort to judicial review under subsection (a); jurisdiction to hear appellants' tax appeal rested exclusively with the tax appeal court. 106 H. 318, 104 P.3d 905.

Orders disposing of petitions for declaratory rulings under §91-8 are appealable to the circuit court pursuant to this section; thus, circuit court had proper jurisdiction to review Hawaii labor relations board order. 107 H. 178, 111 P.3d 587.

Where the purpose of the land use commission's hearing was not to determine the rights, duties, or privileges of specific parties, the hearing did not constitute a contested case for the purposes of obtaining judicial review pursuant to subsection (a), thus, the trial court did not err in dismissing plaintiff's appeal for lack of subject matter jurisdiction. 111 H. 124, 139 P.3d 712.

Where appellants failed to comply with the specific procedures promulgated by the department of land and natural resources, specifically, Hawaii administrative rule §13-1-29, in requesting a contested case hearing, such failure precluded judicial review

pursuant to this section. 112 H. 28, 143 P.3d 1230.

Where a public hearing pertaining to the issuance of a liquor license was statutorily required under §§281-52 and 281-57, and petitioner's legal rights, duties, and privileges were determined based on the public hearing regarding the decision to grant or deny a liquor license to petitioner, the public hearing was a "contested case" hearing governed by chapter 91; thus, (1) petitioner was entitled to judicial review under this section, (2) §91-11 applied to proceedings on petitioner's application for liquor license, and (3) the liquor commission did not comply with §91-11. 118 H. 320, 189 P.3d 432.

Cited in reviewing decision of the labor and industrial relations appeal board. 1 H. App. 350, 619 P.2d 516.

In overturning agency's order, court was required to make detailed findings of fact and conclusions of law. 2 H. App. 92, 626 P.2d 199.

Finality of order. 2 H. App. 219, 629 P.2d 125.

Test under "clearly erroneous" standard is whether appellate court has a firm and definite conviction mistake was made. 56 H. 552, 545 P.2d 692; 4 H. App. 26, 659 P.2d 77.

Order of board not a "final order" where it remands a case to determine service-connected issue. 4 H. App. 526, 669 P.2d 638.

Review of agency decision confined to issues properly raised in record of proceedings leading up to decision. 5 H. App. 115, 678 P.2d 1101.

Public employers directly affected by agency's order were "aggrieved persons" and their filing of amicus briefs with agency was sufficient "adversary participation"; standard used by appellate court when reviewing circuit court's review of agency decision. 5 H. App. 533, 704 P.2d 917.

Does not require that all evidence before agency support its findings; sufficient if findings supported by reliable, probative, and substantial evidence. 6 H. App. 540, 735 P.2d 950.

No "contested case" occurred even though there are situations where a public hearing may be considered a contested case because department rules established procedures for contested cases. 8 H. App. 16, 791 P.2d 1267.

Service of certified copy of agency decision under this section is complete when certified copy is deposited in the

mail. 9 H. App. 298, 837 P.2d 311.

Standard used in review of administrative agency decision. 9 H. App. 377, 842 P.2d 648.

County of Hawai'i department of finance was an "agency" within the meaning of chapter 91, and was not a "person" entitled to appeal under this section (prior to 1993 amendment). 77 H. 396 (App.), 885 P.2d 1137.

Although not titled "Notice of Appeal", where document fairly communicated appellants' intent to appeal appeals administrator's decision and record contained no indication that the document misled or prejudiced department in any way, circuit court had jurisdiction over appellants' appeal. 98 H. 80 (App.), 42 P.3d 657.

Appellants were not entitled to be compensated for their costs in defending against department's efforts to recoup benefits allegedly overpaid to them as pursuant to subsection (g), there is no authority vested in the hearing officer, the circuit court, or the appellate court to award damages to appellants for these costs. 98 H. 80 (App.), 42 P.3d 657.

Because appellant did not demonstrate that it suffered concrete injury, it was not a person "aggrieved" by HLRB decision; thus, it did not have standing to appeal decision to circuit court. 80 H. 376 (App.), 910 P.2d 147.

Where lessee failed to timely appeal Hawaiian homes commission's decision to cancel lease, as required under this section, commission was left without jurisdiction to act on lessee's subsequent requests for reconsideration. 106 H. 246 (App.), 103 P.3d 406.

Where department of planning and permitting director's declaratory ruling--that surfing instructor's use of hotel shop was a proper change in nonconforming use so long as that use remained within certain limits--was reasonably based on the evidence before the director, and constituted a reasonable application of the applicable zoning ordinance and the department's previous interpretation of that ordinance, director's ruling was not an abuse of discretion. 119 H. 452 (App.), 198 P.3d 715.

Cited: 47 H. 1, 24, 384 P.2d 536; 50 H. 172, 435 P.2d 21.

Mentioned: 904 F. Supp. 1098.

Hawaii Legal Reporter Citations

Timeliness of appeal. 79 HLR 79-0643.

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§91-15 Appeals. Review of any final judgment of the circuit court under this chapter shall be governed by chapter 602. [L 1961, c 103, §15; Supp, §6C-15; HRS §91-15; am L 1979, c 111, §10]

Case Notes

Defendants argued they lacked fair notice of illegal conduct because code book was never adopted pursuant to these sections. 824 F.2d 780.

An administrative agency is "an aggrieved party" from a judgment which overturns a decision of the agency with respect to implementation of legislation. 60 H. 436, 591 P.2d 113.

Standard used by appellate court when reviewing circuit court's review of agency decision. 4 H. App. 633, 675 P.2d 784.

Hawaii Legal Reporter Citations

No appeal by administrative agency of an adverse decision. 79 HLR 79-0573.

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§91-16 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. [L 1961, c 103, §16; Supp, §6C-16; HRS §91-16]

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§91-17 Federal aid. The provisions of section 91-14 shall not be applicable where such applicability would jeopardize federal aid or grants of assistance. [L 1961, c 103, §19; Supp, §6C-17; HRS §91-17]

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§91-18 Short title. This chapter may be cited as the Hawaii Administrative Procedure Act. [L 1961, c 103, §20; Supp, §6C-18; HRS §91-18]

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