Office of the Ombudsman
State of Hawaii
Fiscal Year 2007-2008
Report Number 39

As a service to the public provided by the legislature, the Office of the Ombudsman receives and investigates complaints from the public about injustice or maladministration by executive agencies of the State and county governments.

The Ombudsman is a nonpartisan officer of the legislature. The Ombudsman is empowered to obtain necessary information for investigations, to recommend corrective action to agencies, and to criticize agency actions; but the Ombudsman may not compel or reverse administrative decisions.

The Ombudsman is charged with: (1) accepting and investigating complaints made by the public about any action or inaction by any officer or employee of an executive agency of the State and county governments; and (2) improving administrative processes and procedures by recommending appropriate solutions for valid individual complaints and by suggesting appropriate amendments to rules, regulations, or statutes.

By law, the Ombudsman cannot investigate actions of the governor, the lieutenant governor and their personal staffs; the legislature, its committees and its staff; the judiciary and its staff; the mayors and councils of the various counties; an entity of the federal government; a multistate governmental entity; and public employee grievances, if a collective bargaining agreement provides an exclusive method for resolving such grievances.

Kekuanaoa Building, 4th Floor
465 South King Street
Honolulu, HI 96813

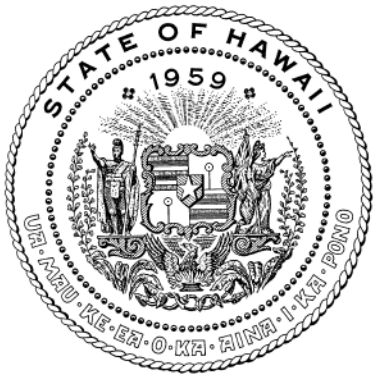
Phone:	**808-587-0770**
Fax:	**808-587-0773**
TTY:	**808-587-0774**

Neighbor island residents may call our toll-free numbers.

Hawaii	**974-4000**
Maui	**984-2400**
Kauai	**274-3141**
Molokai, Lanai	**1-800-468-4644**

Telephone extension is 7-0770
Fax extension is 7-0773
TTY extension is 7-0774

email: **complaints@ombudsman.hawaii.gov**
web site: **www.ombudsman.hawaii.gov**



State of Hawaii

Report of the Ombudsman

For the Period July 1, 2007 - June 30, 2008
Report No. 39

Presented to the Legislature
pursuant to Section 96-16 of
the Hawaii Revised Statutes

December 2008

Mme. President, Mr. Speaker, and Members of the
Hawaii State Legislature of 2009:

In accordance with Section 96-16, Hawaii Revised Statutes, I am pleased to submit the report of the Office of the Ombudsman for fiscal year 2007-2008. This is the thirty-ninth annual report since the establishment of the office in 1969.

On behalf of all the members of the office and the citizens who utilize our services, I would like to thank the State Legislature for its continued support. I would also like to thank the Governor, the Mayors of the various counties, and the State and County department heads and employees for their ongoing cooperation and assistance in our efforts to resolve citizen complaints and to assure fair treatment for the people of Hawaii.

Those who sought assistance from our office would not have been as ably served in a timely, objective, efficient, and professional manner without the dedicated services of First Assistant David Tomatani and the other staff members of the office. For their continued commitment and hard work, I convey my personal thanks.

Respectfully submitted,

ROBIN K. MATSUNAGA
Ombudsman

December 2008

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Chapter I

THE YEAR IN BRIEF

Total Inquiries Received

During fiscal year 2007-2008, the office received a total of 4,649 inquiries. Of these inquiries, 3,268, or 70.3 percent, may be classified as complaints within the jurisdiction of the office. The remaining inquiries consisted of 529 non-jurisdictional complaints and 852 requests for information.

The 4,649 inquiries received represent a 3.3 percent increase from the 4,501 inquiries received the previous fiscal year. There was also a 22.7 percent increase in non-jurisdictional complaints. However, there was a 22.3 percent decrease in information requests.

A comparison of inquiries received in fiscal year 2006-2007 and fiscal year 2007-2008 is presented in the following table.

TWO-YEAR COMPARISON

Years	Total Inquiries	Information Requests	Non-Jurisdictional Complaints	Jurisdictional Complaints		
				Total Jurisdictional	Prison Complaints	General Complaints
2007-2008	4,649	852	529	3,268	1,746	1,522
2006-2007	4,501	1,097	431	2,973	1,589	1,384
Numerical Change	148	-245	98	295	157	138
Percentage Change	3.3%	-22.3%	22.7%	9.9%	9.9%	10.0%

Staff Activities

SBA Forum

On July 19, 2007, Ombudsman Robin Matsunaga attended a forum by the U.S. Small Business Administration (SBA) Regulatory Fairness Board in Honolulu. This meeting was open to the public and was an opportunity for small business owners, community leaders, and representatives of trade associations to discuss concerns about unfair or excessive Federal regulatory enforcement. SBA National Ombudsman Nicholas Owens, members of the SBA's Region IX Regulatory Fairness Board, and representatives of State and federal regulatory agencies were in attendance to hear comments and complaints about regulatory enforcement and compliance practices in Hawaii. Issues presented during the forum were to be directed to the appropriate federal regulatory agencies and shared with federal officials in the National Ombudsman's Annual Report to Congress.

Following the forum, SBA National Ombudsman Owens and Region IX Regulatory Fairness Board Member Zainul Abedin visited our office and discussed strategies to enhance awareness of ombudsman programs in the United States.

USOA

The United States Ombudsman Association's 28th annual conference was held September 24-28, 2007, in Anchorage, Alaska, and was attended by Ombudsman Robin Matsunaga, First Assistant David Tomatani, senior analyst Alfred Itamura, and analyst Lynn Oshiro. The conference focused on providing strategies to help ombudsmen from all areas of the world learn to deal with the ever-changing and increasing challenges we all face. Ombudsman Matsunaga again contributed as a faculty member of the training workshop for new ombudsmen, which was expanded to two full days this year. He also continues to serve as Vice President of the USOA Board of Directors.

Software User Group Conference

Ombudsman Robin Matsunaga, analyst Gansin Li, and support staff Sue Oshima attended a software user group conference in Brisbane, Australia on October 22 and 23, 2007. The conference was sponsored by the computer services company that provides our case management software and included technical sessions for program administrators, a preview of upcoming developments in the software, and discussion forums

where attendees had the opportunity to provide input into the future development of the software. In addition, it was an excellent setting in which to exchange ideas and experiences with fellow users.

Personnel

Analyst Jon Ellis Pangilinan left our employ on December 7, 2007, to become a budget analyst with the Committee on Ways and Means, Hawaii State Senate.

On February 1, 2008, Dawn Matsuoka joined the office as an analyst on our professional staff. Ms. Matsuoka is a graduate of the University of Hawaii and brings to the office valuable experience, having been employed with the State of Hawaii for over 30 years. During that period she has held increasingly responsible positions within the Department of Human Services as an Income Maintenance Worker, Quality Control Reviewer, and an Income Maintenance Program Specialist in the Benefit, Employment and Support Services Division.

At the close of the fiscal year, the office consisted of Ombudsman Robin Matsunaga; First Assistant David Tomatani; analysts Herbert Almeida, Mark Au, Yvonne Faria, Alfred Itamura, Paul Kanoho, Gansin Li, Dawn Matsuoka, and Lynn Oshiro; and support staff Sheila Alderman, Edna de la Cruz, Debbie Goya, Sue Oshima, and Linda Teruya.

Outreach Efforts

Ombudsman Robin Matsunaga, State Long-Term Care Ombudsman John McDermott, and University of Hawaii at Manoa Ombudsman Neal Milner participated in a panel discussion sponsored by the Center for Alternative Dispute Resolution and the University of Hawaii Program on Conflict Resolution on Tuesday, March 18, 2008, at the Supreme Court Conference Room. The panel explained ombudsman services and programs, discussed the role of the ombudsman in dispute resolution, addressed confidentiality issues, and identified emerging trends.

Chapter II

STATISTICAL TABLES

For all tables, the percentages may not add up to a total of 100% due to rounding.

TABLE 1
NUMBERS AND TYPES OF INQUIRIES
Fiscal Year 2007-2008

Month	Total Inquiries	Jurisdictional Complaints	Non-Jurisdictional Complaints	Information Requests
July	455	326	56	73
August	460	336	48	76
September	368	269	32	67
October	404	271	53	80
November	318	204	46	68
December	330	222	38	70
January	392	282	31	79
February	392	269	48	75
March	371	274	45	52
April	435	319	46	70
May	399	281	47	71
June	325	215	39	71
TOTAL	4,649	3,268	529	852
% of Total Inquiries	--	70.3%	11.4%	18.3%

TABLE 2
MEANS BY WHICH INQUIRIES ARE RECEIVED
Fiscal Year 2007-2008

Month	Telephone	Mail	E-mail	Fax	Visit	Other
July	435	11	7	1	1	0
August	423	26	5	1	4	1
September	346	11	1	1	9	0
October	372	13	8	1	10	0
November	287	17	11	1	1	1
December	305	19	3	1	2	0
January	359	12	15	2	2	2
February	330	48	7	1	5	1
March	328	23	15	2	3	0
April	381	28	18	4	3	1
May	350	34	11	0	4	0
June	282	27	11	1	2	2
TOTAL	4,198	269	112	16	46	8
% of Total Inquiries (4,649)	90.3%	5.8%	2.4%	0.3%	1.0%	0.2%

TABLE 3
DISTRIBUTION OF POPULATION AND INQUIRERS BY RESIDENCE
Fiscal Year 2007-2008

Residence	Population*	Percent of Total Population	Total Inquiries	Percent of Total Inquiries
City & County of Honolulu	905,601	70.6%	3,263	70.2%
County of Hawaii	173,057	13.5%	577	12.4%
County of Maui	141,902	11.1%	413	8.9%
County of Kauai	62,828	4.9%	88	1.9%
Out-of-State	--	--	308	6.6%
TOTAL	1,283,388	--	4,649	--

*Source: The State of Hawaii Data Book 2007, A Statistical Abstract. Hawaii State Department of Business, Economic Development, and Tourism, Table 1.06, "*Resident Population, by Counties: 1990 to 2007.*"

TABLE 4
DISTRIBUTION OF TYPES OF INQUIRIES
BY RESIDENCE OF INQUIRERS
Fiscal Year 2007-2008

	TYPES OF INQUIRIES					
	Jurisdictional Complaints		Non-Jurisdictional Complaints		Information Requests	
Residence	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
C&C of Honolulu	2,340	71.6%	306	57.8%	617	72.4%
County of Hawaii	415	12.7%	67	12.7%	95	11.2%
County of Maui	293	9.0%	42	7.9%	78	9.2%
County of Kauai	50	1.5%	15	2.8%	23	2.7%
Out-of-State	170	5.2%	99	18.7%	39	4.6%
TOTAL	3,268	--	529	--	852	--

TABLE 5
MEANS OF RECEIPT OF INQUIRIES
BY RESIDENCE
Fiscal Year 2007-2008

Residence	Total Inquiries	Means of Receipt					
		Telephone	Mail	E-mail	Fax	Visit	Other
C&C of Honolulu	3,263	3,055	84	63	13	42	6
% of C&C of Honolulu	--	93.6%	2.6%	1.9%	0.4%	1.3%	0.2%
County of Hawaii	577	541	9	23	1	2	1
% of County of Hawaii	--	93.8%	1.6%	4.0%	0.2%	0.3%	0.2%
County of Maui	413	387	16	8	2	0	0
% of County of Maui	--	93.7%	3.9%	1.9%	0.5%	0.0%	0.0%
County of Kauai	88	81	3	4	0	0	0
% of County of Kauai	--	92.0%	3.4%	4.5%	0.0%	0.0%	0.0%
Out-of-State	308	134	157	14	0	2	1
% of Out-of-State	--	43.5%	51.0%	4.5%	0.0%	0.6%	0.3%
TOTAL	4,649	4,198	269	112	16	46	8
% of TOTAL	--	90.3%	5.8%	2.4%	0.3%	1.0%	0.2%

TABLE 6
DISTRIBUTION AND DISPOSITION OF JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2007-2008

Agency	Juris-dictional Complaints	Percent of Total	Completed Investigations		Discon-tinued	Declined	Assisted	Pending
			Substan-tiated	Not Substan-tiated				
State Departments								
Accounting & General Services	25	0.8%	4	11	2	4	2	2
Agriculture	7	0.2%	1	4	0	2	0	0
Attorney General	140	4.3%	7	26	8	14	78	7
Budget & Finance	167	5.1%	12	42	7	17	87	2
Business, Economic Devel. & Tourism	10	0.3%	1	5	2	2	0	0
Commerce & Consumer Affairs	39	1.2%	0	21	5	4	0	9
Defense	4	0.1%	0	2	1	1	0	0
Education	94	2.9%	19	27	15	23	1	9
Hawaiian Home Lands	12	0.4%	0	6	1	5	0	0
Health	108	3.3%	7	45	11	31	5	9
Human Resources Development	5	0.2%	2	3	0	0	0	0
Human Services	299	9.1%	37	136	34	57	18	17
Labor & Industrial Relations	82	2.5%	4	32	13	26	0	7
Land & Natural Resources	86	2.6%	18	31	8	17	4	8
Office of Hawaiian Affairs	0	0.0%	0	0	0	0	0	0
Public Safety	1,795	54.9%	183	759	87	636	71	59
Taxation	26	0.8%	1	7	1	7	9	1
Transportation	70	2.1%	13	32	2	10	8	5
University of Hawaii	38	1.2%	3	12	8	8	2	5
Other Executive Agencies	10	0.3%	0	4	2	3	1	0
Counties								
City & County of Honolulu	175	5.4%	15	63	20	59	10	8
County of Hawaii	34	1.0%	0	14	3	15	0	2
County of Maui	32	1.0%	1	12	2	15	0	2
County of Kauai	10	0.3%	1	4	0	4	0	1
TOTAL	3,268	--	329	1,298	232	960	296	153
% of Total Jurisdictional Complaints	--	--	10.1%	39.7%	7.1%	29.4%	9.1%	4.7%

TABLE 7
DISTRIBUTION AND DISPOSITION OF SUBSTANTIATED JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2007-2008

Agency	Substantiated Complaints	Complaints Rectified	Not Rectified/ No Action Necessary
State Departments			
Accounting & General Services	4	4	0
Agriculture	1	1	0
Attorney General	7	7	0
Budget & Finance	12	12	0
Business, Economic Devel. & Tourism	1	1	0
Commerce & Consumer Affairs	0	0	0
Defense	0	0	0
Education	19	19	0
Hawaiian Home Lands	0	0	0
Health	7	6	1
Human Resources Development	2	1	1
Human Services	37	37	0
Labor & Industrial Relations	4	4	0
Land & Natural Resources	18	17	1
Office of Hawaiian Affairs	0	0	0
Public Safety	183	177	6
Taxation	1	1	0
Transportation	13	13	0
University of Hawaii	3	3	0
Other Executive Agencies	0	0	0
Counties			
City & County of Honolulu	15	15	0
County of Hawaii	0	0	0
County of Maui	1	1	0
County of Kauai	1	1	0
TOTAL	329	320	9
% of Total Substantiated Jurisdictional Complaints	--	97.3%	2.7%
% of Total Completed Investigations (1,627)	20.2%	19.7%	0.6%

TABLE 8
DISTRIBUTION OF INFORMATION REQUESTS
Fiscal Year 2007-2008

Agency	Information Requests	Percent of Total
State Departments		
Accounting & General Services	12	1.4%
Agriculture	8	0.9%
Attorney General	36	4.2%
Budget & Finance	35	4.1%
Business, Economic Devel. & Tourism	6	0.7%
Commerce & Consumer Affairs	127	14.9%
Defense	2	0.2%
Education	14	1.6%
Hawaiian Home Lands	3	0.4%
Health	61	7.2%
Human Resources Development	4	0.5%
Human Services	37	4.3%
Labor & Industrial Relations	29	3.4%
Land & Natural Resources	32	3.8%
Office of Hawaiian Affairs	0	0.0%
Public Safety	44	5.2%
Taxation	9	1.1%
Transportation	11	1.3%
University of Hawaii	5	0.6%
Other Executive Agencies	18	2.1%
Counties		
City & County of Honolulu	85	10.0%
County of Hawaii	5	0.6%
County of Maui	7	0.8%
County of Kauai	3	0.4%
Miscellaneous	259	30.4%
TOTAL	852	--

TABLE 9
DISTRIBUTION OF NON-JURISDICTIONAL COMPLAINTS
Fiscal Year 2007-2008

Jurisdictional Exclusions	Number of Complaints	Percent of Total
Collective Bargaining	35	6.6%
County Councils	6	1.1%
Federal Government	43	8.1%
Governor	4	0.8%
Judiciary	80	15.1%
Legislature	11	2.1%
Lieutenant Governor	3	0.6%
Mayors	0	0.0%
Multi-State Governmental Entity	0	0.0%
Private Transactions	342	64.7%
Miscellaneous	5	0.9%
TOTAL	529	--

TABLE 10
INQUIRIES CARRIED OVER TO FISCAL YEAR 2007-2008 AND THEIR DISPOSITIONS, AND INQUIRIES CARRIED OVER TO FISCAL YEAR 2008-2009

Types of Inquiries	Inquiries Carried Over to FY 07-08	Inquiries Carried Over to FY 07-08 and Closed During FY 07-08	Balance of Inquiries Carried Over to FY 07-08	Inquiries Received in FY 07-08 and Pending	Total Inquiries Carried Over to FY 08-09
Non-Jurisdictional Complaints	0	0	0	3	3
Information Requests	2	2	0	0	0
Jurisdictional Complaints	167	162	5	153	158
		Disposition of Closed Complaints: Substantiated 38 Not Substan. 115 Discontinued 9 162			
TOTAL	169	164	5	156	161

Chapter III

SELECTED CASE SUMMARIES

The following are summaries of selected cases investigated by the office. Each case summary is listed under the State government department or the county government involved in the complaint or inquiry. Although some cases involved more than one department or involved both the State and the county, each summary is placed under what we believe to be the most appropriate agency.

LIST OF SUMMARIES

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DEPARTMENT OF THE ATTORNEY GENERAL

(08-01228) Administering of injections by naturopathic physicians. Chapter 455, Hawaii Revised Statutes (HRS), titled "Naturopathy," regulates the licensing of naturopathic physicians and defines naturopathy as the practice of natural medicine, natural therapeutics, and natural procedures, using a system of practice that bases its treatment of physiological functions and abnormal conditions on natural laws governing the human body.

A naturopathic physician contended that Chapter 455, HRS, allows naturopathic physicians to administer injections. He complained, however, that because a deputy attorney general (AG) stated that a legislative committee report supersedes Chapter 455, HRS, naturopathic physicians were not being allowed to administer injections.

We reviewed Chapter 455, HRS, and did not find any provision that expressly allows naturopathic physicians to administer injections. The statutes also do not specifically state that naturopathic physicians are prohibited from administering injections.

We also reviewed a copy of the minutes of a meeting held in 2004 by the Board of Examiners in Naturopathy (Board), Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs. The minutes describe the response by the deputy AG when asked what impact a legislative standing committee report (SCR) had on a statute with regard to the administering of injections by naturopathic physicians. The deputy AG explained that an SCR is used to determine legislative purpose and if there is ambiguity in a statute, the SCR may show what the Legislature intended.

In this case, in 1994 the Legislature considered House Bill No. 2238 that proposed to amend the definition of naturopathy to specifically authorize practitioners to administer substances by injection. During the legislative process, however, the Legislature deleted the provision that would have authorized naturopathic physicians to administer injections and the bill that became law did not contain such provision. The deputy AG concluded that this deletion by the Legislature demonstrated that it was the intent of the legislature to exclude the administering of injections from the scope of practice of naturopathic physicians.

We agreed with the deputy AG that the Legislature's decision to delete the provision in the bill that would have authorized naturopathic physicians to administer injections indicated that the intent of the Legislature was that naturopathic physicians not have that authority.

We also considered action taken by the Legislature in 2006 in House Bill No. 1155, which proposed amendments to Chapter 455, HRS, to specifically authorize qualified naturopathic physicians to administer natural medicines by injection. The bill was passed by the Legislature but was subsequently vetoed by the Governor and did not become law. We found this action by the Legislature strongly indicated that the Legislature also believes that the existing law does not authorize naturopathic physicians to administer injections, or the Legislature otherwise would not have found it necessary to pass such a bill.

We informed the complainant that we were unable to substantiate his contention that the deputy AG stated that the SCR superseded statutory law, nor did we find that the law authorizes naturopathic physicians to administer injections.

(08-02967) Abstract incorrectly shows convictions on two charges that were dropped. An inmate complained that his criminal abstract at the Hawaii Criminal Justice Data Center (Center) erroneously showed convictions for two 1997 charges which were actually dropped. The Center is the agency responsible for the collection, storage, dissemination, and analysis of criminal justice data from all criminal justice agencies. The law provides that the dissemination of nonconviction data is limited to certain authorized agencies and individuals.

According to the complainant, he was arrested in February 1997 and charged with two drug offenses. He was found guilty of both charges. He was also arrested in July 1997 and charged with two other drug offenses. However, he was never found guilty of the charges from his arrest in July.

We requested and received from the Department of Public Safety (PSD) the complainant's judgment and sentencing orders. After a review of the documents, we determined that the complainant was serving two concurrent five-year sentences for the convictions stemming from his February arrest, but there were no judgment or sentencing orders from his arrest in July.

We visited the Center and confirmed that the complainant's criminal abstract showed convictions from the complainant's arrest in July. Further examination of the complainant's abstract revealed that the Case and Arrest Report numbers for his arrests in February and July were the same.

We explained to the Center that the PSD did not have judgment and sentencing orders for any charges from the July arrest, and that there were identical Case and Arrest Report numbers for the February and July arrests. The Center noted that the probation revocation and resentencing order from

the February arrest were related to the July arrest. The Center agreed to inquire with the Department of the Prosecuting Attorney (PA) and the court.

The Center's inquiry with the PA and the court revealed that charges stemming from the February arrest were the very same charges for which a warrant for the complainant's arrest was issued in July. The PA had records of the inmate pleading guilty to only the February charges. In summary, the complainant was convicted of two offenses, not four.

The Center received a copy of the necessary records from the PA and took corrective action by removing the July convictions from the complainant's abstract.

The complainant was thankful for our assistance.

DEPARTMENT OF BUDGET AND FINANCE

(07-03111) Inadequate telephone system. A man complained to us that he had difficulty contacting the Hawaii Employer-Union Health Benefits Trust Fund (EUTF), which provides health and other benefit plans to state and county employees and retirees. He reported that when he telephoned the EUTF, there was a recorded message and he was then placed on hold. After 15 minutes, another recorded message asked him to leave a message. The complainant questioned why he was not invited to leave a message at the beginning of the call, rather than after he had spent 15 minutes waiting on the phone.

When we called the EUTF, we got the following recorded message: "Thank you for calling the EUTF Health Benefits Office. Your call will be handled in the order it was received. Please stay on the line for the next available agent. Thank you." After five minutes, a staff member answered the telephone. We made arrangements for the staff member to call the complainant.

We confirmed with the complainant the next day that staff from the EUTF did call him. Since we had received reports that some callers were able to reach the EUTF while others were not, we told the complainant that we would inquire further about the telephone system. He expressed an interest in learning the outcome of our inquiry.

We spoke with an administrator of the EUTF, who informed us that the EUTF was aware of the problem with its telephone system and planned

to install an interactive menu driven system. We were informed that the EUTF office was being renovated at the time and the new telephone system would be installed after the renovation was completed.

Over the months, we monitored the progress of the installation of the new telephone system. Because of the EUTF annual open enrollment period, which is a very busy time for the agency, work on the renovations was suspended. Subsequently, due to a lack of funding, the telephone system improvement was delayed until the next fiscal year. Finally, a year after we received the complaint, a new telephone system was installed. Following the installation, when the public called the EUTF, the new recorded message stated:

> Aloha, you have reached the Hawaii Employer-Union Health Benefits Trust Fund. If you know your party's extension, you may enter it at any time. For customer service press 1; for enrollment press 2; for accounting press 3; for the EUTF directory by first name press 4 or by last name press 5. To leave a message please stay on the line or dial 0 at any time. Your call may be recorded for quality assurance. Thank you for calling the EUTF.

We informed the complainant, who was pleased to learn of the EUTF's new interactive telephone system.

(08-01589) Unclaimed property. A man living in Texas complained that he was unable to contact the State agency that was holding $1637 that belonged to his wife. An insurance company owed the money to his wife but was unable to locate her because the couple had moved from Hawaii. The couple was informed by a private company that the State of Hawaii was holding his wife's money, but the private company would charge a finder's fee for its further assistance. The complainant decided to pursue the matter on his own and contacted various agencies, but was unsuccessful in finding the agency that held his wife's money. He then wrote to our office asking for our assistance.

Chapter 523A, Hawaii Revised Statutes, titled "Unclaimed Property," authorizes the State to collect and hold unclaimed property. Unclaimed property typically includes dormant (no activity for five years) checking and savings accounts, uncashed checks, stock certificates, and contents of safe deposit boxes. The State annually advertises unclaimed property valued at $100 and over and returns the property to the rightful owners at no charge. The program is administered by the Unclaimed Property Branch (UPB), Department of Budget and Finance.

We accessed the UPB Web site at http://pahoehoe.ehawaii.gov/lilo/app and conducted a search under the name of the complainant's wife. The search revealed that the insurance company had actually turned over to the State a total of $2563 that was owed to the complainant's wife. The UPB Web site included an online claim form or invited a claimant to email the UPB with information necessary to prove that the claimant was entitled to the property.

We notified the complainant that his wife's money was in the custody of the UPB, advised him of the UPB's Web site, and suggested that his wife file a claim for the money. The complainant was appreciative of our assistance.

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM

(08-01437) Draft rules scheduled for public hearing differed from version submitted for review by regulatory board. In 1998, the State Legislature found that administrative rules adopted by State agencies can have an unduly burdensome impact on the growth and vitality of small business. The Legislature further found that an agency's interpretation or application of its rules may also have a disproportionately burdensome impact on a small business especially when the small business lacks the resources to contest an agency's interpretation or application of a rule imposing a fine, citation, or penalty. The Legislature declared that it is the policy of this State to address the disproportionate impact administrative rules may have on small business by requiring agencies to consult with the affected small business community to better assess the impacts and consider alternatives for easing those impacts when drafting rules. As a result, the Legislature passed Senate Bill No. 2803, which provides a process to petition an agency for regulatory review; requires periodic administrative review of rules that impact small business; and establishes an independent regulatory review board to consider the concerns of small businesses and make recommendations to adopt, amend, or repeal rules.

The bill was signed into law by the Governor as Act 168, SLH 1998, and codified as Chapter 201M, Hawaii Revised Statutes (HRS), titled "Hawaii Small Business Regulatory Flexibility Act." It established the Small Business Regulatory Review Board (Board) "to review any proposed new or amended rule or to consider any request from small business owners for review of any rule adopted by a state agency and to make recommendations to the agency or the legislature regarding the need for a rule change or legislation."

Only five days prior to a scheduled public hearing on rules proposed by the Department of Transportation, representatives of a tug boat owners' association complained that the version of the rules to be considered at the public hearing was substantially different from the version reviewed and recommended by the Board.

Commercial and passenger vessels entering Hawaii's ports require the assistance of tug boats to guide the vessels safely into port. Standards set by administrative rules dictate the number of tug boats required to guide the vessels into port. The proposed rules would amend existing standards for determining the number of tug boats required and would economically impact tug boat operators, as well as operators of commercial and passenger vessels.

Section 201M-2(b), HRS, states: "If the proposed rules affect small business, the agency shall . . . prepare a small business impact statement to be submitted with the proposed rules to the . . . board when the rules are essentially complete and before the rules are submitted to the governor for approval for public hearing." (Emphasis added.)

In our investigation, we found that the proposed rules sent to the Board were revised several times during the Board's review. Eventually, the rules that were recommended for public hearing by the Board appeared to differ from the rules that were submitted to the Governor for approval for public hearing.

The department staff responsible for preparing the proposed rules for submission to the Governor believed it was too late to cancel the public hearing.

We did not believe, however, that the department should present for public hearing a version of the proposed rules that did not appear to have gone through the process intended by Section 201M-2(b), HRS. In particular, we questioned whether the proposed rules at the time of the Board's review were "essentially complete" as required by law. Thus, we contacted a deputy director of the department, who agreed to review the matter.

Thereafter, the deputy director agreed with our concern. He found that the proposed rules that were sent to the Governor were changed substantively from the version reviewed and recommended for public hearing by the Board. As a result, the department decided not to proceed with the hearing.

We provided this information to the complainant.

DEPARTMENT OF EDUCATION

(07-03485) Nonreceipt of workers' compensation wage loss payments. In 2007, a retired Department of Education (DOE) employee complained that he did not receive workers' compensation wage loss payments. He suffered a heart attack on the job in 2002 and was on leave for five months. He said his workers' compensation claim was approved 16 months before he called us, and he complained that he still had not received wage loss payments for the five-month period.

According to State workers' compensation law, an employee on workers' compensation leave may receive wage loss payments of two-thirds of the employee's regular salary. Furthermore, according to State public service law, a public service employee who is receiving workers' compensation wage loss payments may use accumulated vacation and/or sick leave to make up the remaining one-third of the employee's salary in order to receive his or her full regular salary. The public service law also provides that upon retirement, a retiree is entitled to receive monetary payment for his or her unused vacation leave, and unused sick leave may be applied to increase the retiree's monthly pension.

We inquired with the DOE payroll office as to whether the complainant was entitled to workers' compensation payment. We also obtained and reviewed his relevant personnel documents.

Based on information from the DOE payroll office and the complainant's personnel records, we determined that the complainant was not on approved workers' compensation leave during the five-month period following his heart attack. Because he did not provide certification from his attending physician that his inability to work was due to a work-related illness, he did not receive approval of workers' compensation leave. Instead, his five-month leave was charged against his accumulated vacation and/or sick leave and he received his full salary during that time. As a result, at the time he retired in 2005, his accumulated vacation and sick leave were reduced by the amount of leave that he had used during the five-month period.

We also learned that in 2007, the complainant finally had his physician provide the DOE with certification that he was unable to work during his five-month leave due to a work-related illness. Upon receipt of the physician's certification, the DOE determined that the complainant's heart attack was work-related and approved his workers' compensation claim in 2007, only a month before he contacted our office.

Since the complainant's five-month leave was determined to be workers' compensation leave, we concluded he was entitled to the restoration of two-thirds of the vacation and sick leave that had been used

for his five-month leave, while one-third would still be charged to his vacation and/or sick leave. Initially, the DOE did not agree that the employee was entitled to restoration of any vacation and sick leave. After further discussion, however, the DOE concurred that two-thirds of the vacation and sick leave that were used for the complainant's five-month leave should be restored.

The restoration of the complainant's vacation leave entitled him to receive cash payment for his unused vacation upon his retirement. The DOE calculated the complainant's unused vacation and determined that he was owed a vacation leave payment of $10,262. The complainant's sick leave was also restored, but the amount was insignificant and did not result in an increase in his monthly pension.

We monitored the vacation leave payment and informed the complainant when the check was ready for him to pick up.

(07-04119/08-01806) Student was not allowed to participate in high school graduation ceremony. The mother of a public high school senior complained that her daughter was unfairly suspended from school and was not allowed to participate in the commencement exercise.

We contacted the school principal, who informed us that senior students and their parents signed an agreement with the school in the Fall semester whereby they agreed to comply with certain conditions in order for the students to participate in the commencement exercise. We received a copy of the agreement and confirmed that the student and her parents had signed it.

One of the conditions of the agreement was that the student not commit a Class C or D offense that resulted in a suspension in the last quarter of the school year. In the complainant's case, her daughter violated the agreement because she incurred an insubordination offense which resulted in her suspension from school three weeks before graduation. According to Department of Education (DOE) rules on student misconduct, insubordination was a Class C offense. The principal noted that it was the student's second Class C or D offense in the fourth quarter. The principal informed us that the student was eligible to graduate, but would not be allowed to participate in the commencement exercise. After the completion of the exercise, the student would be allowed to meet with classmates, family, and friends in the reception area.

We informed the complainant that the action taken by the school was in compliance with the agreement they signed at the beginning of the school year.

In our review of DOE Regulation 4540.1, titled "Graduation and Related Regulations," however, we found a discrepancy between the DOE regulation and the school's commencement agreement. Paragraph 3.b.(2) of the DOE regulation provides that a first Class C or D offense during the fourth quarter would result in a warning that the privilege of participating in the commencement exercise would be revoked if a second Class C or D offense was committed. The regulation provides further that a second Class C or D offense during the fourth quarter would result in the revocation of the privilege, regardless of whether the student was suspended.

Contrary to the DOE regulation, the school's commencement agreement provided that a single Class C or D offense that resulted in a suspension would prevent the student from participating in the commencement exercise. Additionally, the commencement agreement would not prohibit a student from participating in the commencement exercise if the student committed a second (or third, or fourth, etc.) Class C or D offense during the fourth quarter, as long as the student was not suspended.

In the complainant's case, since her daughter had two Class C or D offenses during the fourth quarter, she would not have been allowed to participate in the commencement exercise under both the DOE regulation and the school's commencement agreement. However, as the discrepancy could affect cases that may arise in the future, we asked the DOE administration to clarify whether the school's commencement agreement was in compliance with the DOE regulation.

Upon review of the matter, the DOE administration requested that the high school revise its commencement agreement to comply with the DOE regulation. We reviewed the high school's revised commencement agreement and verified that the agreement complied with DOE Regulation 4540.1. The DOE administration also issued a reminder for all high schools to review their agreements to ensure statewide compliance with the DOE regulation.

(08-02814) Suspension of student with a disability. The mother of a public high school student complained that her son was suspended from school for 20 days for misconduct. According to the complainant, her son observed her daughter engaged in a heated argument with another student. As her son approached them, he saw someone running towards him. He sidestepped this person and stuck his arm out, knocking the person to the ground and injuring him. It turned out that this person was a school staff member who was running to intervene in the argument between her daughter and the other student.

The complainant reported that her son receives services as a disabled student under Section 504 of the federal Rehabilitation Act of 1973. She believed that a suspension from school for 20 days for a Section 504 student was excessive.

In our investigation, we reviewed Title 8, Chapter 19, Hawaii Administrative Rules (HAR), titled "Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism." Section 8-19-8, HAR, titled "Suspension," states in part:

> (c) The student may be suspended if the principal or designee finds that the charges are sustained. If the total number of days in any single semester for suspensions exceeds ten days, the due process procedures of §8-19-9 shall apply. Students who receive special education or other services under chapter 8-56 or chapter 8-53, however, may be suspended no more than ten days during the school year, unless otherwise indicated in chapter 8-56 or chapter 8-53. (Emphasis added.)

We reviewed Title 8, Chapter 53, HAR, titled "Provision of a Free Appropriate Public Education for Students with a Disability Under Section 504, Subpart D." Section 8-53-36, HAR, titled "Authority of school personnel," applies to Section 504 students, and states in part:

> (b) School personnel shall not order the suspension, including crisis suspension, or other removal of a student with a disability from the student's current educational placement for disciplinary reasons if that suspension or removal is for more than ten consecutive school days at a time or for more than ten cumulative school days for each series of short-term suspensions, including crisis suspension, or removals in a given school year unless:
>
> (3) The Section 504 modification plan team determines, for suspensions or disciplinary removals for more than ten consecutive school days at a time or for each series of short-term suspensions for more than ten cumulative school days in a given school year that the

behavior is not a manifestation of the disability in accordance with section 8-53-37; . . . (Emphasis added.)

We found that Section 8-53-37, HAR, titled "Manifestation determination review," requires a timely review if a Section 504 student is to be suspended for more than ten days at a time, and states in part:

> (a) If an action is contemplated . . . involving the suspension or other removal of a student with a disability from the student's current educational placement for disciplinary reasons for more than ten consecutive school days at a time . . . .
>
> . . . .
>
> (2) Immediately, if possible, but in no case later than ten school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the student's disability and the behavior subject to the disciplinary action.

Based on our review of the above-quoted sections of the rules, it appeared that if the complainant's son were a Section 504 student, the school should not impose a suspension longer than ten days without first conducting a manifestation review to determine whether his disability was related to the behavior for which disciplinary action was being contemplated.

We contacted the school principal, who did not know if the complainant's son was a Section 504 student. We also informed the principal of the requirements in the above-quoted sections of the rules. The principal informed us that she would verify whether the complainant's son was a Section 504 student and that she would review the sections of the rules we cited.

The next day, the principal informed us that the suspended student was indeed a Section 504 student and that the required manifestation determination review was scheduled for the following day. We informed the complainant of the action to be taken.

DEPARTMENTOF HUMAN SERVICES

(07-00185) Payment for a disputed bill. A woman who worked for a company in Ohio that provided translating and interpreting services complained that her company was not paid in full for services provided to the Med-QUEST Division (Med-QUEST), Department of Human Services. By the time we received the complaint, more than a year had elapsed since the company had provided the translation services to Med-QUEST.

According to the complainant, Med-QUEST asked her company for a cost estimate for the translation of 7 pages of text and a cover page (8 pages total) into 4 foreign languages/dialects. The company responded with a price quote of $2,250 in March 2005, and Med-QUEST eventually selected the company to provide the translation services. In April 2005, Med-QUEST sent the company 10 pages of text plus a cover page (11 pages total) for translation into the same 4 languages/dialects. Subsequently, Med-QUEST asked the company to translate the 11 pages into a fifth language. Eventually, the company translated 11 pages into 5 languages/dialects.

The company sent Med-QUEST an invoice for the originally quoted price of $2,250, plus $975 for the additional work. Med-QUEST, however, paid the company only the originally quoted price of $2,250 and maintained that this represented payment in full. The company communicated with Med-QUEST by telephone and email, but Med-QUEST did not make any further payment. The company then assessed a late fee for each month that passed.

In our investigation of the complaint, Med-QUEST informed us that it did not pay the company for the additional work because it believed that the cost estimate provided by the company in March 2005 covered the translation of 11 pages into 5 languages/dialects. After reviewing the correspondence between the company and Med-QUEST, however, we believed that the price quote of $2,250 was for the translation of 8 pages into 4 languages and did not include the additional work. Since the company performed the additional translation work at the request of Med-QUEST, we believed that the company was entitled to receive an additional payment.

For several months, we were unable to persuade Med-QUEST to accept our recommendation to pay the bill. Finally, after a new Med-QUEST administrator took office, Med-QUEST agreed to the additional payment.

We also concluded that Med-QUEST could not pay the company its monthly late fee assessments, which amounted to $272, because late payments by a State agency were governed by the provisions of Chapter 103, Hawaii Revised Statutes, titled "Expenditure of Public Money

and Public Contracts." The law required a State agency to pay interest on bills that were unpaid after 30 days, except under certain circumstances, and prescribed a method for calculating the amount of interest to be paid.

Med-QUEST sent the company two checks, one in the amount of $975 for the additional translation work, and the other for $192 for the interest payment in lieu of the $272 late fee assessed by the company. The company director thanked us for our assistance.

(08-00421) Calculation of food stamp benefits. A homeless woman complained that the Department of Human Services miscalculated her food stamp benefits and provided her with only $14 in food stamps. The complainant reported that her only income was $942 in monthly Social Security benefits and since she lived alone, her total household monthly income was $942.

In our investigation, we contacted the department to inquire how the complainant's food stamp benefits were calculated. We also reviewed the department's food stamp rules as well as a worksheet used by the department to calculate food stamp benefits.

The department confirmed that the complainant's only income was her Social Security benefits. In accordance with the food stamp rules, the department subtracted the standard deduction of $189 from the complainant's total income of $942, which resulted in a balance of $753. The rules also allow for deductions for monthly expenses for shelter, dependent care, and child support payments, but the complainant did not have any of these expenses. Thus, the complainant's net income for food stamp purposes was $753.

We also found that the department rules prescribe that the "thrifty food plan" developed by the United States Department of Agriculture is the basis for the amount of food stamps allotted a household. According to the plan, for a household of one, the food stamp allotment was $240.

After a household's food stamp allotment is determined, the actual amount of food stamp assistance provided the household is determined pursuant to Section 17-680-28(d), Hawaii Administrative Rules, which states:

> [T]he household's monthly allotment shall be equal to the thrifty food plan for the household's size reduced by thirty per cent of the household's net monthly income as calculated under chapter 17-676.

In the complainant's case, 30% of her net monthly income of $753 was $225.90. Her thrifty food stamp allotment of $240 was reduced by

$225.90, leaving a balance of $14.10. Pursuant to the department's rules, that amount was rounded down to $14, which was the amount of food stamp benefits that the complainant received.

We informed the complainant that the department complied with its rules and properly calculated her food stamp benefits.

(08-00937) Denial of food stamps. A woman received notice in September 2007 that her food stamps assistance would be terminated beginning October 2007 because her income exceeded the limit for food stamps eligibility. Her income was more than $1646, which was the limit for a household of three members.

The complainant questioned her food stamps case worker's computation of child support payments that she received through the Child Support Enforcement Agency (CSEA). Her child support order was for $780 a month, but she received a different amount almost every month. She stated that her case worker told her that in calculating her income each month, she added $780 as child support payment received, whether or not the complainant actually received $780 for the month.

We contacted the complainant's case worker, who informed us that her calculations were based on the actual amount of child support that the complainant received each month. She noted that Department of Human Services (DHS) records were interfaced with CSEA records, so she knew how much the complainant actually received in child support each month.

In accordance with DHS rules, the total income that the complainant received for August 2007, which the complainant was required to report in September 2007, was used to determine her eligibility for food stamps in October 2007.

The case worker informed us that the complainant received three child support payments in August for her children from two different fathers. The payments were for $227, $730, and $290 and totaled $1247 for August. The worker noted that the complainant also received $676 in Social Security, so her total net income for August was $1923. According to DHS rules, the worker subtracted a $189 standard deduction, resulting in the complainant's net income of $1734. Since the net income limit for a family of three was $1646 and her net income was $1734, the complainant was not eligible to receive food stamps for October.

We reported this information to the complainant. The complainant confirmed that she received child support from two fathers and a monthly Social Security payment of $676. However, she reported that she received the $227 child support payment in July, not August, and that she did not

receive a $730 child support payment in August. Thus, her income for August was only $966, not $1923, so she should be eligible to receive food stamps in October.

We brought the complainant's contention to the case worker's attention. After further review, the worker acknowledged that she had erred and the complainant was correct. Thus, she restored the complainant's food stamps eligibility for October. The complainant was happy with the outcome.

(08-02001) Denial of late requests for reimbursement. In 2005, the Department of Human Services (DHS) started a new program called SEE (Supporting Employment Empowerment) Hawaii Work. The program was designed to place public assistance recipients in suitable on-the-job training positions with private employers. The employer sets and pays the employee wages, and for a period of six to twelve months the DHS reimburses the employer the minimum wage plus 14% to cover training and employment-related expenses such as unemployment insurance, workers' compensation, and FICA taxes. In order to receive payment from the DHS, the employer is required to submit a reimbursement invoice on a timely basis.

A company that processed payroll for several employers who participated in the SEE Hawaii Work program complained that the DHS decided to no longer pay invoices that were too old. The complainant admitted that some of the invoices were for wages paid to employees more than a year ago, as some employers were very tardy in submitting payroll information to the company. The complainant acknowledged that they were aware of the requirement that invoices be submitted on a monthly basis, but stated that in the past the DHS made payment on old invoices despite the requirement.

In our investigation, we reviewed the SEE Hawaii Work agreement between the DHS, the employer, and the employee. We confirmed the agreement required the employer to submit invoices for reimbursement at the end of each month for which wages were paid.

We spoke with a program specialist of the SEE Hawaii Work program and learned that in the past, she manually processed all reimbursement invoices for payment, regardless of when they were submitted. In February 2007, the DHS entered into a contract with a private fiscal agent to perform the reimbursement function for the SEE Hawaii Work program. Thereafter, invoices for reimbursement of wages paid prior to February 2007 were not accepted because the fiscal agent's automated system was not set up to accommodate these invoices.

We inquired with the DHS as to whether employers in the SEE Hawaii Work program were notified of the change to a private fiscal agent and

warned that the DHS would cease the past practice of accepting late invoices for payment. We noted that by the DHS's past practice, employers might reasonably expect that their late invoices would be accepted and paid by the DHS.

The DHS informed us it was in the process of notifying the SEE Hawaii Work employers that it would accept and pay reimbursement on invoices for wages that employers paid prior to February 2007, if the invoices were submitted by December 31, 2007, and that overdue invoices submitted after December 31, 2007 would not be paid. The DHS was also in the process of drafting a notice to remind all employers to submit reimbursement invoices within 30 calendar days following the month for which wages were paid to all employees.

We reported this to the complainant, who was grateful for the action being taken by the DHS.

We continued to monitor the DHS's action and later confirmed that the DHS sent a notice to all SEE Hawaii Work employers reminding them to submit their reimbursement invoices in accordance with the time frame set forth in the written agreement, or forfeit the reimbursement. We also noted the amendment made to the agreement stated that the employer shall submit invoices to the DHS or its agent within 30 calendar days following the month for which wages were paid to the employee and that the employer shall forfeit reimbursement for any invoice that was submitted late.

(08-02054) Delay in processing of application for medical assistance. A man complained that his adult son's application for medical assistance was not processed. His son applied for Med-QUEST assistance on November 15, 2007. Twelve days later, his son fell off a 12-foot-high parking structure and suffered multiple injuries. According to the complainant, physicians at the hospital would not provide treatment unless his son could pay for the treatment. On November 28, 2007, the complainant submitted a request to Med-QUEST for expedited processing of his son's application and he contacted our office on December 6, 2007, after the request was not acted upon.

We reviewed Med-QUEST Division rules in Title 17, Chapter 1711, Hawaii Administrative Rules (HAR), titled "Application Processing Requirements." Section 17-1711-8, HAR, states in part:

> **Emergency processing.** (a) An applicant shall be entitled to emergency processing within forty-eight hours or two working days if:

(1) The applicant is suffering from a medical condition for which covered medical services are available; and

(2) Any of the following consequences would result from a medical condition not immediately treated:

(A) Serious risk of disease;

(B) Threat to life or vital function;

(C) Serious health complication; or

(D) Serious irreparable harm.

(b) The department shall determine whether an applicant meets the requirements for emergency processing of the medical assistance application. In order to assist in this determination, applicants shall provide:

(1) A written statement from a licensed physician or dentist with:

(A) The nature of the medical condition;

(B) A statement certifying that immediate medical treatment for the condition is required because of any of the reasons in subsection (a); and

(C) A statement certifying that the urgently necessary medical treatment services will not be available to the applicant without a determination of eligibility or ineligibility for medical assistance by the department; . . .

We spoke with the applicant's Med-QUEST case worker, who informed us that he had not yet determined whether the applicant met the emergency processing requirements. Thereafter, we spoke with the worker's supervisor, who informed us that there were questions as to whether health care insurance was available to the applicant through his employer. The supervisor informed us that if an employer offers health care insurance but the employee declines the insurance, the employee is not eligible for Med-QUEST assistance. Under Hawaii law, employers are required to offer

health care insurance to employees who work more than a certain number of hours per month, but we noted that the applicant reported that he was self-employed.

We brought the Med-QUEST rules to the attention of the supervisor and asked if a determination was made that the applicant was suffering from a medical condition for which covered medical services were available, and if serious risk of disease, threat to life or vital function, serious health complication, or serious irreparable harm would result from a medical condition not immediately treated.

The supervisor checked the applicant's file and reported that Med-QUEST received a Med-QUEST form, "Request for Emergency Processing of a Medical Application," which was completed by the applicant's physician. However, the supervisor did not think the medical conditions cited by the physician qualified the applicant for emergency processing of his application. At our request, the supervisor sent us a copy of the Med-QUEST form.

Upon review of the Med-QUEST form, we found the physician had certified that the applicant was suffering from a medical condition which, if not treated immediately, could result in serious health complications. We informed the supervisor that it appeared the applicant met the requirements for the emergency processing of his application pursuant to Section 17-1711-8 of the Med-QUEST rules. The supervisor agreed to process the application immediately and she assured us that her office would comply with the emergency processing rules in the future.

We informed a grateful complainant that his son's application was approved on December 11, 2007.

(08-03767) Employer not notified of termination of public assistance recipient from the Grant Plus program. In an effort to help public assistance recipients enter the workforce, the Department of Human Services developed the Grant Plus program, which is administered by the department's First-to-Work (FTW) program. The Grant Plus program is a subsidized employment program that diverts a recipient's monthly financial assistance grant to employers to pay a portion of the recipient's wages.

An employer in the Grant Plus program complained that the department refused to pay him the public assistance recipient's grant for September to November 2007 because the recipient had been terminated from the Grant Plus program in June 2007. The complainant contended that the FTW program failed to inform him that the recipient had been terminated from the Grant Plus program.

We spoke with an FTW staff member, who recalled informing the complainant by telephone in August 2007 that the public assistance recipient was terminated from the Grant Plus program in July 2007. Further, after receiving claim forms submitted by the complainant in October, the FTW staff member telephoned the complainant and left a recorded message to again inform the complainant that the recipient was terminated from the Grant Plus program.

The complainant acknowledged to our office that he received the recorded message in October 2007, which stated that the public assistance recipient was no longer eligible for public assistance benefits. However, there was no further explanation that the recipient's ineligibility for public assistance meant that she was terminated from the Grant Plus program. The complainant believed that he was not given timely written notice that the recipient was terminated from the Grant Plus program, so the department owed him reimbursement of the money he paid to the employee for the period in question.

We were unable to resolve the discrepancy between the claims of the FTW staff member and the complainant as to what information was reported to the complainant over the telephone and when it was reported.

We reviewed the Hawaii Administrative Rules pertaining to the FTW and Grant Plus programs, as well as the Grant Plus Memorandum of Agreement between FTW and the employer. However, neither the rules nor the agreement addressed the issue of written notice to an employer when a public assistance recipient is terminated from the Grant Plus program.

As we were unable to determine what was reported to the complainant and when, and without a requirement for written notification of the recipient's termination from the Grant Plus program, we could not conclude that the department failed to give the complainant adequate notice of the recipient's termination from the Grant Plus program. Therefore, we informed the complainant that we could not recommend that the department reimburse him for the period in question.

In order to prevent a recurrence of the problem, however, we recommended a change in the manner in which employers are notified of a public assistance recipient's termination from the Grant Plus program. We asked FTW to provide timely notification to employers, in writing, when recipients are terminated from the Grant Plus program.

The Grant Plus Program Administrator considered our recommendation and consulted the division administrator, who agreed with our recommendation. Thereafter, the Grant Plus program created a termination notice, which FTW staff are now required to send to Grant Plus employers when public assistance recipients are terminated from the Grant

Plus program. Also, an amendment was made to the Memorandum of Agreement form, requiring FTW staff to communicate with employers when recipients are to be terminated from the Grant Plus program.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

(08-00616) Clarification of administrative order for independent medical examinations. A complainant contended that an employee who is ordered to submit to an independent medical examination (IME) by the Department of Labor and Industrial Relations (DLIR) Director must be afforded a hearing to contest the order. In support of his contention, the complainant referred to the language in the DLIR Director's IME order. We learned that all IME orders by the DLIR Director contained the following wording:

> Pursuant to Section 386-79, HRS, you are ordered to submit yourself for examination by (name of medical examiner) on (date and time of scheduled examination). Said examination will be held at (place of examination). Should you refuse to submit yourself to, or in any way obstruct such examination, your right to claim compensation may, after hearing by the Director, be suspended until the refusal or obstruction ceases, and no compensation may be payable for the period during which the refusal or obstruction continues. Employer shall provide claimant with a copy of the report and all correspondence relating to said examination. (Emphasis added.)

We inquired with the DLIR Disability Compensation Division (DCD) about the complainant's contention that the IME order afforded him a hearing to contest the order. We were informed that because the IME order was not subject to appeal, a hearing would not be afforded an employee to contest the director's IME order. The DCD explained that the hearing referred to in the IME order would be afforded an employee who wished to contest the suspension of compensation that may be imposed should the employee refuse to submit to or obstruct the IME.

In our research of the law, we noted that Section 386-79, Hawaii Revised Statutes, states that an employee "shall submit to examination" by a qualified physician or surgeon "whenever ordered by the director." Moreover, Section 12-10-75(c), Hawaii Administrative Rules, states that upon finding that an IME would assist in the disposition of a case or in determining the need for or sufficiency of medical care or rehabilitation, the DLIR Director shall issue an IME order "without necessity of hearing." The same section of

the rules further provides that the IME order was not subject to appeal. Based on our research, we agreed with the DCD that the employee was not entitled to a hearing to contest the IME order.

We recognized, however, how the wording of the IME order might be misconstrued by an employee as establishing a right to a hearing to contest the IME order. We brought the matter to the attention of the DCD Administrator and suggested that clarification of the language was warranted.

The administrator agreed that the language in the director's order should be clarified. Subsequently, we were notified that the information in the IME order was amended to read:

1. Pursuant to section 386-79, Hawaii Revised Statutes, you are ordered to submit yourself for examination by (name of medical examiner) on (date and time of scheduled examination). Said examination will be held at (place of examination). This Order is not appealable. Employer shall provide claimant with a copy of the report and all correspondence relating to said examination.

2. If you refuse to submit to or any way obstruct the ordered examination, your right to claim compensation may, after a hearing by the Director, be suspended until such refusal or obstruction ceases, and no compensation may be payable for the period during which the refusal or obstruction continues.

We agreed that the new IME order clarified when a hearing would be afforded the employee.

DEPARTMENT OF LAND AND NATURAL RESOURCES

(08-02160) Authority of Conservation and Resources Enforcement Officer on private land. Two adults and five teenagers were hunting without authorization on private property owned by a large corporation when they were confronted by an officer of the Division of Conservation and Resources Enforcement (DOCARE), Department of Land and Natural Resources (DLNR). One of the adult hunters complained that the officer was not in uniform, failed to identify himself, and exceeded his authority by pointing a gun at him while using offensive language and demanding the hunter to disarm.

We spoke with the DOCARE Administrator about the complaint. The administrator informed us that an investigation had been conducted because DOCARE received a complaint about the incident. Based on the investigation, the administrator determined that the officer's actions were proper under the circumstances. According to the administrator, the officer was off duty and was helping the landowner put up fences on the private property. The officer had his badge and gun with him because during each of the previous four days the officer saw hunters with guns driving in the area. When the officer came upon the complainant and his group, the complainant was carrying what appeared to be a semi-automatic rifle. The officer identified himself and ordered the complainant to put his weapon down, but the complainant did not immediately comply. The administrator found justification for the use of strong language because the complainant reportedly fiddled with the ammunition clip and worked the bolt of the rifle. A retired officer was present during the incident and supported the DOCARE officer's version of the events that transpired.

Although we were unable to resolve the conflicting versions of what occurred, we questioned whether the authority of a DOCARE officer extended to private lands. The administrator stated that Section 199-3, Hawaii Revised Statutes (HRS), authorized the DOCARE officer to stop and question the complainant on all lands within the State, including private land. Section 199-3, HRS, states in pertinent part:

> **Conservation and resources enforcement officers, duties; other law enforcement officers.** (a) The conservation and resources enforcement officers, with respect to all state lands, including public lands, state parks, forest reserves, forests, aquatic life and wildlife areas, Kaho'olawe island reserve, and any other lands and waters within the State, shall:
>
> . . . .
>
> (6) Enforce the laws relating to firearms, ammunition, and dangerous weapons contained in chapter 134; . . . (Emphasis added.)

We reviewed the legislative history of the statute. We learned that prior to 2004, the statute read in part:

> **Conservation and resources enforcement officers, duties; other law enforcement officers.** (a) The conservation and resources enforcement officers, with respect to all state lands, including public lands, state parks, forest reserves, forests, aquatic life and wildlife areas, Kaho'olawe

island reserve, and any other lands and waters subject to the jurisdiction of the department of land and natural resources, shall:

. . . .

(6) Enforce the laws relating to firearms, ammunition, and dangerous weapons contained in chapter 134; . . . (Emphasis added.)

According to a legislative committee report, the change was made to the statute in 2004 to expand the enforcement authority of the conservation and enforcement program to include all lands and waters within the State. According to legislative testimony, the DLNR requested that DOCARE officers be given authority over illegal activity occurring on lands not under DLNR jurisdiction, including private lands. The testimony cited examples of the need for the change in the law, such as DOCARE officers being able to inspect fish markets on private property, being able to cite people who catch and keep wildlife illegally on private property, or being able to assist another State agency in an emergency.

Based on our review, we concurred with the DOCARE Administrator that DOCARE officers were authorized to exercise their enforcement authority on private lands.

We informed the complainant that according to the law, the DOCARE officer had enforcement authority on private lands and we were unable to substantiate the complaint that the DOCARE officer had acted unreasonably toward the complainant. Although the outcome was not in his favor, the complainant was appreciative of our investigation.

(08-04064) Expungement of an erroneously filed lien. A woman complained that the Bureau of Conveyances (BOC), Department of Land and Natural Resources (DLNR), refused to expunge the lien that it erroneously recorded against her property.

The complainant explained that a homeowners' association filed a lien against her property for her nonpayment of road maintenance fees. The complainant was not a member of the association and did not have a contract with the association to pay the maintenance fees. The homeowners' association submitted the lien to the BOC for filing without a certified court order, and the BOC filed the lien. The complainant requested that the BOC expunge the lien, but the DLNR Chairperson responded that the law did not allow for the expungement of the lien. The complainant was not satisfied with the response and contacted us.

In our investigation, we reviewed correspondence between the complainant and the BOC. We also reviewed sections of Chapter 507D, Hawaii Revised Statutes (HRS), which pertained to nonconsensual common law liens. We also discussed the complaint with the BOC Registrar and a deputy with the Department of the Attorney General.

We found the following sections of Chapter 507D, HRS, to be relevant:

> §507D-2 Definitions. . . .
>
> . . . .
>
> "Nonconsensual common law lien" means a lien that:
>
> (1) Is not provided for by a specific statute;
>
> (2) Does not depend upon, require by its terms, or call for the consent of the owner of the property affected for its existence; and
>
> (3) Is not a court-imposed equitable or constructive lien.
>
> . . . .
>
> §507D-5 Requirement of certified court order.
>
> . . . .
>
> (b) Any claim of nonconsensual common law lien against a private party in interest shall be invalid unless accompanied by a certified order from a state or federal court of competent jurisdiction authorizing the filing of nonconsensual common law lien.
>
> (c) The registrar shall not accept for filing a claim for nonconsensual common law lien unless the claim is accompanied by a certified state or federal court order authorizing the filing of the lien.

Thus, in the absence of a certified court order, it appeared that the BOC should not have recorded the lien against the complainant's property.

In a letter to the complainant, the DLNR Chairperson explained that under the law, the BOC could not expunge the lien, but there were two remedies available to her. The first remedy, under Section 507D-6(b), HRS,

provided that the BOC Registrar shall accept for filing a notice of invalid lien signed and submitted by the party in interest, which in this case was the complainant. The notice of invalid lien would serve to question the validity of the nonconsensual common law lien on file, although the lien would not be expunged. The second remedy, under Section 507D-7(a), HRS, provided that if a circuit court deemed a lien invalid, the court could order the BOC Registrar to expunge the lien and order the lien claimant to pay actual damages, costs of suit, and reasonable attorneys' fees. The court process was the only means to expunge the lien from the BOC files.

We informed the complainant that based upon our review of the law, the DLNR Chairperson was correct in stating that the BOC Registrar is unable to unilaterally expunge the lien. We advised the complainant that the remedial actions available to her by law were for her to file a notice of invalid lien or to pursue action in circuit court to have the lien expunged. The complainant accepted our findings and said she would seek an amendment to the law through her legislators.

DEPARTMENT OF PUBLIC SAFETY

(06-03017) Deductions erroneously made from inmates' paychecks. An inmate complained that 10% of his earnings from a Correctional Industries (CI) workline position was being deducted for deposit into the Crime Victim Compensation Fund, even though he was not incarcerated for a violent offense that required such a deduction.

In our investigation, we reviewed Chapter 354D, Hawaii Revised Statutes (HRS), titled "Hawaii Correctional Industries." We found that Section 354D-12(b), HRS, requires deductions of 5% to 20% from the CI earnings of inmates who were incarcerated for a violent crime listed under Chapter 351, HRS, titled "Crime Victim Compensation Fund." Section 351-32, HRS, lists 17 violent offenses for which the payment of victim compensation may be ordered.

The complainant was incarcerated for drug offenses and not for a violent crime. We discussed the complaint with the CI Administrator, who informed us that 10% was deducted for victim compensation from the CI earnings of each inmate without regard to the offense for which the inmate was incarcerated. The administrator maintained that the deductions from inmates' wages were appropriate because inmates employed by the CI were paid at a higher rate than inmates employed on the regular facility workline. The administrator contended that the deductions were within the CI's

discretionary authority. The administrator also claimed it was difficult to determine which CI inmates were incarcerated for a violent crime listed under Section 351-32, HRS.

We disagreed with the CI Administrator, so we consulted with the deputy attorney general (AG) assigned to the PSD. After several months of discussion and review, the deputy AG informed us that he and his supervisor agreed with our conclusion that deductions from earnings of CI inmates who were not incarcerated for a violent crime listed under Section 351-32, HRS, were improper. The deputy AG met with the CI Administrator who informed the deputy AG that he would cease the deductions from the earnings of inmates who were not incarcerated for a violent crime. According to the CI Administrator, the deductions would be ceased within a month.

After a couple of months, however, the improper deductions continued. Therefore, we wrote to the PSD Director and noted that we found this very troubling since the matter had been under review by CI for over a year, and the PSD legal counsel had deemed the CI's practice to be improper. However, the deductions from the complainant and other inmates continued. We also noted that the PSD had in its possession the information as to which CI inmates were and were not incarcerated for violent crimes listed in Section 351-32, HRS, so CI should be able to quickly determine which inmates should and should not have deductions made from their earnings.

After another three months and further inquiry with PSD officials, the PSD finally ceased the practice of making victim compensation deductions from the CI pay of inmates who did not commit a violent crime listed in Section 351-32, HRS.

Unfortunately, we were unable to share our findings with the complainant as he had been released from custody.

(07-03243) Delayed responses to Step 3 grievances. Inmates under the jurisdiction of the Department of Public Safety (PSD) who have complaints about prison conditions are allowed to file a grievance. If an inmate in a PSD correctional facility is dissatisfied with the grievance response or does not receive a response within the specified time limit, the inmate may file the grievance at two successively higher administrative levels. The grievance system provides a mechanism to identify institutional problems, increase communication, and reduce litigation.

According to the PSD Policies and Procedures, grievances filed at the third and final step are to be responded to within 20 working days

from the date the grievance was filed. The third step respondent is the PSD Institutions Division Administrator, who oversees all of the PSD facilities and wardens.

Our office initiated an investigation upon receipt of numerous complaints from inmates about lack of responses to their third step grievances.

At the time we began our investigation, there were 157 third step grievances that had not been responded to by the deadline, some of which were years overdue. We wrote to the PSD Director to bring to his attention the backlog of grievance responses and to ask what steps would be taken to address the problem. We were informed that a staffing issue had contributed to the delay in responding to the grievances. The director instructed the division administrator to expedite the grievance responses.

We continued to monitor the situation over the next several months, during which time the number of overdue grievances actually increased to 216. We wrote again to the PSD Director, pointed out that the problem had worsened, and asked what further measures would be taken to address the problem. A PSD Deputy Director responded on behalf of the director that he had asked staff who was responsible for preparing responses to the grievances to account for all pending grievances and to remedy the backlog.

We continued to monitor the situation, and approximately two months after we received the deputy director's response, we noted that the number of overdue grievances had again increased, this time to 276. We wrote to the PSD Director yet again.

The deputy director responded that specific actions were being undertaken to reduce the backlog. Staff would review grievances to determine which required no further action due to the release of the inmates who filed the grievances. A number of the more recently received grievances were assigned to two senior administrators, who were provided with clerical and administrative support. As they completed the grievance responses, additional grievances would be assigned to them until all grievances were addressed. The older grievances were assigned to a newly-appointed division administrator who was to respond to no fewer than 10 grievances every week. The PSD anticipated that the backlog would be addressed and resolved within four to five months. We advised the deputy director that we would continue to monitor the department's progress.

Approximately five months later, we checked further and learned that the number of overdue grievance responses had been reduced to 46. We also noted that under the new division administrator, complaints to our office

about the lack of third step grievance responses had virtually ceased. As it appeared that the PSD had taken reasonable steps to address the backlog of overdue grievances, we closed the case in our files.

(07-03252) Change in the grievance procedure. Inmates under the jurisdiction of the Department of Public Safety (PSD) who have complaints about prison conditions are allowed to file a grievance. The process begins with the inmate obtaining a grievance form from staff. The inmate writes the complaint on the top half of a grievance form and is entitled to receive a written response from a staff member, which is written on the bottom half of the same grievance form. The form containing the inmate's complaint and the staff member's response is treated as confidential material. Each PSD grievance form includes three attached carbonless copies for distribution to the inmate, responding staff member, and the inmate's institutional file.

An inmate at a PSD correctional facility complained that a grievance officer violated the grievance procedure by not allowing him to sign the actual grievance form to acknowledge his receipt of a grievance response. The grievance officer sent the complainant a separate form, titled "Inmate Acknowledgement of Receipt of Grievance Response," which was attached to the complainant's copy of the grievance form and sent to him through the facility's in-house mail system. The inmate was instructed to sign and date the acknowledgement form and return it to the grievance officer to acknowledge receipt of the grievance response. The inmate's signed acknowledgment and the date of acknowledgment were necessary in order for the inmate to appeal the response to the next higher administrative level in the grievance process.

In our investigation, we reviewed the PSD Policy No. 493.12.03, titled "Inmate Grievance and Appeals Process." The policy calls for the inmate's signature on the actual grievance form in order to acknowledge receipt of a response, as Section 4.14 of the policy states in part:

> Filing Steps
>
> . . . .
>
> j. The inmate shall acknowledge the receipt of responses at all steps of the complaint/grievance process.
>
> 1) The inmate shall sign and date the response upon receipt.

2) Space shall be provided at the bottom of Complaint/Grievance Form 8215 for this response.

3) Inmates signing for receipt of Complaint/Grievance Form 8215 does (sic) not indicate agreement with response; only that an answer was received. Answers to step one and two may be appealed.

4) An inmates (sic) refusal to sign and accept receipt of Complaint/Grievance Form 8215 ends the process for that particular grievance/subject. (Emphasis added.)

We contacted the grievance officer and pointed out the policy requirement. She was aware of the policy, but informed us that she developed the acknowledgment form and implemented the new procedure in an effort to expedite the timely delivery of grievance responses to the inmates.

Previously, the grievance officer personally delivered grievance responses to inmates and obtained their acknowledgment signatures. This required her to locate the inmate, who might be at various locations within the facility, and proved to be quite time consuming. The difficulty in locating some inmates delayed their receipt of grievance responses. The new procedure allows the grievance officer to utilize the facility's in-house mail system to confidentially deliver grievance responses to inmates in sealed envelopes. The inmate's copy of the grievance form, containing the staff response, is detached from the original and other copies. The inmate's copy is then attached to the "Inmate Acknowledgment of Receipt of Grievance Response" form of the grievance and sent to the inmate to sign, date, and return to the grievance officer through the in-house mail system. Since the inmate only returns the acknowledgment form and keeps the grievance form, the confidentiality of the grievance is protected.

We agreed that the new procedure made the delivery of grievance responses to inmates more efficient and timely, which benefitted the inmates. However, we noted that the new procedure did not comply with the existing written grievance procedure. We brought this matter to the attention of the PSD Compliance Office, which oversees the implementation of the grievance procedure at all correctional facilities.

The Compliance Office agreed that an amendment to Policy No. 493.12.03, Section 4.14j, was required. Subsequently, the PSD Director issued an administrative memo to amend the policy to reflect the new procedure. The memo states in part:

> Effectively immediately Section 4.14j shall include:
>
> 5. Grievance/Appeal responses may be forwarded to an inmate via Privileged, Confidential mail in order to expedite receipt of responses.
>
> a. The canary copy will be enclosed in the envelope with a "Receipt of Acknowledgement" (ROA) form.
>
> b. Inmate will be responsible to sign and date the ROA, sign and date the canary copy; retain the canary copy and return to (sic) ROA to the Inmate Grievance Specialist via the mail depository.
>
> c. No confidential information will be included on the ROA, thus preserving confidentiality.
>
> d. Failure to sign, date and return the ROA will be the same as 14j(4) above, ending the process for that particular grievance/subject.

We informed the complainant that we found the new procedure to be more efficient and that the grievance policy was amended to include the new procedure.

(08-00225) Inmate found guilty of tampering with or obstructing the collection of a urine sample. An inmate in a work furlough program complained that an Adjustment Committee (Committee) found him guilty of failing to provide a urine sample upon request. The complainant stated that he had used the restroom to relieve himself less than a half hour before staff asked him to submit to a urinalysis and alleged that he was not allotted the full two hours to provide the urine sample as required by policy. Therefore, he believed he should not have been found guilty of misconduct.

In our investigation, we reviewed the staff reports and Department of Public Safety (PSD) Policy No. COR.08.10, titled "Drug Detection Program." We also spoke to the facility urinalysis officer.

PSD Policy No. COR.08.10 states in pertinent part:

> 8. If the inmate/defendant is unable to provide a urine specimen 30 ml immediately, he/she shall be detained in a secure room for up to two hours. . . .Staff shall not give the inmate/defendant more than two cups of water. . . .If an inmate/defendant is unable to provide a specimen in two hours (considered a refusal) the inmate/defendant shall be subject to the sanctioning schedule established in PSD policy COR. 13.03 Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations.
>
> . . . .
>
> 11. If an inmate/defendant refuses to submit a urine specimen, it shall be taken as an inference of guilt of a positive test result and shall be sanctioned under the schedule established in PSD policy COR. 13.03 . . .The same sanctioning schedule shall apply to inmates/defendants who tamper or attempt to tamper with urine specimens and/or results.
>
> The inmate/defendant maybe (sic) subject to additional misconduct violation(s) for refusing to obey an order of any staff member.

According to the staff reports, the complainant was asked by staff at 5:20 p.m. to provide a urine sample. Because he was not able to provide the sample immediately, he was placed in a secured room. At 7:25 p.m. the complainant had not yet provided a urine sample, so he was charged with misconduct.

We questioned the urinalysis officer, who informed us that he provided the complainant with two cups of water to drink over the required two-hour period. The officer informed us that the inmate made three attempts to provide a urine sample, but failed to do so.

Based on the policy and the facts of the case, we found that the complainant was properly found guilty of violating the rule that prohibited the use of any drugs, intoxicants, or alcoholic beverages not prescribed by the facility medical staff. We believed that the policy that equated a failure to

provide a urine sample with a positive urinalysis result was reasonable in that inmates could otherwise evade disciplinary action by refusing to provide a urine sample.

We noted, however, that the Committee also found the complainant guilty of "[a]ttempting, tampering, or obstructing the lawful collection of a urine sample." We did not believe it was appropriate to have found the complainant guilty of this charge. The complainant's failure to provide a urine sample during the two hours allotted by policy did not constitute an attempt to tamper with or obstruct the collection of a urine sample.

We spoke with the staff member in charge of the work furlough program and requested a review of the guilty finding for "[a]ttempting, tampering, or obstructing the lawful collection of a urine sample." The staff member conducted a review but upheld the guilty finding.

We thereafter contacted the warden of the facility, explained our concern, and requested his review of the guilty finding. After review, the warden agreed with our analysis and informed us that he would rescind the guilty finding and make an adjustment to the complainant's institutional file to reflect this.

We informed the grateful complainant of the results of our investigation.

(08-00738) Improper use of prosthesis purchase agreement form. In our annual report two years ago, we reported a case in which the medical staff of a correctional facility incorrectly allowed indigent inmates to obtain elective hormonal medication by signing a prosthesis purchase agreement form that allowed the inmates to obtain the medication in advance and reimburse the facility over time. However, according to the Department of Public Safety (PSD) policy, the prosthesis purchase agreement form is to be used for medically necessary prosthetic devices prescribed by a doctor or dentist. Since the elective hormonal medication was not a prosthesis, we recommended that the facility cease its use of the prosthesis purchase agreement form for medications. The facility agreed with our recommendation and ceased the practice.

This year, we learned that an inmate housed at a different correctional facility was allowed to use the prosthesis purchase agreement to obtain elective hormonal medication.

As we did in the previous case, we contacted the facility's medical unit and questioned the appropriateness of the use of the prosthesis purchase agreement for the elective hormonal medication. The facility's medical unit was unsure whether to cease its practice.

Therefore, we contacted the medical director of the PSD Health Care Administration (HCA). After discussing the matter within the HCA, the medical director informed us that the facility's use of the form for medications was improper and the facility's medical unit would be instructed to stop the practice.

(08-00969) "Stacking" of charges. An inmate complained that he was found guilty of misconduct for returning late to a correctional facility from work furlough. He claimed that he was required to return by 7 p.m. and returned at 6:55 p.m., but nevertheless disciplinary action was taken against him.

We found that the complainant was found guilty of four separate charges: (1) deviation from the authorized time of his furlough pass; (2) refusing to obey an order of any staff member; (3) being in an unauthorized area; and (4) violating a condition of any community release furlough program.

In our investigation, we reviewed staff reports and Department of Public Safety Policy No. COR.13.03, titled "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations." We also discussed the matter with facility staff.

The work furlough schedule of the facility's inmates showed that the complainant worked from 6 a.m. to 6 p.m. on Mondays, Wednesdays, Fridays, and Saturdays. On Tuesdays and Thursdays, he worked from 6 a.m. to 4 p.m. The complainant was allowed one hour travel time to return to the facility each day. Since the day in question was a Tuesday, the complainant worked until 4 p.m. and was required to be back at the facility by 5 p.m.

According to a staff report, the complainant did not return to the facility from work furlough by 5 p.m. When staff contacted his workplace to determine whether the complainant was working late, the workplace supervisor reported that the complainant finished work at 4 p.m. and left at that time. The complainant did not return to the facility until 6:55 p.m. When questioned by staff, the complainant maintained that 6:55 p.m. is the usual time he returned from work. The complainant also admitted that he went to a restaurant after work before returning to the facility.

Based on the staff report, we concluded that it was reasonable to have found the complainant guilty of deviation from the authorized time of his furlough pass because of his late return to the facility. We also concluded that it was reasonable to have found the complainant guilty of being in an unauthorized area because he visited the restaurant without authorization. Finally, we concluded that it was reasonable to have found the complainant

guilty of violating a condition of any community release furlough program because his conduct was a violation of the furlough agreement that he signed with the facility.

However, we found the guilty finding on the charge of refusing to obey an order of any staff member to be questionable and contacted the Adjustment Committee (Committee) Chairperson for clarification of the basis for this charge. The Committee Chairperson informed us that the work furlough agreement operates as a standing order, so failure to comply with the agreement resulted in the complainant being found guilty of refusing to obey an order of any staff member. However, we believed that the charges of refusing to obey an order and violating a condition of any community release furlough program were both based on the complainant's violation of the work furlough agreement. It appeared the facility was "stacking" the charges, or bringing multiple charges against the inmate for the same conduct.

We explained our analysis to the facility warden and requested that he conduct an administrative review. Upon completion of his review, the warden concurred with our analysis and expunged the guilty finding for refusing to obey an order from the complainant's records. We informed the complainant of this outcome.

The warden also issued a memo to a staff member who had just been assigned to chair Committee hearings, noting that on occasion he has noticed the tendency of some adult corrections officers to "stack" charges in inmate misconduct reports and instructing the staff member to assist in eliminating and consolidating charges.

(08-02150) Religious diets. An inmate at a correctional facility was approved for a Kosher diet. After he transferred to another facility, the inmate complained to our office that he did not receive the Kosher diet at the new facility.

In investigating the complaint, we learned that a religious diet that was approved at one facility was not automatically continued at another facility. The complainant was required to make yet another request for a Kosher diet at the new facility. We advised the complainant to make the request and informed him that in the meantime, we would investigate why a religious diet approved at one facility was not continued at another facility when an inmate was transferred. The complainant subsequently informed us that he received the Kosher diet about a week after he contacted our office.

According to the Department of Public Safety (PSD), its practice was to require the transferred inmate to make a request for a religious diet at the receiving facility. The staff at the receiving facility would review the request.

Based on our past experience, we believed that a review at the receiving facility would result in an unnecessary interruption of the inmate's religious diet.

We questioned the need to review an inmate's religious diet upon transfer to another facility, as we did not believe that an inmate's transfer would cause a change in his religious beliefs. Thus, we asked the PSD to consider changing its practice.

After consulting staff at the different correctional facilities and at the division level, the Deputy Director for Corrections informed us that the PSD would begin implementing a practice whereby an inmate who had a valid religious or medical special diet and who was transferred to another facility would automatically receive the same diet at the receiving facility for seven days. During the seven days, staff at the receiving facility would review the inmate's dietary needs. At the end of the seven-day period, the diet from the previous facility would expire, and the inmate would receive the special diet that the new facility deemed appropriate. The Deputy Director assured us that staff would be able to complete its review of an inmate's needs within seven days of arrival at the new facility so that the inmate's special diet would not be unnecessarily interrupted.

We found the new procedure to be reasonable.

(08-02158) Guilty finding was not supported by the facts. An inmate at a correctional facility complained that in addition to finding him guilty of assaulting another inmate, the Adjustment Committee (Committee) also found him guilty of refusing to obey an order. He did not contest the guilty finding for the assault, but disputed the guilty finding for refusing to obey an order. The complainant stated that when an adult corrections officer (ACO) ordered that he stop hitting the other inmate, he immediately complied with the order.

In our investigation, we reviewed the staff reports about the incident. We confirmed that the Committee found the complainant guilty of assault. However, the complainant was not charged or found guilty of refusing to obey an order. Instead, the Committee found the complainant guilty of violating the rule that prohibited the use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

According to a staff report, an ACO observed the complainant punch the other inmate in the eye. The ACO yelled at the complainant to stop, at which time the complainant immediately turned around and went back to his

cell. According to a second staff report, another ACO was called to escort the victim to the health care unit and he was eventually sent to a hospital for treatment.

We found that the Committee had sufficient basis to find the complainant guilty of assault. However, the reports did not appear to support a guilty finding for the use of physical interference or obstacle. We spoke with the Committee Chairperson, who informed us that the complainant was found guilty because ACOs were diverted from their normal duties to respond to the assault and escort the victim to the health care unit. The complainant was deemed to have interfered with the ACOs' performance of their normal duties.

We believed that the rule was intended to prohibit an inmate from physically interfering with or using an obstacle to interfere with a staff member's performance of his or her duties. For example, an inmate who physically blocked an ACO's path or closed a door to prevent an ACO from entering a cell would be guilty of violating the rule. In this instance, however, no such physical interference or obstacle was employed by the complainant. Although an ACO had to be called from his post, responding to the incident and escorting the complainant to the health care unit were part of an ACO's duties. The Committee Chairperson disagreed with our analysis and refused to reverse the guilty finding.

We thereafter explained our analysis to the warden. After reviewing the matter, the warden agreed with our analysis and reversed the guilty finding. The warden informed us that the official record would be amended to reflect a finding of not guilty for the charge of physical interference and obstacle.

We informed the complainant of the outcome of our investigation.

(08-02987) Adjustment Committee found inmate guilty of duplicative charges. An inmate complained that a facility Adjustment Committee (Committee) improperly found him guilty of two charges: (1) Refusing to obey an order of any staff member; and (2) failing to perform work as instructed by a staff member.

We contacted the facility and obtained copies of the staff reports on which the findings and disposition of the Committee were based. We found that the complainant, who worked in food services, was ordered by an adult corrections officer (ACO) to push a food cart to deliver meals to inmates being held in segregation. The complainant, who had injured his back, told the ACO that he was on light duty and was unable to push the food cart. However, the ACO inquired with the facility's medical staff, which reported that although the complainant was on light duty, he would be able to

complete the assigned work because the food cart was on wheels, did not exceed the maximum weight he was authorized to lift, and the complainant would not be required to do any excessive lifting or bending. Thus, the ACO ordered the complainant to deliver the food cart to the inmates in segregation, but the complainant refused.

We believed that the complainant was not justified in refusing to deliver the food cart. However, it appeared that the two charges for which the Committee found the inmate guilty were duplicative. The conduct or behavior for which the complainant was disciplined was his refusal to push the food cart, which was the basis for both the charge of refusing to obey an order as well as the charge for failing to perform work as instructed by a staff member.

We contacted the facility warden, explained our concern about the duplicative charges, and recommended that one of the charges be expunged from the complainant's record.

After reviewing the matter, the warden informed us that the charge of refusing to obey an order would be expunged. The warden issued written instruction to the staff to expunge the charge from the complainant's institutional file.

We informed the complainant of the outcome. He maintained that he should be exonerated of both charges and that both charges should be expunged from his file. We disagreed and advised him that we would not be able to assist him further.

(08-03063) Inmate was not returned to island where he was convicted. In order to ease overcrowding in Hawaii's correctional facilities, the Department of Public Safety (PSD) has entered into contracts with operators of private correctional facilities on the mainland to house inmates.

A State senator asked that we look into the case of an inmate who was returned to Hawaii from a private mainland correctional facility in December 2007. The inmate's sentence was to expire at the end of March 2008. He was returned to the island of Oahu rather than to the Big Island (island of Hawaii), where he had been convicted and sentenced. The inmate had a place of residence and a job waiting for him upon his return to the Big Island and his family also resided there. We contacted the inmate, who complained that department staff was not processing his request for a return to the Big Island.

In our investigation, we learned that a PSD policy required that an inmate be returned to the island where he was convicted or sentenced, if requested by the inmate. Policy No. COR.16.07, titled "Return of Inmates to Island of Commitment," states:

> **1.0 PURPOSE**
>
> To specify responsibility for the return of an inmate to the island of their commitment upon discharge from custody or release on parole.
>
> . . . .
>
> **3.0 POLICY**
>
> .1 Upon discharge from custody or release on parole of an inmate, it shall be the responsibility of the Department to return the inmate to the island where they were convicted or sentenced if requested by the inmate.

We contacted PSD staff and were informed that inmates on the mainland were returned to Hawaii on a chartered flight. Previously, the chartered flight made a stopover on the Big Island before flying to Oahu. However, due to an increase in fuel costs, the chartered flight flew directly to Oahu. The PSD then chartered an interisland plane to fly inmates and staff to the neighbor islands, including the Big Island.

After the complainant returned to Oahu, there were two subsequent chartered flights scheduled to the neighbor islands. The complainant was to have returned to the Big Island on the first flight, but at the last minute he was "bumped" in favor of medical staff. The complainant was then scheduled for the second flight, but due to staff oversight he missed the flight. The next chartered flight to the Big Island was not until April 2008, which would be too late because the complainant was to be released in March 2008. The facility on Oahu where the complainant was held was planning to discharge him on Oahu.

After our inquiry, PSD acknowledged its responsibility to return the complainant to the Big Island and purchased a ticket on a regular commercial flight for the complainant. The complainant was grateful for our assistance.

DEPARTMENT OF TRANSPORTATION

(07-03674) Roadside memorial removal. The sudden loss of a loved one to a traffic or pedestrian accident is undoubtedly a tragic event. Family and friends often choose to mourn the loss of their loved one by marking the site of the accident with a memorial of flowers, balloons, stuffed animals, photographs, or religious symbols. While these roadside memorials provide an outlet of grief for the family and friends of the deceased, and a reminder to all who travel our roads of the need for prudent care when driving or walking along our streets and highways, they can also serve as an unfortunate distraction, creating a further hazard to all motorists and pedestrians.

A complainant on the island of Hawaii contacted us about one such roadside memorial that had been allowed, over a two-year period, to grow into more of a gathering area, rather than just a simple temporary memorial. The memorial site along the roadside had been cleared of vegetation, a 20-foot long rock wall had been constructed around the site, picnic tables had been placed, and a shrine and religious symbol had also been erected which was adorned with flowers and necklaces.

Although there is presently no law prohibiting roadside memorials, the Highways Division, Department of Transportation, after consulting the Honolulu Police Department, established a policy in 1997 to deal with this issue on the island of Oahu. The policy allowed memorials to be placed along highways as long as the highway shoulder was wide enough to accommodate disabled vehicles; the memorial was placed as close to the right edge of the shoulder as possible without obstructing the shoulder; and the memorial consisted only of cut flowers in plastic or aluminum containers. The family would be asked to remove the memorial within 30 days, or the department would remove and dispose of the memorial items. The policy also prohibited the placement of memorials on the H-1, H-2, H-3, and Moanalua freeways, or the freeway on and off ramps.

We contacted the Highways District Manager regarding the memorial in question and inquired as to why the memorial was allowed to exist, especially given its size, over such a long period of time. The manager, who was already familiar with the complaint, informed us that the family who placed the memorial was contacted but was reluctant to remove the memorial. Eventually, after meeting with department representatives, the family agreed to remove the memorial within 30 days.

Nearly 90 days later, however, the rock wall, shrine, and religious symbol still remained. The department stated that it was sympathetic to the family's loss and continued to try to persuade the family to remove the items. Eventually, all items except the religious symbol were removed by the family,

which declined to remove it because other religious symbols dotted the highways around the island and were not being removed. The problem was compounded because it seemed that department highway crews were also reluctant to remove religious symbols.

We continued to monitor the department's action to remedy the situation. The department decided that the roadside policy established 10 years ago for Oahu needed to be made applicable throughout the State. Thereafter, there would be no question as to where, when, or how the policy should be applied.

A year after our receipt of the complaint, the policy was finalized and issued by the department director. The policy applied Statewide, not only to roads under the jurisdiction of the Highways Division but also to roads under the jurisdiction of the Harbors Division and Airports Division as well. The policy allowed roadside memorials as long as they are placed as far away from the road as possible, without obstructing pedestrian traffic areas or areas where disabled cars may need to pull off the road. It prohibited memorials on any interstate highway or freeway, including on and off ramps, and limited the memorials to photos no larger than 8-1/2" x 11", cut flowers, lei, and other items that would not create a hazard. The policy also required that families be asked to remove the memorial within 30 calendar days, and if not removed by the families, for the department to remove and dispose of the memorial.

Following the adoption of the updated policy, the Highways Division was to begin removal of all roadside memorials that had stood for more than 30 days. We notified the complainant who was pleased with the final outcome.

(08-00746) Employer late in filing workers' compensation report. Hawaii's workers' compensation law requires an employer to report an employee's injury to the Department of Labor and Industrial Relations (DLIR) within seven business days after the employer learns of such injury, if the injury caused the employee to be absent from work for one day or more or required medical treatment beyond ordinary first aid. The employer's report is made on Form WC-1, "Employer's Report of Industrial Injury."

An airport employee of the Department of Transportation reported an on-the-job injury to his supervisor the day the injury occurred. The injury required medical treatment and kept the employee from returning to work for more than one day. The employee complained to us one-and-a-half months after the date of the accident that his employer had not yet filed the required WC-1 report. This prevented the complainant's healthcare treatment providers from billing for services they provided.

We contacted the complainant's supervisor and were informed that the delay in filing the WC-1 report was due to questions an administrator had about the employee's injury. However, the supervisor was aware that the report was long overdue and informed us that according to the administrator the WC-1 report would be filed soon.

We inquired with the administrator about the delay in processing the WC-1 report. The administrator informed us that he had received a report from another employee that the complainant's claim of injury may be fraudulent. Thus, the administrator wanted to investigate the allegation before completing the WC-1 report. The administrator required additional time in his investigation because of a discrepancy in a report he received and the lack of a diagram of the accident scene.

We inquired with the Disability Compensation Division (DCD), DLIR, which administers the workers' compensation law. The DCD informed us that a decision to accept or deny liability for a work injury was not required to be indicated on the WC-1 report, and that such decision could be made at a later date after the WC-1 report was submitted.

We advised the administrator of the statutory requirement that the WC-1 report be filed within seven business days of the department being informed of an employee's injury. We informed him that even if he had not completed his investigation within seven business days of the complainant's injury, he could have still filed the WC-1 report and provided supplemental information about the claim at a later date. The administrator stated that he now understood this and expressed remorse for the delay that his actions caused in processing the complainant's claim.

Subsequently, we confirmed that the WC-1 report was filed and approved, thus allowing for payment of the complainant's healthcare treatment expenses. The complainant was pleased that he could continue seeking treatment for his injuries with the proper workers' compensation coverage.

(08-00992) Overhanging tree on State property. A woman who lived next door to a State parcel complained that a banyan tree on the State property was not trimmed. She informed us that her husband was struck on the head by a small branch from the tree. She reportedly called various State and County agencies over the course of a year but no one would trim the overhanging tree branches.

We checked the property tax map and confirmed the parcel was owned by the State. We contacted the Department of Land and Natural Resources and found that the lot bordering the complainant's property belonged to the Department of Transportation (DOT).

Upon contacting the DOT, we were advised that the matter would be referred to its maintenance office. The DOT reported that it did not have a record of having received a complaint about the tree in question. Subsequently, a work order was submitted and the tree was scheduled to be trimmed in three weeks.

We informed the complainant and invited her to call us back if the tree was not trimmed. She was happy that the government was taking action on her complaint.

CITY AND COUNTY OF HONOLULU

(06-00531) City department did not promulgate rules. After the terrorist attacks of September 11, 2001, the Department of Facility Maintenance (DFM), City and County of Honolulu, instituted security procedures at the municipal building. One of the procedures required a person entering the building to leave a photo identification with the building's security staff. The identification would be returned when the person left the building.

A woman who refused to provide her photo identification due to her concerns about identity theft complained that the DFM security procedures were not promulgated in accordance with Chapter 91, Hawaii Revised Statutes (HRS), titled "Administrative Procedure."

In our investigation, we learned that the DFM agreed with the complainant's concern about identification theft, so the procedure was discontinued. However, the DFM disagreed that its building security procedures were required to be established as a rule in accordance with Chapter 91, HRS, as it considered the security procedures to be internal management regulations that were not subject to the statutory rulemaking procedure. We found the DFM's response to be reasonable.

In our investigation, however, we also learned that the DFM had not promulgated any administrative rules under Chapter 91, HRS. We believed that all departments, including the DFM, were required by Chapter 91, HRS, to establish certain types of rules. As a county agency, the DFM was subject to the following sections of Chapter 91, HRS:

> **Section 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. (Emphasis added.)

. . . .

Section 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. (Emphasis added.)

Section 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. (Emphasis added.)

We believed that the DFM was required, at a minimum, to promulgate the rules of practice and procedure described in the above-quoted sections of Chapter 91, HRS. We brought the matter to the attention of the DFM and asked whether such rules would be promulgated.

The DFM agreed that the law required it to promulgate rules of practice and procedure. In accordance with Section 91-3, HRS, the DFM published a notice for a public hearing on the proposed rules. The notice explained how the need arose for the DFM to promulgate the rules:

> The proposal is to amend and update the Rules to conform with HRS and administrative rule requirements. The proposed changes to Title 14 is in response to a request to create rules under the Department of Facility Maintenance. Prior to the City's reorganization in 1998, the rules were promulgated

under the existing Building Department. The Rules of the Building Department Governing the Operation and Use of the Facilities of the City and County of Honolulu and Ground Adjacent Thereto, Building Department of the City and County of Honolulu, were the rules governing city facilities and grounds. Since 1998, the City has been reorganized and the newly created Department of Facility Maintenance has been governing the city facilities and grounds. Therefore, the proposed rules are redrafted and re-titled under the Department of Facility Maintenance.

We monitored the case until the rules were finalized and filed at the Office of the Lieutenant Governor as required by law.

(06-03054) Neighborhood store has unneighborly business hours. A man was unhappy with a neighborhood grocery store due to noise and traffic problems created by the store's customers. It was his understanding that the store was allowed to operate in the residential neighborhood because of an agreement with the City and County of Honolulu (C&C), and he wanted the agreement to be terminated.

In our investigation, we reviewed the C&C Land Use Ordinance (Ordinance). We also spoke with staff at the C&C Department of Planning and Permitting (DPP). According to the DPP, the neighborhood grocery store was within an area zoned for residential use. The Ordinance, however, allowed the store to operate within a residential area if the store was granted a minor conditional use permit. In order to obtain such a permit, Section 21-5.470(a) of the Ordinance required a neighborhood grocery store to have occupied its present location prior to October 22, 1986.

The DPP reported that the building which housed the neighborhood store had been constructed in 1925, and building permit records indicated the existence of a store at that location dating back to 1939. Thus, the store met the Ordinance requirement for the permit by having been at its location prior to October 22, 1986.

The owner of the building that housed the neighborhood grocery store applied for and received a conditional use permit in 1999. The permit authorized the use of a portion of the building for operation of a grocery store, subject to the following pertinent conditions:

3. The hours of operation shall be limited to the hours between 7 a.m. and 9:30 p.m. daily.

. . . .

10. In the event of noncompliance with any of the conditions set forth herein, the Director of DPP may terminate all uses approved under this permit or halt their operation until all conditions are met or may declare this permit null and void or seek civil enforcement.

Prior to receiving its conditional use permit in 1999, the store was considered a nonconforming use and its operation was allowed to continue, subject to strict limits placed on nonconforming uses by the Ordinance. The DPP reported that the issuance of the conditional use permit in 1999 brought the building into conformity.

At the completion of our investigation, we wrote to the complainant and explained why the neighborhood store operation was permitted at its present location. With regard to the complainant's concern about traffic hazards resulting from the operation of the store, we advised him to convey his concerns to the Honolulu Police Department and the C&C Department of Transportation Services (DTS), as the DTS studied road conditions to determine whether changes such as the elimination of street parking were needed to improve safety.

After receiving our letter, the complainant contacted our office and stated that he was unaware of the condition that the store's operation was limited to the hours between 7 a.m. and 9:30 p.m. He noted that he observed the store to be open until 10:30 p.m. on many occasions.

We informed the DPP of the complainant's observation. We were informed that due to lack of resources, the DPP inspectors did not work at night and could not confirm the violation. Also, the DPP needed an inspector to verify the store's late hours in order to issue a Notice of Violation, and a statement from the complainant was not sufficient. During the day time, however, a DPP inspector spoke to the store owner. According to the inspector, the owner acknowledged that the store was open until 10 p.m. and claimed he did not know that the store was required to close at 9:30 p.m. The DPP informed us that it may issue a violation the next time the owner kept the store open beyond 9:30 p.m. We so informed the complainant.

Over the next several months, the complainant noted the days that he observed the store to be open past 9:30 p.m., and the DPP issued warning letters to the store owner. Additionally, DPP administration officials who lived in the area made site visits on their own time, but found that the store was not open past 9:30 p.m. on those occasions, so could not cite the store owner for a violation.

We informed the complainant of the DPP enforcement efforts and explained to the complainant why the store owner could not be cited for a violation.

(07-04307) A case of mistaken identity. A man complained that his stepson was unable to renew his driver's license because he was issued an "Order of Requirement for Proof of Financial Responsibility or Suspension" (Order). The Order was issued because of his stepson's alleged conviction of certain traffic offenses.

The complainant contacted the police and was advised that his stepson had the same first and last names as another man. He informed us that his stepson's middle initial was "K," while the other man's middle initial was "W." It was also on record that the two men had different social security numbers, lending further credibility to the notion that they were actually two different individuals. The complainant surmised that the Order was mistakenly placed on his stepson's record.

We contacted the stepson and confirmed that he wanted us to investigate the complaint and to report our findings to his stepfather.

We inquired with the Honolulu Police Department and learned that the man whose middle initial was "K" had no traffic offense convictions, but the man whose middle initial was "W" did. Thereafter, we checked the State Judiciary's Web site for traffic offenses and verified that the man cited for the traffic offenses in question was the man whose middle initial was "W."

We notified the Division of Motor Vehicle, Licensing and Permits (DMV), Department of Customer Services, City and County of Honolulu, of the apparent error. The DMV checked its records again and determined that this was indeed a case of mistaken identity. The DMV subsequently wrote to the stepson to inform him that the Order was rescinded.

The appreciative complainant later confirmed his stepson's receipt of the notice rescinding the Order.

(07-04308) Improper extension of zone change deadline. A man complained that the Director of the Department of Planning and Permitting (DPP), City and County of Honolulu, improperly granted an extension of a 90-day deadline to act on an application for a zone change after the deadline had expired. The complainant contended that any request for an extension of the 90-day deadline should have been made prior to the expiration of that deadline.

We reviewed the documentation that the complainant provided us. We also reviewed Chapter 21, "Land Use Ordinance," Revised Ordinances of Honolulu (ROH).

We found that Section 21-2.60, ROH, authorizes the DPP Director, upon the prior request of an applicant, to grant an extension of up to 30 days for a major permit that required only the director's approval. We confirmed that the applicant requested an extension of the 90-day deadline after the deadline had passed, and the DPP Director informed us that he granted the request pursuant to Section 21-2.60, ROH. Based on our review of Section 21-2.60, ROH, we were of the opinion that to be valid, a request for an extension must be made prior to the expiration of the specified time period.

We noted, however, that the extension provision in Section 21-2.60, ROH, was not applicable in the complainant's case because the application in question was for a zone change. According to other sections of the ROH, the DPP Director does not have sole authority to approve an application for a zone change. Instead, additional actions by the Planning Commission (Commission) and approval by the Honolulu City Council are required.

The ROH provides that within 90 days of the DPP Director's acceptance of an application for a zone change, the director shall deny the application or submit a report and proposed ordinance to the Commission. Within 45 days of its receipt of the director's report and proposed ordinance, the Commission is required to hold a public hearing. Thereafter, within 30 days after the close of the hearing, the Commission is required to transmit the director's report and proposed ordinance, with its recommendation, to the City Council.

As required by the ROH, within 90 days of receipt of the zone change application the DPP Director should have denied the application or submitted a report and a proposed ordinance to the Commission. The ordinance does not authorize the DPP Director to extend the time to act on the application beyond 90 days.

We consulted with the Department of the Corporation Counsel (DCC), which serves as legal counsel to the DPP. After reviewing the matter and contacting the DPP, the DCC informed us that although it was too late for corrective action in the complainant's case, in the future the DPP would not grant extensions of time to act on a major permit application for a zone change.

We explained to the complainant the outcome of our investigation.

(07-04444) Responsibility for a fallen tree. The resident manager of a condominium complained that no government agency would take responsibility for a large tree on the embankment of a stream adjacent to the condominium. A portion of the tree had broken off and fallen onto the condominium grounds two days earlier, and the remaining portion of the tree was leaning at an angle. According to the complainant, termite damage had caused the tree to break. He felt that the standing portion of the tree was a hazard and wanted it removed immediately. The Department of Facility Maintenance (DFM), City and County of Honolulu (C&C), had already cleared the fallen portion of the tree due to safety concerns.

The complainant informed us that he contacted State and County agencies to request the removal of the standing portion of the tree, but the agencies denied responsibility for the tree.

We contacted the Department of Land and Natural Resources (DLNR) for a determination of ownership of the tree. Initially, the DLNR thought the tree was on State land under its jurisdiction, but after speaking with the complainant and conducting a site visit, the DLNR informed us that it would need to do further research on the ownership question.

We accompanied DLNR staff on a subsequent site visit and observed that the top portion of a very tall tree had broken off. It appeared that there was no need for immediate removal of the standing portion of the tree, since there was no pedestrian traffic in the tree's vicinity. It appeared that the tree grew at an angle and did not appear to be in danger of toppling over.

Thereafter, the DLNR informed us that according to its research, the tree was situated on property that was under the jurisdiction of the C&C. The pavement of a C&C street ended at a cul-de-sac which was protected by a guardrail. Beyond the guardrail was the bank of the stream where the tree was located. According to the DLNR, this area was a part of the C&C street right-of-way.

When we contacted the DFM, we were told that another C&C agency, the Department of Parks and Recreation (DPR), was responsible for City trees. The DPR informed us, however, that it is responsible for maintaining trees planted on City sidewalks. Because the tree was located on property that was part of a C&C street, we were referred back to the DFM.

We thereafter contacted the DFM administration, which decided that since it was not certain that the tree was under C&C jurisdiction, it would request that the C&C Department of Design and Construction (DDC) survey the area. The DFM wanted to verify ownership of the tree so that taxpayer dollars were not used to remove a tree that may be on private property.

When we contacted the DDC, we were informed that due to other priorities, the survey could not be done for another couple of months. After the survey was completed, the DDC informed the DFM and our office that the tree was indeed under C&C jurisdiction.

The DFM accepted responsibility but because of the size of the tree, it was necessary to contract a private company to remove the tree. Because of procurement requirements, the contract had to be let for public bidding, which required additional time.

Finally, after several months, the tree was removed. The resolution of the complaint required the involvement of several divisions of the State DLNR and the DFM, DPR, and DDC of the C&C. The complainant was grateful for the action taken.

(08-01252) Reapplication required to receive TheHandi-Van services. A man complained that he was required to reapply every four years to receive services from TheHandi-Van. He stated he was 67 years old and was legally blind, so he should not have to reapply for services.

TheHandi-Van is operated by a private company that is contracted by the City and County of Honolulu (C&C) to provide curb-to-curb service to riders who are certified as being paratransit eligible under the Americans with Disabilities Act. In order to be certified as eligible for service, an applicant must be found to be unable to use a city bus system because he or she is: (1) unable to board, ride, or disembark a city bus without a wheelchair lift or other boarding assistance device; (2) able to independently board, ride, and exit a city bus if it is equipped with a wheelchair lift or other boarding assistance device, but such an equipped bus is not assigned to the route used by the applicant or the boarding assistance device cannot be deployed at the applicant's bus stop; or (3) unable to travel to or from a city bus stop. Age is not a factor in qualifying to receive services from TheHandi-Van.

The Ombudsman does not have jurisdiction over TheHandi-Van since it is a private operation, but we do have jurisdiction over the C&C Department of Transportation Services (DTS), which contracted the services of TheHandi-Van.

In our investigation, we reviewed Chapter 13, Revised Ordinances of Honolulu (ROH), titled "Public Transit," which provides the following:

Article 1. Definitions

> "Special transit service" means the public transit service which supplements the city bus system to serve persons who are paratransit eligible according to the Americans with Disabilities

Act of 1990 (ADA); CFR 49, Part 37, Subpart F, Section 37.123 or persons certified as eligible by the department of transportation services.

. . . .

Article 4. Special Transit Service

Sec. 13-4.3 Access.

(a) Each certified passenger shall be issued a pass, without charge, specifically endorsed for the special transit service by the department of transportation services or its designated representative.

(b) Such pass shall be shown to the operator when so requested and each certified passenger shall pay the fare established in Section 13-4.5 of this article.

(c) The pass shall be effective for four years from the applicant's last birthday. It may be renewed thereafter upon the expiration of the prior term; provided the person requesting such renewal demonstrates at each renewal date that such applicant's mental or physical condition warrants continued status as ADA paratransit eligible . . . .

According to the DTS, the eligibility of all recipients of TheHandi-Van services is subject to periodic review, as disabilities may change over time.

We noted that the law made no exceptions and required the periodic review of all recipients' eligibility. We notified the complainant that by law, all passes to use TheHandi-Van must be renewed every four years.

Appendix

CUMULATIVE INDEX OF SELECTED CASE SUMMARIES

To view a cumulative index of all selected case summaries that appeared in our Annual Report Nos. 1 through 39, please visit our Web site at www.ombudsman.hawaii.gov and select the "Annual Reports" link from the homepage.

If you do not have access to our cumulative index via the Internet, you may contact our office to request a copy.

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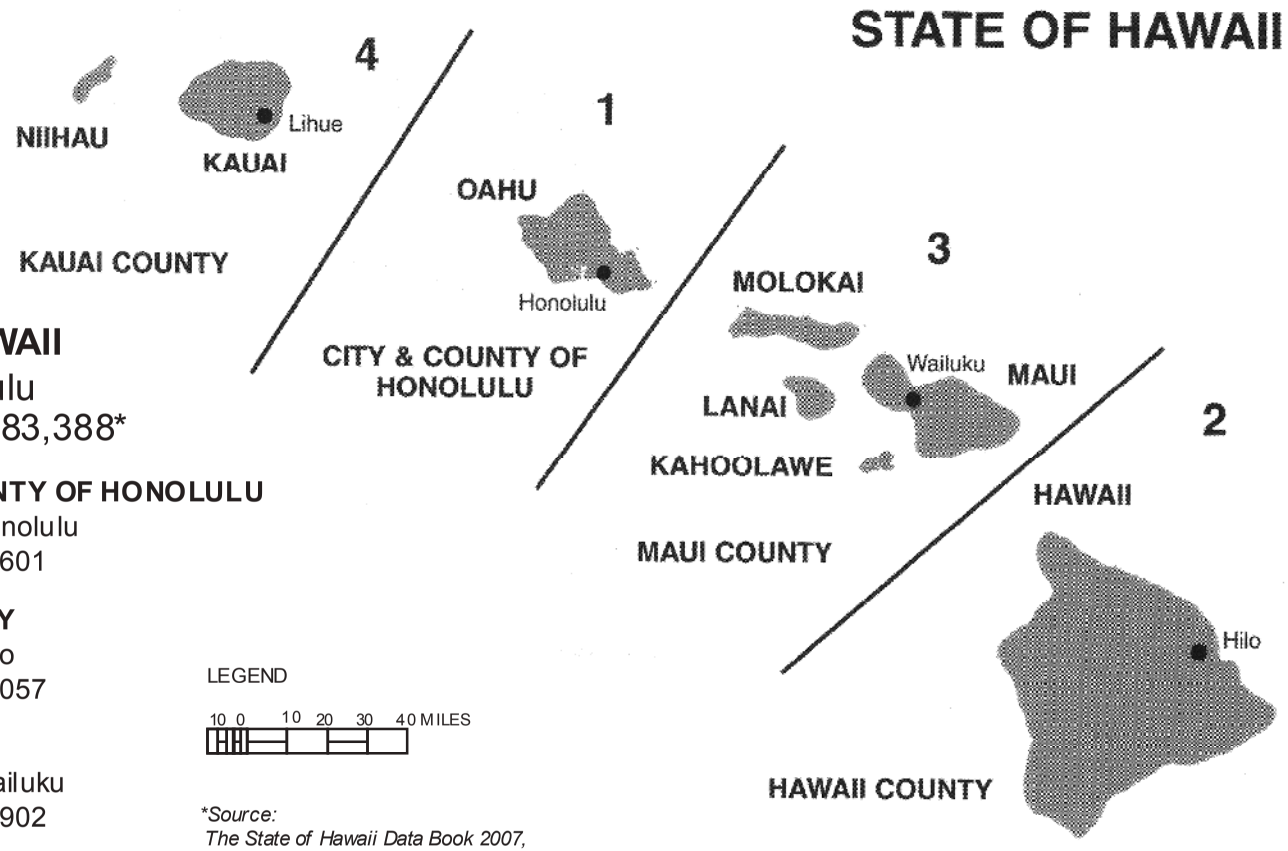

STATE OF HAWAII

Capital: Honolulu
Population: 1,283,388*

1. **CITY AND COUNTY OF HONOLULU**
   County Seat: Honolulu
   Population: 905,601

2. **HAWAII COUNTY**
   County Seat: Hilo
   Population: 173,057

3. **MAUI COUNTY**
   County Seat: Wailuku
   Population: 141,902

4. **KAUAI COUNTY**
   County Seat: Lihue
   Population: 62,828

**Source:*
The State of Hawaii Data Book 2007, A Statistical Abstract, Hawaii State Department of Business, Economic Development, and Tourism, Table 1.06, "Resident Population, by Counties: 1990 to 2007."