



HAWAI'I CIVIL RIGHTS COMMISSION

2009-2010 Annual Report

Linda Lingle
Governor

Darwin L.D. Ching, Director
Department of Labor & Industrial Relations (July 1, 2009 - June 15, 2010)

Pearl Imada Iboshi, Acting Director
Department of Labor & Industrial Relations (June 16-30, 2010)

Coral Wong Pietsch
Commission Chair

William Hoshijo
Executive Director

830 Punchbowl Street, Room 411
Honolulu, Hawai'i 96813
Phone (808) 586-8636
Fax (808) 586-8655

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Mission Statement

The mission of the Hawai'i Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

Overview

Maintaining Civil Rights Law Enforcement in Difficult Times - The Impact of the State Budget Crisis on the HCRC.

The Hawai'i Civil Rights Commission (HCRC) has shared in the budget reduction required of all state agencies during the past two years in response to the worst and unprecedented economic downturn and budget crisis the state has faced. Substantial reduction in state general funds (GF) has been necessary and unavoidable, while the number of discrimination complaints increased during the recession. As the direct result of the reduction in force (RIF), freezes and abolishment of positions, and employee furloughs, the HCRC had to adjust to lost capacity and productivity, while maintaining the highest possible levels of efficiency and effectiveness.

Fair and Effective Enforcement – History and Structure of the HCRC

The state of Hawai'i has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawai'i Constitution provides that "no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." The legislature gave meaning to this commitment by creating the Hawai'i Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For nineteen years the HCRC has enforced state laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. §368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC has five (5) uncompensated volunteer Commissioners. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes.

An Effective and Uniform Enforcement Scheme

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State prosecution of discrimination complaints was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims. As a result, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law.

The intent of the legislature in creating the HCRC was "...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals."¹

The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure "...designed to provide a forum which is accessible to anyone who suffers an act of discrimination."²

Fair Administrative Process

The HCRC is committed to, and its procedural safeguards are structured, to ensure fairness to both complainants and respondents. The HCRC is divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section which hears, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners have authority to adjudicate and render final decisions based on the recommendations of their Hearings Examiner, and oversee the adjudication section through their Chief Counsel.³

The Commissioners and Hearings Examiner are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate ex parte with the Commissioners or Hearings Examiner about any case.

¹ 1989 House Journal, Standing Committee Report 372.

² Id.

³ The Chief Counsel position was unfunded in FY 2010 and then abolished in the FY 2011 budget. The Commissioners appointed the Hearings Examiner as Acting Chief Counsel, and currently appoint hearings examiners on a case by case basis.

The HCRC investigates complaints of discrimination as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC before filing a discrimination lawsuit in state court. Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majority of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

Civil Rights Law Enforcement: State & Federal Law

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing and Urban Development (HUD), respectively. Pursuant to work share and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints.

While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against pregnancy discrimination, sexual harassment, and disability discrimination in employment.⁴

The greater protections in Hawai‘i law are attributable to a strong civil rights mandate contained in the Hawai‘i State Constitution, HCRC statutes, HCRC rules, HCRC Commission decisions, and state court interpretations. In contrast, federal court interpretations of federal civil rights laws have historically resulted in fewer protections against discrimination, particularly in the areas of disability and sexual harassment. The issue of state versus federal standards is an important one, particularly in states like Hawai‘i that have a strong commitment to equal opportunity and non-discrimination.

⁴ The ADA Amendments Act of 2008 (ADAAA) provides new and stronger federal standards and protections against disability discrimination in employment. Pursuant to Act 30, Special Session 2009 and Act 139, L. 2010, the HCRC will interpret state law and adopt rules in conformance with the new stronger protections provided by the ADAAA.

The HCRC Today

During FY 2010, HCRC Commissioners and staff focused their efforts on maintaining enforcement and public education activities. HCRC staff engaged in an internal “Moving Forward” process, discussing and implementing changes to cut costs and improve HCRC procedures and use of resources.

Investigation and charge processing. During FY 2010, the HCRC lost 3 of 11 (27%) of its permanent investigator positions. Coupled with the two days per month furlough of all state employees, these had a significant impact on the HCRC’s capacity to timely and effectively investigate discrimination complaints from intake through investigation and disposition.

Mediation. The HCRC’s voluntary mediation program completed its eleventh year of operation, working with the Mediation Centers of Hawai‘i, community mediation centers on O‘ahu, Hawai‘i, Maui, and Kaua‘i, and private mediators. 34 cases settled in mediation for monetary relief exceeding \$270,000.

Public Education. The HCRC continued to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, professional, civil rights, and other community organizations. Public education included fair housing training on Kaua‘i, Maui, Hawai‘i, and O‘ahu. The HCRC held its annual EEO public training in October 2009 at the Hawai‘i Convention Center, covering basic and advanced topics, including a session on best practices in a down economy.

Litigation. During FY 2010, HCRC enforcement attorneys continued to conciliate and litigate cause cases, in which a determination was made that there is reasonable cause to believe that unlawful discrimination has occurred. The loss of 1 of 3 permanent attorney positions in the RIF, and subsequent staffing changes resulted in higher caseloads and impacted the processing of cases to just resolution.

The HCRC Commissioners and staff continue their unwavering commitment to the HCRC mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education. We renew our pledge to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawai‘i law.

Objectives and Goals for FY 2010-2011 - Moving Forward

During FY 2010-2011, the HCRC will rebuild its capacity for effective and efficient civil rights law enforcement work, including timely investigation, as well as conciliation and litigation of cause cases. The HCRC will work to maintain state civil rights law enforcement efforts despite serious state fiscal constraints and deep budget cuts.

Case Inventory and Processing: In the face of substantial funding and staffing cuts it will be difficult to maintain the progress made on completing investigations in 95% of all complaints within 24 months of filing. The HCRC will continue to reexamine its processes and attempt to avoid substantial increases in case inventory and length of time to investigate cases.

Voluntary Mediation Program: The HCRC will continue to improve and expand its voluntary mediation program to encourage and offer mediation in more cases. The HCRC is continuing to discuss and implement expanded mediation efforts in housing discrimination cases and in later stages of the HCRC process, both in conciliation and litigation of cause cases.

Public Awareness: The HCRC plans to continue its focus on public education activities during the upcoming year. The HCRC will hold its annual public EEO training in October 2010. The HCRC also plans to continue its co-sponsorship of the E Ola Pono program, as it evolves from an art, video and writing Contest for public and private school students statewide into a student-centered campaign for Pono and Safe schools. The HCRC will work with federal, state, business, labor, and community partners to expand outreach and public education statewide, especially on the neighbor islands. The HCRC will continue to explore more public-private partnerships to develop user-friendly public education resources.

The accompanying report is submitted pursuant to H.R.S. §§ 368-4 and 515-9.

Mediation Program

The HCRC's voluntary mediation program successfully completed its eleventh full year on June 30, 2010. Complainants, respondents and the HCRC, with the strong support of the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third persons (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify and settle complaints.

The HCRC voluntary mediation program uses trained community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources. It also eliminates the stress of litigation and allows the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawaii (MCH), a statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators receive training on civil rights laws and settling disputes by HCRC and MCH staff on a regular basis. The HCRC mediation coordinator facilitates the process by explaining, encouraging, referring, and reviewing mediation and its benefits to the parties. There are mediation centers on O'ahu (Mediation Center of the Pacific - MCP), Maui (Mediation Services of Maui -MSM), east Hawai'i (Ku'ikahi Mediation Center in Hilo (KMC), the West Hawai'i Mediation Center in Kailua-Kona, and Kaua'i (Kaua'i Equal Opportunity Mediation Program). The centers charge fees on a sliding scale for the sessions, which can be waived or reduced if there is financial hardship.

Private mediation is also available if the parties choose. Private mediations generally utilize an evaluative approach, in which the law and possible damages are emphasized. Private mediation is an important part of the HCRC mediation program. Parties are free to select commercial private mediators who charge market rates or private mediators from the Access ADR program, a reduced fee program of the MCP.

Mediation can occur at any stage of the intake, investigation, conciliation or hearing process. Mediation is first offered when the complaint is accepted. At this early stage disputes are often easier to resolve because the facts are fresh, damages may not have accumulated, and the positions of the parties may still be fluid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, conciliation or hearing process.

During FY 2010, 52 cases were referred into mediation (including cases carried over from the previous fiscal year). 34 mediations were completed (dispositions) and 18 cases were carried over to the next fiscal year. Of the 34 dispositions, 25 resulted in mediated settlements (73.5%), which was the highest settlement rate in the history of the program. Nine (26.5%) cases resulted in no agreement. All 25 settlements were in employment cases.

The total disclosed monetary value of mediated agreements was \$269,269 with a wide variety of affirmative relief as well. (In 3 cases, the monetary consideration was subject to a confidentiality clause and not disclosed). MCP had 19 settlements; Ku'ikahi Mediation Center had 1 settlement; Mediation Services of Maui had 1 settlement; West Hawai'i Mediation Center had 2 settlements; and there were 2 settlements with private mediators.

The primary bases of discrimination of the 25 settlements were as follows: Sex -- 11 (4 harassment, 6 pregnancy, 1 transgender); Disability -- 6; Arrest & Court Record -- 4; Age -- 2; Race/ Nation Origin -- 2. Most of the completed mediations also included charges on other protected bases. 16 mediated settlements were cases dual-filed with the EEOC.

Although monetary settlements were achieved in most agreements, all mediated agreements involved some form of non-monetary affirmative relief. Examples of non-monetary relief include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) reinstatement and/or restoration of employee benefits;
- 3) formal or informal apologies (by either or both sides);
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) provision of reasonable accommodations;
- 8) changing shifts when practicable;
- 9) policy revisions and postings; and
- 10) clarification of communications between employer and employee, leading to more productive working environments.

Public Education & Outreach

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

The HCRC conducted its annual training in October 2009 at the Hawai'i Convention Center, for several hundred attendees. The theme of the training was "EEO in Hawai'i: Recent Developments" and included an address on the state of civil rights by UH Professor of Law Mari Matsuda, and panels on the ADA Amendments Act and SB 1183, credit history discrimination and HB 31, the Ledbetter Fair Pay Act, and best practices in a down economy. The winners of the E' Ola Pono Art & Video Competition, a statewide student contest co-sponsored by HCRC and the UH Center for Disability Studies was presented by former Commissioner Sara Banks.

HCRC continues to be an active participant in the fair housing public education campaign committee, which is comprised of representatives from the housing departments of the state and each county, the HUD Honolulu Field Office, and the Legal Aid Society of Hawaii's Fair Housing Enforcement Program. The committee holds an annual joint private-public awareness fair housing campaign involving public service announcements on television, radio and print media, an annual Governor's Fair Housing Proclamation, and public education seminars on the Islands of O'ahu, Maui, Kaua'i, and Hawai'i.

The HCRC also worked with the U.S. Department of Housing and Urban Development, the state, the counties, community fair housing organizations, non-profit and for-profit organizations, and businesses to co-sponsor fair housing trainings on all islands. Trainees included the Board of Realtors, National Association of Residential Property Managers, Condominium Council of Maui, and various community associations. In addition, the HCRC conducted state-wide fair housing educational outreach workshops/trainings during April 2010 to increase compliance and prevent unlawful discrimination. The workshops/trainings were held on O'ahu, and in Kailua-Kona, Hilo, Lihue, and Kahului. An estimated 700+ people took advantage of these informative and free workshops/trainings.

HCRC participated in the all-day Community Homebuyer Fair held on Saturday, June 19, 2010 at Kapolei Hale, the City and County of Honolulu's office building in central Oahu. The fair was a one-stop-shop for minority first time homebuyers. Over 30 exhibitors provided information and handouts on housing laws to prospective homebuyers. Resources were provided in English, Spanish, Ilocano, Chinese, Marshallese, Samoan, and Vietnamese. An estimated 375 people attended the fair. HCRC worked with the following organizations in the development, planning and implementation of the Community Homebuyers Fair:

- Hawaii Home Ownership Center
- City and County of Honolulu - Dept of Community Services, Section 8 and Rehabilitation Loan Branch
- Office of Hawaiian Affairs
- Honolulu Board of Realtors
- Hawaiian Community Assets
- Alu Like, Inc.
- Department of Hawaiian Homelands
- Consumer Credit Counseling Services of Hawai'i-CCCS of Hawaii
- Hawaii Public Housing Authority
- Hawai'i Association of Mortgage Brokers
- Hawai'i Credit Union League
- Habitat for Humanity
- Legal Aid Society of Hawai'i
- U.S. Department of Agriculture Rural Development (USDA)
- U.S. Department of Housing and Urban Development
- Mortgage Bankers Association of Hawai'i
- Self-Help Housing Corporation of Hawai'i

During FY 2010 the HCRC also conducted outreach and participated in and/or made presentations at the following:

- Joint outreach events with the U.S. Equal Employment Opportunity Commission (EEOC)
- Joint informal exchanges of information between HCRC and EEOC staffs
- United Nations Human Rights Day
- Honolulu Pride Week activities on several Islands

- Hawaii Government Employees Association Labor-Management Training
- William S. Richardson School of Law, University of Hawai'i, various panels and programs
- Outreach training & flyers on Act 1 (Special Session 2009) adding credit history as a protected basis to the fair employment law
- Center for Alternative Dispute Resolution, State Judiciary
- Alternative Dispute Resolution Section, Hawai'i State Bar Association
- Mediation Centers of Hawai'i
- Hawai'i Dispute Prevention & Resolution
- KNDI Radio: "Know Your Legal Rights" program
- Observance of the newly-enacted National Matthew Shepard & James Byrd, Jr. Hate Prevention Act
- University of Hawai'i Center on Disability Studies
- University of Hawai'i at West Oahu Center for Legal Research & Education
- Hawai'i Foodbank; Aloha United Way; March of Dimes
- Hawai'i Department of Labor & Industrial Relations (DLIR) Job Fair
- Hawai'i Industry Liaison Group
- Annual Martin Luther King, Jr. Holiday Parade & Festival
- Hawai'i Friends of Civil Rights Annual Dinner
- Statewide Fair Housing Month events
- UCLA Law School

The HCRC website is part of a consolidated website which includes all divisions of the Department of Labor & Industrial Relations. The HCRC is grateful for the assistance of DLIR webmaster Casey Cho who posts information and helps make the HCRC website user-friendly. Analysis of the webmaster's detailed monthly index indicates that the site continues to attract broad public interest particularly to those pages on administrative rules, case decisions, and the mediation program.

Caseload Statistics

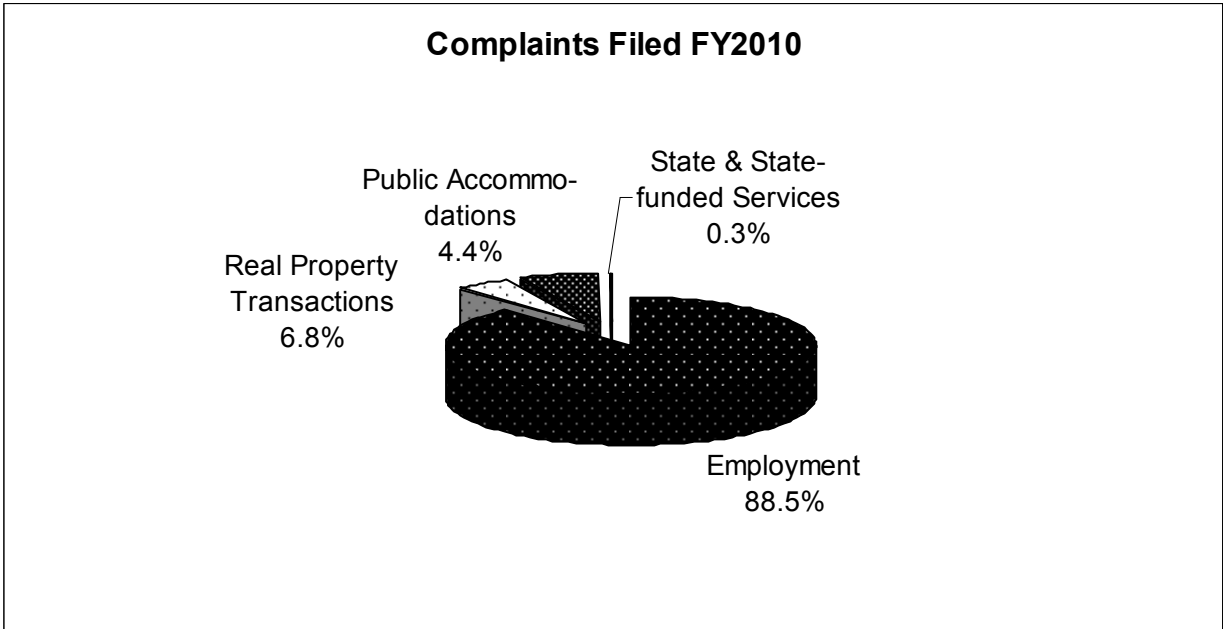
During FY 2010, the HCRC continued its program of improving efficiency without sacrificing effective law enforcement. Notable achievements for FY 2010 include: 1) reduced average processing times; and 2) increased case closures.

Intake

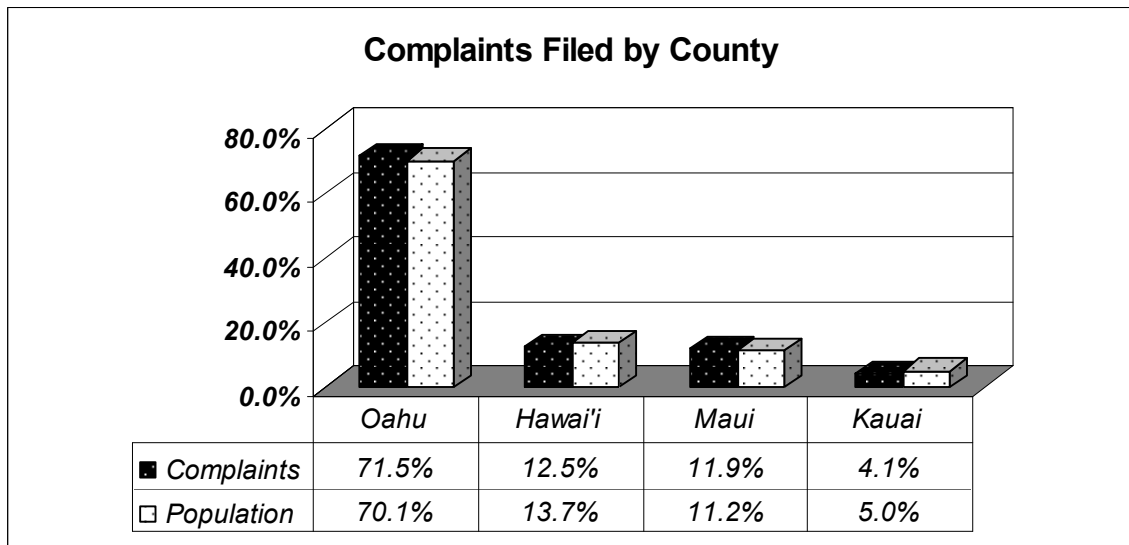
During FY 2010, the HCRC received over 3,932 telephone and walk-in inquiries. HCRC investigators completed 800 intakes, and 714 discrimination complaints were filed with the HCRC, an average of 59.5 complaints a month.

Of the 714 complaints that were filed with the HCRC, 469 complaints originated with HCRC investigators (averaging 39 per month), and another 245 cases originated with the federal EEOC or HUD. These 245 cases were dual-filed under state law with the HCRC.

The 714 cases included 632 employment cases, 32 public accommodations cases, 48 housing cases, and 2 cases involving state and state-funded services. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.

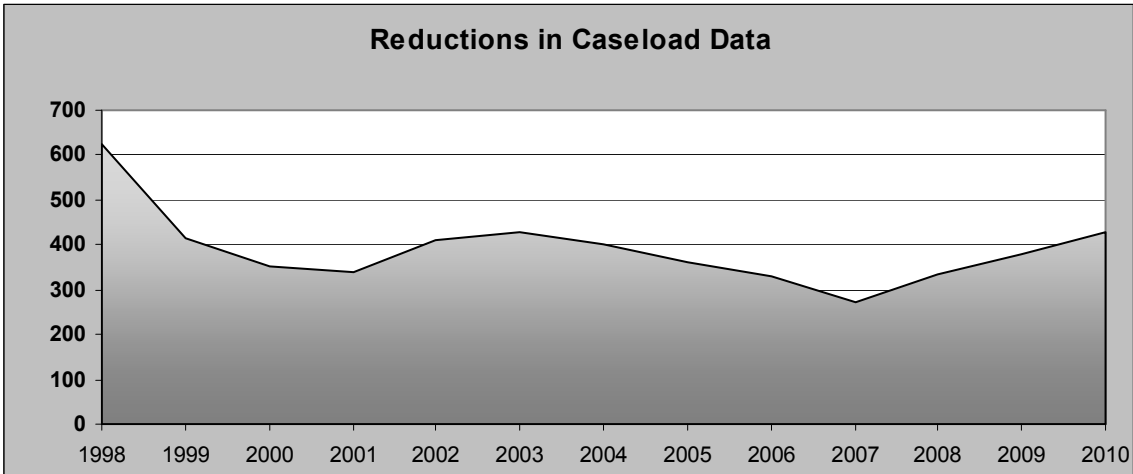


The 714 charges accepted by the HCRC consisted of 511 O‘ahu complaints, 89 Hawai‘i County complaints, 85 Maui County complaints, and 29 Kaua‘i County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state (Honolulu County 70.1%; Hawai‘i County 13.7%; Maui County 11.2%; and Kauai County 5.0%)



Closures⁵

HCRC investigators and attorneys closed 452 cases during FY 2010 (an increase of 51 cases from FY 2009), for an average closure rate of 37.6 cases per month (up from 33.4 cases per month in FY 2009). HCRC investigations resulted in cause determinations in 15 cases. As of June 30, 2010, there were 429 cases pending with HCRC investigators.



The average period for case closure by investigators was 326 days, as compared to 332 days for FY 2009, 333 days for FY2008, and 371 days for FY 2007. A review of this fiscal year shows the following reasons for investigative closures:

⁵ ANALYSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations that result in cause determinations. Generally, the reason for this distinction is that cases are not closed upon issuance of a notice of cause, but are conciliated, and, if conciliation fails, are docketed for hearing.

Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions constitute between 15-25% of the total of those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties.

During FY 2010, HCRC investigations resulted in 15 cause determinations, and 63 cases were closed on the basis of pre-determination settlement or resolution between parties. 298 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determination and predetermination settlement/resolution (78) to those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties (376) for this fiscal year is 4.82.

	No. of Cases	% of Subtotal	% of Total Closures
Merit Closures			
Resolved by Parties	51	15.38%	11.67%
Pre-Determination Settlements	12	3.15%	2.75%
Cases Resolved by Attorneys	20	5.25%	4.58%
No Cause Determinations	<u>298</u>	<u>78.22%</u>	<u>68.18%</u>
Subtotal	381	100.0%	87.18%
Non-merit Closures			
Complainant Elected Court Action	36	64.28%	8.24%
No Jurisdiction	4	7.14%	.91%
Complaint Withdrawn	3	5.36%	.69%
Complainant Not Available	2	3.57%	.46%
Complainant Failed to Cooperate	8	14.29%	1.83%
Failure to Accept Just Settlement	0	0%	0%
Bankruptcy of Respondent	0	0%	0%
No Significant Relief Available	<u>3</u>	<u>5.36%</u>	<u>.69%</u>
Subtotal	56	100.00%	12.82%
Total Number of Closures	431		100.00%

Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

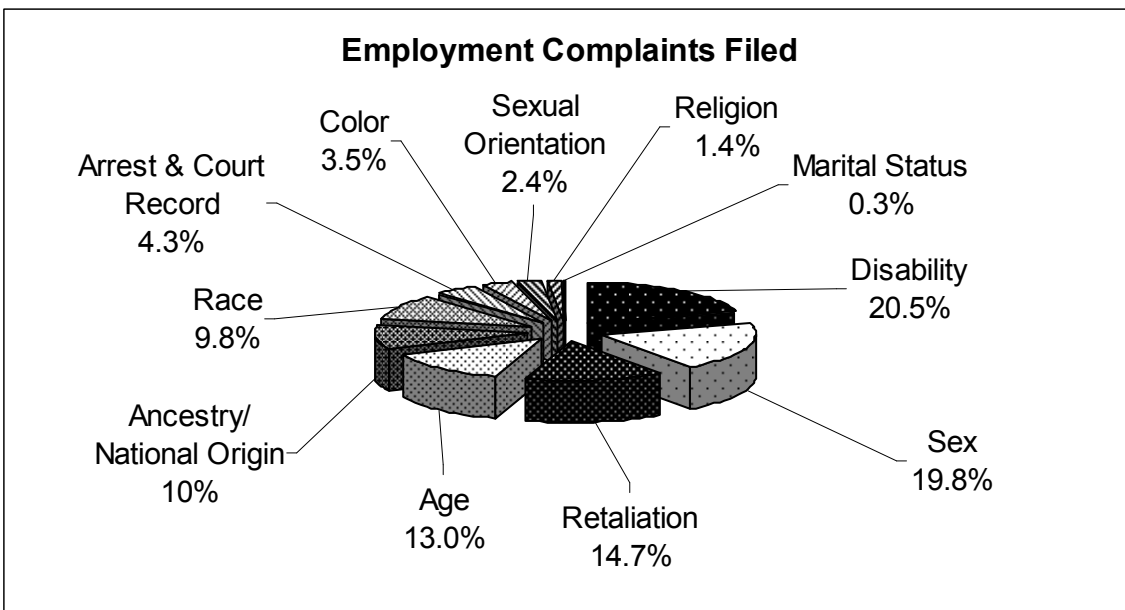
The HCRC has a work-share agreement with the EEOC. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 632 employment cases were accepted by the HCRC. HCRC was the intake agency

for 398 of these cases, and HCRC dual-filed another 234 cases originating with EEOC.

Of the HCRC-originated cases, 56% were also filed with EEOC. Of the 632 employment complaints filed, the bases most cited were disability, in 130 cases (20.5%), sex, in 125 cases (19.8%), and retaliation in 93 cases (14.7%). Of the sex discrimination complaints, 32 (25.6% of all sex cases) alleged sexual harassment and 43 (34.4% of all sex cases) were based on pregnancy.

Age was the fourth most cited basis with 82 cases, representing 13.0% of all employment cases, followed by ancestry and national origin in 65 cases (10.3%), race in 62 cases (9.8%), arrest and court record in 27 cases (4.3%), color in 22 cases (3.5%), sexual orientation in 15 cases (2.4%), religion in 9 cases (1.4%), and marital status in 2 cases (.3%). There were no cases based on child support obligations, National Guard participation, or breast feeding.

The case closure period averaged 347 days for the 334 employment cases that were closed or caused by HCRC investigators during FY 2010.



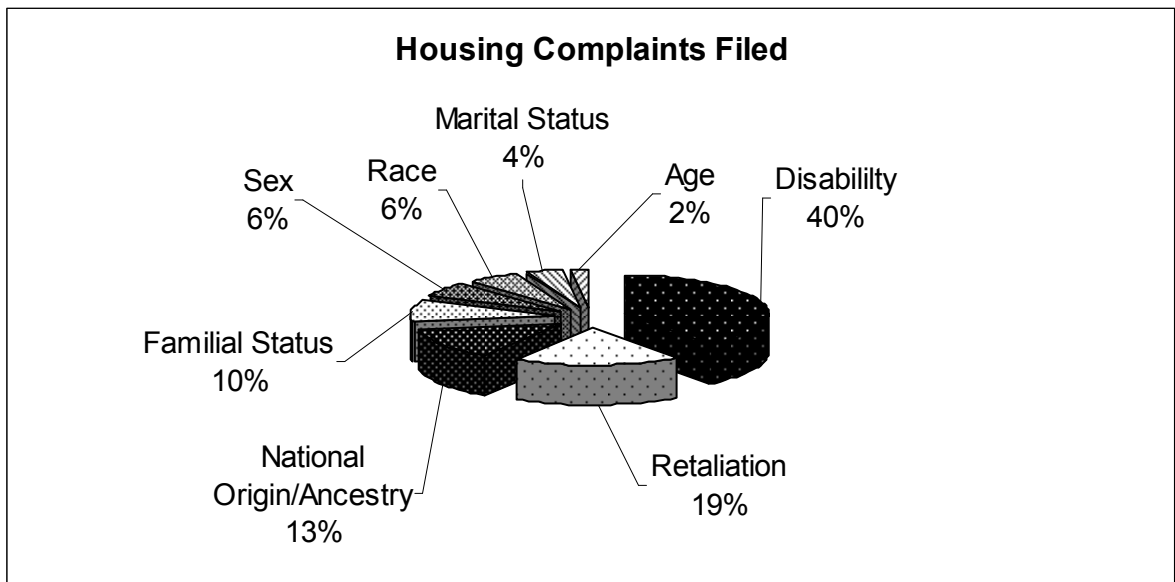
Housing Cases

H.R.S. Chapter 515 is Hawai'i's fair housing law. It prohibits discriminatory housing practices based on race, sex, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

The HCRC has a cooperative agreement with the HUD. HUD refers most of the Hawai'i complaints it receives regarding unlawful housing discrimination to the HCRC for investigation.

During FY 2010, the HCRC accepted 48 cases of housing discrimination. There were 19 cases based on disability status (40%); followed by 9 cases based on retaliation (19%); 6 cases based on national origin (13%); 5 cases based on familial status (10%); 3 cases each based on race (6%) and sex (6%); 2 cases based on marital status (4%), and 1 case based on age (2%). There were no cases based on color, HIV infection, or religion.

Housing case closures averaged 129 days for the 41 cases closed or caused during FY 2010.

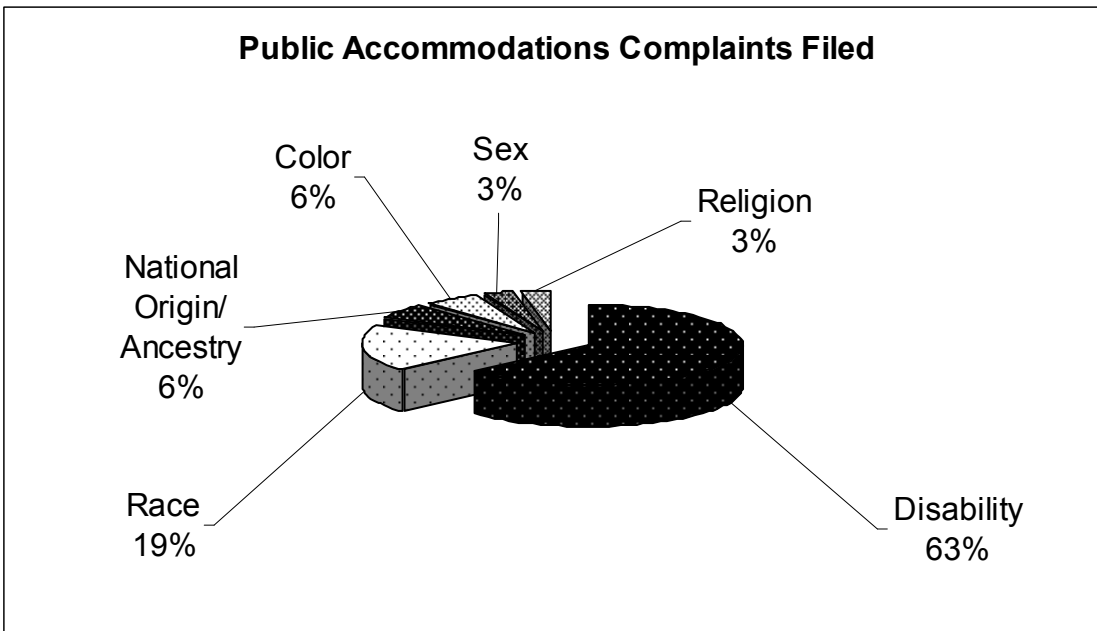


Public Accommodations Cases

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny, or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, sexual orientation, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 32 new cases of public accommodations discrimination were accepted. Of these, 20 cases were based on disability discrimination (63%); 6 cases were based on race discrimination (19%); 2 cases each were based on national origin discrimination (6%) and color (6%) and 1 case each based on sex (3%) and religion (3%). There were no cases based on sexual orientation.

Public accommodations case closures averaged 327 days for the 52 cases closed (or caused) during FY 2010.



Access to State and State-Funded Services Cases

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

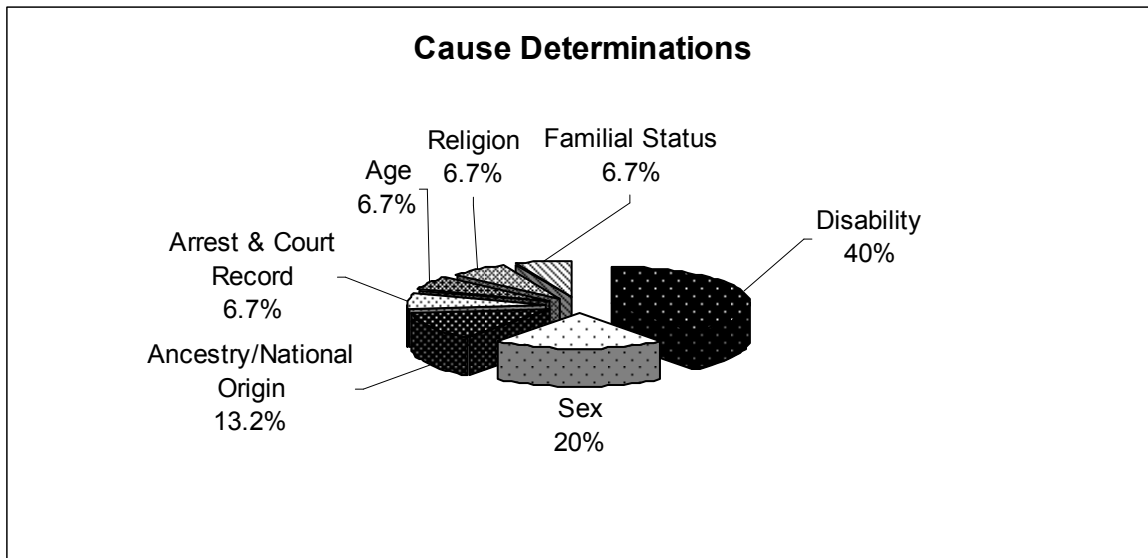
During the fiscal year, there were 2 cases filed under § 368-1.5. Five cases were closed during FY 2010. Access to state and state-funded services case closures averaged 515 days for the 5 cases closed or caused during FY 2010.

Cause Cases

When the investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2010, 15 recommendations for cause were brought forward for legal action. Of these cases, 6 (40.0%) were employment cases, 6 (40.0%) were housing cases, 2 cases involved access to state funded services, and 1 case (6.7%) involved public accommodations.

Of the 15 investigations with a cause recommendation, 6 were based on disability (40%); 3 were based on sex (20%); 2 were based on ancestry/national origin (13.2%); and 1 each was based on familial status, age, religion, and arrest and court record (6.7% each).

During FY 2010, enforcement attorneys closed 20 cases, and 7 of these cases (35%) were negotiated settlements.



Case Settlements

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2010 the HCRC continued to successfully obtain monetary relief through settlement of complaints. Of the 20 closed cause cases, HCRC attorneys obtained monetary settlements totaling \$129,500. In the 70 cases settled prior to an investigative finding, monetary relief exceeded \$301,005. This figure includes both pre-determination settlements obtained through HCRC investigators (\$31,736) and investigative settlements obtained through the HCRC mediation program (\$269,269). Collectively HCRC's monetary settlements for FY 2010 totaled \$430,505.

In addition to monetary relief, significant affirmative relief was obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely contain various types of affirmative relief including the development and implementation of non-discrimination policies, employee and supervisor training on non-discrimination policies, posting non-discrimination policies, and publishing notices informing the public of HCRC's role in enforcing state non-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2010, there were complainants who received letters of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases were resolved when an employer, housing provider, or public accommodation corrected an unlawful discriminatory policy or practice after notice of the violation. During FY 2010, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation or mediation and describe the relief obtained during FY 2010:

- In a case involving sex discrimination, a public housing provider agreed to notify all tenants and to translate the federal Violence Against Women’s Act rules detailing public housing protections for battered persons and their families. Disputed back rent fees were also waived.
- In an employment case involving sex discrimination on the bases of pregnancy, the complaint settled for \$10,000 plus affirmative relief.
- In a housing case involving a refusal to rent to a family with minor children, the complainant settled for \$2,500 and affirmative relief including the adoption of a non-discrimination policy and training.
- In an employment case involving the denial of a reasonable accommodation, the complaint settled for \$10,500 plus affirmative relief including the posting of the employer’s non-discrimination policy.
- In an employment case involving sex harassment the complaint settled for \$5,056 and affirmative relief including the distribution of the employer’s non-discrimination policies to all current employees.

HCRC Warning Letters

In an effort to prevent future or recurring problems, the HCRC provides respondents with “warning letters” advising them of unlawful or potentially unlawful practices that the HCRC discovers during the course of its investigation of other claims against the respondent. In those instances in where the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed, and the HCRC investigator finds evidence of other unlawful practices (such as a discriminatory written policy, employment application, or conduct in the workplace that could rise to the level of unlawful harassment if repeated), the HCRC will advise the respondent of the potential violations and provide the respondent information about how it can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

Case Decisions

Contested Case Hearings

During FY 2010 one case was docketed and proceeded to contested case hearing.

Litigation

Hoshijo/Bowes v. Kakar housing sexual harassment case

On March 16, 17 and 24, 2010 the Commission held a contested case hearing in William D. Hoshijo, Executive Director on Behalf of the Complaint filed by Elaine M. Bowes vs. Michael Kakar, Docket No. 09-001-H-SH. This case involved allegations of sexual harassment in housing.

The Hearings Examiner concluded that Respondent Kakar engaged in quid pro quo sexual harassment when he conditioned the rental of his unit at a price Complainant could afford by requesting sexual favors from her. However, the Hearings Examiner concluded that Respondent did not subject Complainant to hostile environment sexual harassment (HESH). Complainant Bowes was a 61 year old female who was looking for rental housing on Kauai. She intended to pay for her rental with a HUD Section 8 housing voucher, which limited her to rental payments of \$900 per month. Respondent Kakar sought to rent his unit for \$1,100 per month and after showing Complainant the unit, initially rejected her as a tenant because she could not afford that amount. Two weeks later Respondent telephoned Complainant and invited her to a second viewing of the unit, which was located behind his house. After this viewing Respondent invited Complainant into his home, ostensibly to see some renovations. He then offered her wine, led her into his bedroom to look at a picture and encouraged Complainant to sit with him on his bed. After Complainant refused and walked back towards the front door, Respondent followed her, complimented her physical appearance, made other sexual comments and invitations, and told Complainant the rent was flexible and that he could lower it and make it work for her. Respondent became angry when Complainant refused his advances and when she left.

On October 1, 2010 the Commission issued a final decision in this case. The Commission utilized state employment law sexual harassment standards and tests to determine whether sexual harassment occurs in the fair housing context. The Commission affirmed the Hearings Examiner's conclusion that Respondent discriminated against Complainant by engaging in quid pro quo sexual harassment. The Commission also affirmed the Hearings Examiner's conclusion that Respondent did not engage in hostile environment sexual harassment because his conduct was not severe or pervasive. The Commission awarded Complainant \$2,500 in compensatory damages for emotional distress and \$10,000 in punitive damages because Respondent's quid pro quo harassment was intentional, malicious and with a conscious indifference to civil obligations and consequences. The Commission also ordered Respondent to pay costs and penalties for his failure to comply with discovery orders and ordered equitable relief, including: a) a cease and desist order; b) requiring Respondent to develop and implement a written anti-discrimination policy and provide that policy to all applicants and tenants; and c) requiring Respondent to publish the results of the contested case.

Legislation

One bill relating to civil rights was enacted during the 2010 legislative session.

S.B. 2565, enacted as Act 139, extends the deadline for the HCRC to adopt administrative rules to minimally conform to the new disability definitions contained in the Americans with Disability Act Amendments Act (ADAAA). The ADAAA was passed in 2008 to correct several U.S. Supreme Court decisions that interpreted the definition of disability more narrowly than Congress intended. Under Act 139, the HCRC is required to complete the rulemaking process within one year after the EEOC finalizes its new ADAAA guidelines and in the interim apply, at minimum, the ADAAA definitions. The act also amends H.R.S. §368-4 to define “confidential witness” as a witness who is not a complainant or respondent, who requests that his or her statement be kept confidential, and whose request is approved by the Executive Director.

Appendix

Overview

The Hawai'i Civil Rights Commission (HCRC) was established under Act 219, L. 1988, and Acts 386 and 387, L. 1989.

The HCRC's enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex, sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. Certain bases are not protected under all HCRC laws.

The HCRC exercises jurisdiction over Hawai'i's laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5). Under its statutory mandate, the HCRC receives, investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state's discrimination laws.

The HCRC has five (5) uncompensated volunteer Commissioners who are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and their commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. During FY 2010 the HCRC had a staff of 28 persons, divided into separate enforcement and adjudication sections.

Administrative Procedure

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination¹ because of a protected bases,² and,
- 2) The unlawful discrimination occurred within the previous 180 days.³

Where appropriate, after a complaint is filed with the HCRC, the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. HCRC investigators are impartial and gather evidence to allow the Executive Director to make a determination in each case. The HCRC investigator collects, reviews, analyzes documents, and contacts and interviews witnesses. Some witnesses may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the course of the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.⁴ If conciliation is unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complaint before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present his/her case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30

days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.⁵

The HCRC enforcement and administrative hearing process is more cost effective than litigation in court. It provides for the investigation of complaints and access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-jurisdictional or non-meritorious complaints, or with complaints that can be closed or settled in the HCRC's administrative process. In fact, the great majority of complaints filed with the HCRC are resolved or disposed of without resort to the courts.⁶

Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents, in Hawai'i and across the United States, provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

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- 1 "Unlawful discrimination" may occur in any of the following ways:
- a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a "protected basis." Examples of disparate (unequal) treatment include: firing an employee because of her race, her age, or because she is pregnant; refusing to serve a person because of his race or his disability; refusing to rent to a person because of her race; or refusing to rent to a family because it has young children.
 - b. Reasonable Accommodation – this is the second most common way that discrimination appears; it occurs when an individual is denied a "reasonable accommodation" designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing impaired customer into a taxicab because he is accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
 - c. Disparate Impact -- the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test that has a "disparate impact" on persons with a particular "protected basis." Examples of disparate impact include: a pre-employment test that includes a number of

questions that are not job related but have the effect of disqualifying a large number women, or men, or any other protected basis.

- ² “Protected basis” is the criteria that it is unlawful for a respondent to discriminate upon. Protected bases vary depending on the statute involved:
- a. State Funded Services (Chapter 368, H.R.S.) The only protected basis is disability.
 - b. Employment (Chapter 378, Part I, H.R.S.) The protected bases that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record or credit history.
 - c. Public Accommodations (Chapter 489, H.R.S.) The protected bases that a public accommodation may not discriminate on are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, ancestry, or disability.
 - d. Housing (Chapter 515, H.R.S.) The protected bases that an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate on are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

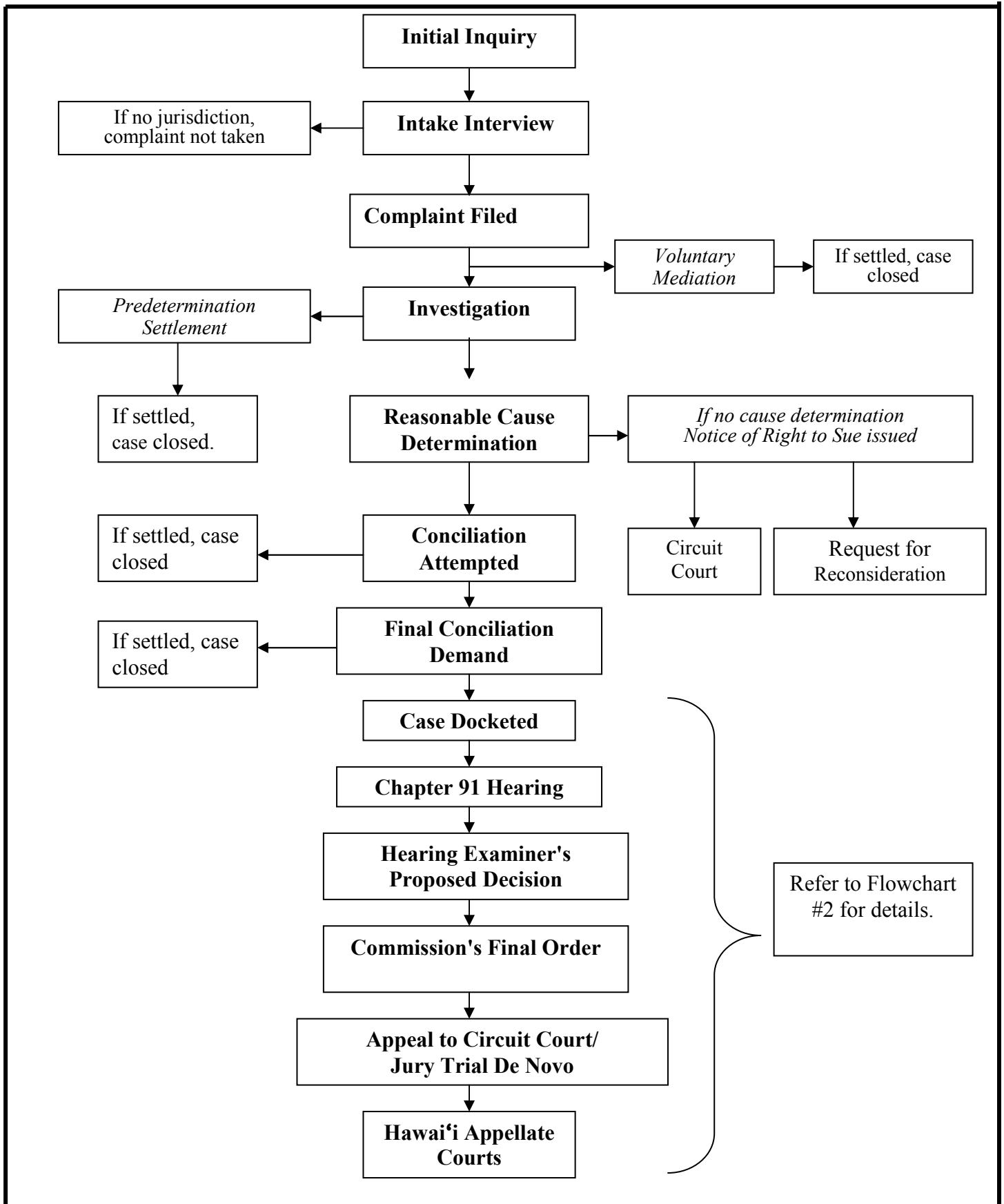
³ Complaints filed with the HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

⁴ During FY 2010, of all investigative and attorney 437 case closures, 8.24% (36) were closed on the basis of the complainant electing court action. The remaining cases (396) were closed on the following basis: in 68.98% of the cases (298), the Executive Director found no cause and dismissed the complaint; 14.42% (63) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 4.58% (20) of the cases were resolved by staff attorneys, and of the remaining 4.58% of the cases (20) were closed because there was no jurisdiction, the complaint was withdrawn, the complainant was unavailable and could not be located, the complainant failed to cooperate, or no significant relief available.

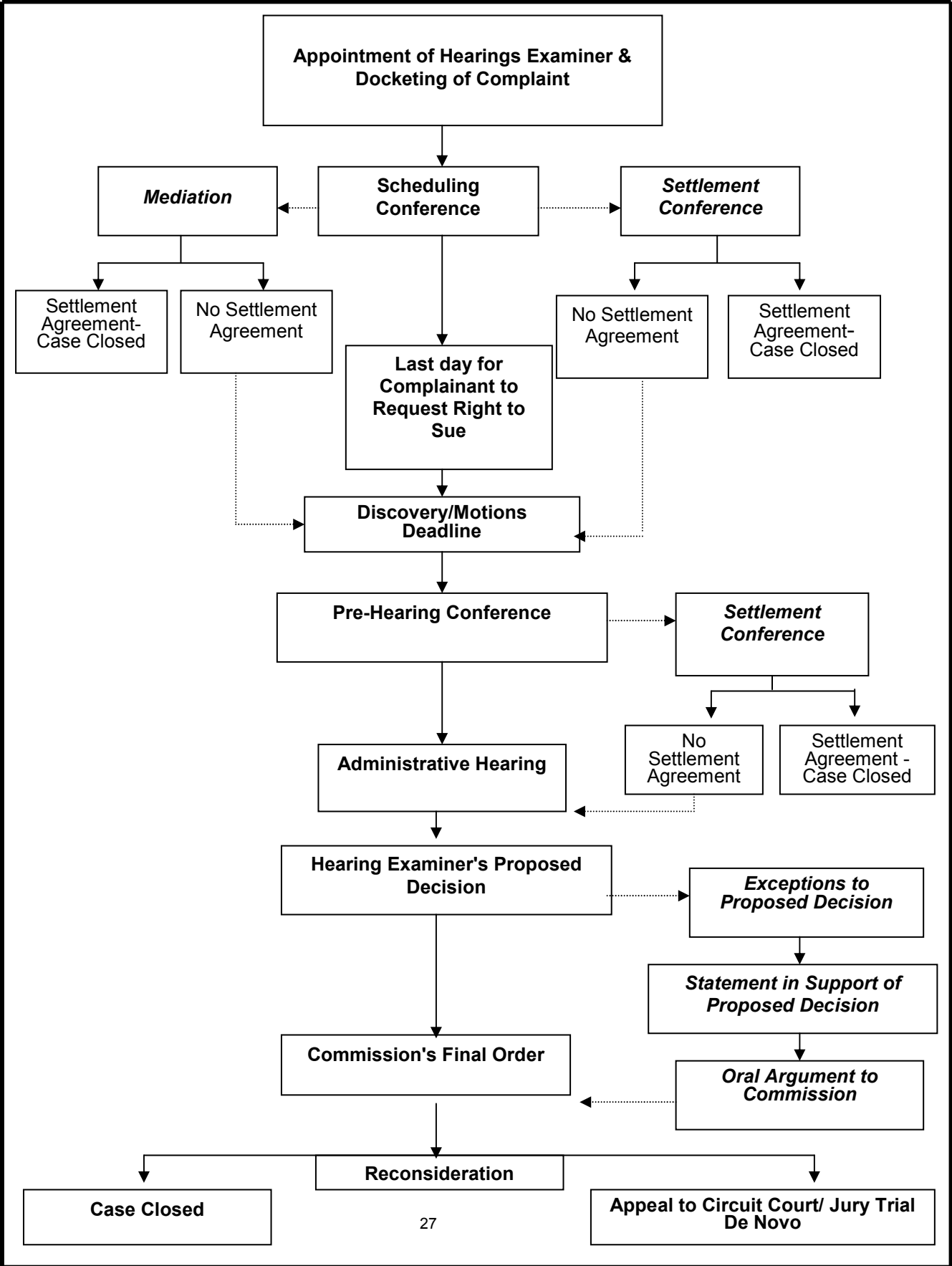
⁵ The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllynne Sims, et. al.*, 101 Hawai‘i 438, 71 P.3d 389 (2003), the Hawai‘i Supreme Court held that “a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC.”

⁶ HCRC contested case procedures are illustrated in Flowchart # 2.

HCRC Procedural Flowchart #1



**HCRC Contested
Case Flowchart #2**



HCRC Commissioners

Coral Wong Pietsch

Chair (terms 2003-2007, 2007-2011)

Coral Wong Pietsch is the Senior Civilian Attorney for the U.S. Army Pacific. In this position she oversees the personnel and labor law practice at Headquarters, U.S. Army Pacific Command, as well as the ethics program and the environmental law program. She is also responsible for providing advice and guidance on international law issues in the U.S. Army Pacific Command. Ms. Pietsch is a retired Brigadier General and was the first female general in the 231-year history of the U.S. Army Judge Advocate General Corps. She is also the first Asian American female to reach the rank of Brigadier General in the Army. From 1986 to 1991 she served as Labor Counselor for the U.S. Army Support Command Hawai'i and was responsible for providing training to managers and supervisors on Title VII, the Rehabilitation Act, and sexual harassment. She has been honored by the Organization of Chinese Americans, the Catholic University of America, Honolulu YWCA, and Hawai'i Women Lawyers for her accomplishments. She is a frequent presenter on her experiences as a Rule of Law Advisor in Iraq.

Les Ueoka

Commissioner (terms 2005-2008, 2008-2012)

Les Ueoka is Assistant General Counsel for Hawaiian Telcom, formerly known as Verizon Hawaii and GTE Hawaiian Tel, prior to which he was in private practice. Currently Mr. Ueoka is serving his second four-year term as a commissioner on the Hawaii Civil Rights Commission. He strongly supports the Commission's educational outreach efforts, including its annual Pono art and video contest championed by former commissioner Sara Banks. He also has advocated to enhance the Commission's research and policy review efforts.

Mr. Ueoka serves on the Oahu Metro Board of the American Heart Association. In 2007 Mr. Ueoka was awarded the Association's Impact Award, the highest award given annually to an individual, group, corporation or foundation that serves admirably, exhibits an earnest devotion to and has made a remarkable impact on the mission of the Association. Mr. Ueoka serves as a trustee, and was formerly the director of development, of the 442nd Regimental Combat Team Foundation and is a member of the Sons and Daughters Chapter of the 442nd Veterans Club. In addition, Mr. Ueoka is a director and vice president of Hawaii Opera Theatre. Mr. Ueoka has served as a director of Gregory House Programs and as an Assistant Scoutmaster to Troop 325, Aloha Council, Boy Scouts of America.

Mr. Ueoka was born in Honolulu, Hawai'i and graduated from Iolani School. He received his BA in English from Northwestern University in Evanston, Illinois, and his Juris Doctor from Washington University in St. Louis, Missouri.

Mark G. Valencia
Commissioner (terms 2007-2009, 2009-2013)

Mark G. Valencia is a director in the law firm of Case Lombardi & Pettit. His practice includes both plaintiff and defense work in contract, insurance, tort, construction, land use, appellate, product liability, and employment cases. In addition, Mr. Valencia has served as an adjunct professor at Hawai'i Pacific University and the University of Hawai'i Richardson School of Law. He is also active in the community, volunteering with the Read Aloud America Program, serving as a longtime member of the Kuakini Medical Center Ethics Committee, and for many years was an annual participant in the Professionals for Drug Free Kids Project.

Before joining Case Lombardi & Pettit in 2005, Mr. Valencia served as a policy analyst for Governor Linda Lingle, an attorney in private practice, a law clerk to former Hawai'i Intermediate Court of Appeals Judge Walter Kirimitsu, and as a Sergeant in the United States Army. He is currently a reserve officer in the United States Army Judge Advocate General's Corps.

Jonathan L. Ortiz
Commissioner (term 2008-2012)

Jonathan Ortiz is a director in the law firm of Ortiz & Katano. He practices in the areas of personal injury, products liability, construction defects, professional malpractice and insurance fraud litigation. Prior to private practice, Mr. Ortiz was General Counsel for the State of Hawai'i Organization of Police Officers, a Deputy Public Defender, and a law clerk for the Equal Employment Opportunity Commission. Mr. Ortiz is a member of the American Inns of Court, the Defense Research Institute and the Community Associations Institute. He is also past president of the United Puerto Rican Association and Pearl City Little League.

Mr. Ortiz was born in Honolulu, Hawai'i. He is a graduate of Castle High School, received his BA in Political Science from the University of Hawai'i, and his Juris Doctorate from George Washington University Law School.

Samuel Moku
Commissioner (term: 2010-2011)

Samuel Moku is the Program Manager for the Department of Hawaiian Home Lands Home Ownership Assistance Program (HOAP). The Hawaiian Homes Commission established HOAP in 2004 to promote home ownership for Native Hawaiians on Hawaiian Home Lands. Mr. Moku has expanded HOAP to provide credit counseling, homebuyer education, job training, employment placement, and addictions treatment services. HOAP has been successful in reaching over 2,500 Native Hawaiians, of which 500 have successfully become homeowners.

For the past 17 years, Mr. Moku has also been an active volunteer for Special Olympics Hawaii. In 2007 he was selected as a Team USA coach for the 2007 World Special Olympic Games in Shanghai, China and was also selected as a Team USA coach for the 2011 World Special Olympic Games in Athens, Greece. He is also active in providing free Speed & Quickness training for public elementary schools on the Windward side, as well as a volunteer coach for various youth sports.

HCRC Staff

During FY 2009-2010 the HCRC staff consisted of 28 individuals in the following positions:*

- Enforcement Staff:
 - Executive Director
 - Deputy Executive Director
 - Enforcement Attorneys (4)
 - Administrative Assistant – Mediation Coordinator
 - Investigator-Supervisors V (2)
 - Investigator IV (10)
 - Investigator III-IV (temporary) (1)
 - Secretary III
 - Legal Stenographer I
 - Office Assistants (III-IV) (4)

- Adjudication Staff:
 - Acting Chief Counsel
 - Secretary II

* Staffing levels reflect positions which were filled during FY 2010. Due to reduction in force (RIF) and abolishment of positions in the FY 2011 budget affecting investigator, attorney, and clerical positions, at the end of FY 2010 the HCRC was staffed by a total of 23 employees.