

August 27, 1998

The Honorable Lawrence Miike, M.D.
Director of Health
State of Hawaii
1250 Punchbowl Street
Honolulu, Hawaii 96813

Dear Dr. Miike:

Re: Whether a Division Chief May Act as a Hearings Officer in Administrative Hearings Involving Programs in the Division Chief's Division.

By letter dated September 24, 1997, you requested an opinion as to whether it is appropriate for a Department of Health division chief to act as a hearings officer in an administrative hearing involving a program within the division chief's division.

Unless a statutory section or an administrative rule of the Department of Health prohibits a division chief from acting as a hearings officer in an administrative hearing involving a program within the division chief's division, we believe that the division chief may do so. However, certain internal safeguards must be in place to avoid an actual conflict or bias or the appearance of administrative impropriety.

In reaching this opinion, we reference Hawaii case law discussing administrative hearings, Department of Health administrative rules, and case law of other jurisdictions.

I. A State Department or Agency is Presumed to Render the Decision in Hearings Under Chapter 91, HRS.

Chapter 91, Hawaii Revised Statutes ("HRS"), sets out the mechanism by which a state department or agency adjudicates contested cases. Section 91-1(1) defines the term "agency" as "each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." The term "contested case" is defined in section 91-1(5) as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

Because chapter 91, HRS, provides for a decision in a contested case to be rendered by an agency, a decision rendered by an official who is not within that agency would be the exception and not the rule. ([top](#))

II. When an Administrative Rule, a Departmental Rule of Practice and Procedure, or a Statute Requires a Hearings Officer from Outside the Department, a Division Chief May Not Act as a Hearings Officer for a Program in the Division Chief's Division. ([top](#))

In *In re Eric G*, 65 Haw. 219, 220, 649 P.2d 1140 (1982), the Hawaii Supreme Court referred to rule 49(9) of the Department of Education (DOE) administrative rules, and to 20 U.S.C. section 1415(b), part of the Individuals with Disabilities Education Act, in a footnote mentioning the requirement of an administrative hearing in a DOE case: ([top](#))

Rule 49.9(a) [of the DOE rules] states: "An impartial hearing may be requested . . . to initiate or change the identification, evaluation, program, or placement of a child."

Section . . . 1415(b)(2) [of 20 U.S.C.] provides that all impartial hearings are to be before a hearings officer who is not an employee of the agency involved in the education of the child. In accordance therewith, Rule 49.9 (f) provides that the hearing shall be conducted by an impartial hearings officer from outside the Department [of Education].

Id. at 220 n.1, 649 P.2d at 1141, n.1 (emphasis added). Consequently, when such a statutory or administrative rule applies, the hearings officer must be from outside the department and may not be a division chief of the department holding the administrative hearing.⁽¹⁾ ([top](#))

Chapter 91, HRS, does not require a hearings officer from outside the department for administrative hearings. However, the various Department of Health administrative rules must also be examined individually to ascertain whether they, like the Department of Education rule discussed above, contain a requirement that a hearings officer come from outside the department. We reviewed three chapters of the Department of Health administrative rules and found no such requirement. Chapter 11-12, Hawaii Administrative Rules ("HAR"), pertaining to food establishment sanitation, in section 11-12-10(b)(4), refers to the opportunity for a hearing "with the director or the director's representative." HAR section 11-46-14(e)(1) and (2), pertaining to noise, gives an opportunity for a hearing "before the director" and only requires that the hearing be conducted "as a contested case under chapter 91, HRS." Chapter 11-26, HAR, pertaining to vector control, is silent on administrative hearing procedural requirements.⁽²⁾ If any of the other Department of Health administrative rules for other programs require a hearings officer from outside the department, however, administrative hearings under those programs would need to be conducted by an official from outside the Department of Health, and such a rule would then preclude a division chief from acting as a hearings officer for that hearing. ([top](#))

The Department of Health's Rules of Practice and Procedure do not require an outside hearings officer, and in fact state that the director or the director's designee (who presumably might be the division chief) "shall" conduct the administrative hearing. Section 2(a) of Part C of the Rules of Practice and Procedure states that "the Director may designate a representative who shall be the presiding officer and shall conduct such hearings and shall make his recommendations in writing to the Director, which recommendations shall include recommendations as to findings of fact and conclusions of law." ([top](#))

Indeed, the hearings officer's recommendations in writing to the director are only recommendations that the director may adopt, modify, or override in issuing a final order. In addition, the respondent always has the right to appeal the final order of the director to the circuit court pursuant to section 91-14, HRS. ([top](#))

III. Hawaii Case Law Cautions Against an Appearance of Impropriety in Administrative Hearings, but an Administrator Serving as an Adjudicator Is Presumed to Be Unbiased.

The Hawaii Supreme Court set out its conceptual framework for a discussion on the appearance of impropriety in *Sussel v. City & County of Honolulu Civil Service Comm'n*, 71 Haw. 101, 784 P.2d 867 (1989). In *Sussel*, a former administrator of the Oahu Civil Defense Agency sued the City & County of Honolulu when the newly elected mayor dismissed *Sussel* from his position in favor of a candidate chosen by the new mayor. *Sussel* argued that he was inappropriately dismissed because his position was not exempted from civil service. *Sussel* appealed to the Honolulu Civil Service Commission. *Sussel* then argued for disqualification of certain members of the commission who were new appointees of the new mayor and, *Sussel* averred, biased in favor of the mayor. ([top](#))

The Hawaii Supreme Court discussed the appearance of impropriety at length and found that

while there was no indication of actual bias, an appearance of impropriety did exist. In so holding the court stated that "we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality." *Id.* at 110, 784 P.2d at 871.

In *Sifagaloa v. Bd. of Trustees of the Employees' Retirement Sys.*, 74 Haw. 181, 840 P.2d 367 (1992), appellant *Sifagaloa* alleged that the trustees of the Employees' Retirement System (the "Trustees") who denied his retirement benefits were not unbiased adjudicators, based on an allegedly conflicting duty as trustees to preserve the ERS funds. The Hawaii Supreme Court referenced its conceptual framework regarding bias and the appearance of impropriety set out in *Sussel*. The court emphasized the importance of a fair trial in a fair tribunal and the endeavor of our justice system "to prevent even the probability of unfairness." *Id.* at 189, 840 P.2d at 371 (citation omitted). ([top](#))

In *Sifagaloa*, the Hawaii Supreme Court quoted *Sussel* with regard to the appearance of impropriety in an administrative hearing:

Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts [,]" . . . , we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality. ([top](#))

Id. at 190, 840 P.2d at 277 (citation omitted).

The court observed, however, that on the other hand,

An appearance of impropriety does not occur simply where there is a joinder of executive and judicial power . . . Administrators serving as adjudicators are presumed to be unbiased. . . . The presumption can be rebutted by a showing of disqualifying interest, either pecuniary, . . . or institutional, . . . or both, . . . But the burden of establishing a disqualifying interest rests on the party making the assertion. ([top](#))

Id. at 191-92, 840 P.2d at 372 (citations omitted).

The court in *Sifagaloa* held that "*Sifagaloa* has failed in the present case to establish a 'disqualifying interest' on the part of the Trustees. The Trustees have no 'direct, personal, [or] pecuniary interest' in their adjudication." *Id.* at 192, 840 P.2d at 372, contrasting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (when a village mayor derived a salary "directly contingent upon defendants' convictions of violations of the State's prohibition act in 'Liquor Court' over which the mayor presided, [he] had a direct, personal, and pecuniary interest in the outcome of such adjudications"). ([top](#))

Based on these cases, a division chief serving as an adjudicator is presumed to be unbiased unless and until the presumption is effectively rebutted by a showing of direct, personal, or pecuniary interest on the part of the hearings officer. ([top](#))

IV. The Only Hawaii Statutory Provision on Point Prohibits Consultation on the Facts by an Agency Official Rendering a Decision in a Contested Case Hearing.

In the administrative hearing context the question may arise whether *ex parte* consultation on facts may lead to bias on the part of the hearings officer. The Hawaii Revised Statutes speaks to this issue. Section 91-13, HRS, precludes consultation by an agency official rendering a decision in

a contested case hearing regarding the facts involved in the contested case hearing: "No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law." ([top](#))

This statute prohibits any agency official rendering a decision in a contested case, including a division chief who is acting or likely to act as hearings officer, from consulting any person (including agency staff) on any issue of fact without notice and an opportunity for all parties to participate, except with regard to certain ex parte matters.⁽³⁾ Thus, the Hawaii Revised Statutes contains no prohibition against a division chief acting as a hearings officer in an administrative hearing involving a program in his or her division. However, when acting as a hearings officer in a contested case any agency official rendering a decision, including a division chief, must comply with the prohibition in section 91-13, HRS, on discussion of issues of fact.⁽⁴⁾ ([top](#))

V. Conclusion

It is our position that in the absence of a statute or a departmental administrative rule requiring that a hearings officer from outside the department conduct administrative hearings, a division chief may be presumed to be unbiased and may act as a hearings officer in administrative hearings involving programs in the chief's division. The presumption of lack of bias may be rebutted. In addition, a division chief acting as a hearings officer must comply with section 91-13, HRS, and may not consult any person in or outside of the division on any issue of fact, with the exception of ex parte matters authorized by law. Moreover, to avoid an actual conflict or any appearance of impropriety, internal safeguards should be in place such that the division chief is not consulted about the facts of a case going to or likely to go to administrative hearing. ([top](#))

Please feel free to contact our office if you have further questions on this issue.

Very truly yours,

Elizabeth A. Schaller
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

EAS:dt

1. See also *Linney v. Turpen*, 49 Cal. Rptr. 2d 813, 816-18 (1996) (noting that section 8.341 of the San Francisco City Charter provides that the hearing be conducted by a "qualified and unbiased hearing officer employed under contract by the city and county and selected by procedures set forth in the rules of the civil service commission," and rejecting appellant's argument that the fact that the employer pays the hearing officer deprived appellant of due process). ([top](#))

2. By way of analogy, section 92-16, HRS, which states the powers of boards required to hold hearings for the purpose of receiving evidence, permits a board member to serve as a master and to hold a hearing for the purpose of receiving evidence. Section 92-16(a)(3) states that a master or masters "who may, but need not be, a member or members of the board, or a disinterested attorney at law or other person, or a combination of any of them [may] hold the hearing and take testimony upon the matters involved in the hearing and report to the board the master's or their findings and recommendations." ([top](#))

3. This prohibition against consultation also applies to consultation with a deputy attorney general who has participated as an adversary at an administrative hearing. In *White v. Board of Education*, 54 Haw. 10, 16, 501 P.2d 358, 363 (1972), the Hawaii Supreme Court held that a deputy attorney general who acted as counsel for the DOE superintendent at an administrative hearing before the board should not have been consulted by members of the Board of Education regarding its decision. The court found that the actions of the deputy attorney general and the superintendent "cast suspicion on the integrity of the hearing," and that "where the board requires legal advice in its decisionmaking function, it should call in another deputy attorney general who had no part in the adversary hearing." *Id.* at 16 & n.7, 501 P.2d at 363 & n.7. ([top](#))

4. This prohibition would also presumably be applicable to settlement discussions and recommendations of settlement, and to both recommended decisions submitted by the hearing officer and the final decision issued by the director. Chapter 91 appears to use the terms "decision" and "final decision" interchangeably (see sections 91-11 and 91-12, HRS), but the better practice would be to assume that the prohibition refers to any administrative decision. ([top](#))
