

April 19, 2021

TO: Dave Moskowitz
Managing Editor
Waikiki Today
Email dave@waikikitoday.com

FROM: William D. Hoshijo
Executive Director
Hawai'i Civil Rights Commission

RE: [REDACTED]
[REDACTED]

Dear Mr. Moskowitz:

I am writing in response to your email, received today, regarding a story you plan to run tomorrow about [REDACTED] complaint against Hawaiian Electric Industries, Inc., and his allegations of bias and/or conflict of interest on the part of the Hawai'i Civil Rights Commission (HCRC) and its Chair Liann Ebesugawa.

HCRC investigations are subject to statutory confidentiality, so this response will not disclose or discuss any information about the specifics, allegations, evidence, analysis, or merits of [REDACTED] complaint.

This response will address your concerns regarding allegations of bias in the investigation of [REDACTED] complaint, due to Chair Ebesugawa's employment with Hawaiian Electric Industries, Inc., and the incorrect notion that the HCRC's testimony on S.B. No. 64 is tainted by a conflict of interest.

Fairness of the HCRC Process

HCRC procedures are structured to ensure fairness to both complainants and respondents. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and, the adjudication section, which conducts hearings, issues orders, and renders final decisions in contested cases.

Pursuant to Hawai'i Revised Statutes § 368-13, the HCRC Executive Director oversees and is responsible for the enforcement section and all investigation activities. Pursuant to HRS § 368-14, the Commissioners have authority to adjudicate and render final decisions.

The Commissioners 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. And, the Executive Director and enforcement section staff are not permitted to communicate *ex parte* with the Commissioners about any case.

In this case, the Executive Director and enforcement staff have not communicated with Commissioner Ebesugawa about the complaint and/or investigation in the [REDACTED] case.

In the HCRC process, when an HCRC investigation is completed, the Executive Director determines 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 there is a finding of reasonable cause to believe that unlawful discrimination has occurred, a notice of reasonable cause determination is issued.

Prior to the determination of whether there is reasonable cause, the HCRC investigation is neutral, with no predetermination of the merits of a complaint. From the time when a notice of reasonable cause is issued, the Executive Director pursues a law enforcement interest in the complaint.

After the issuance of a notice of reasonable cause, an enforcement attorney attempts to conciliate (settle) the case. If conciliation fails, the case is docketed for a contested case hearing before a hearings examiner appointed by the Commission.

After the completion of a contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The Commission then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Commission. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order.

It is only after a case is docketed that the Commissioners are involved in cases in their adjudication role. At this stage of the process, both the state ethics code and HCRC rules disqualify Commissioners from participation in cases in which they have a financial (including employment) interest or other conflict of interest. Until that time, as discussed above, there is no communication between the Executive Director (enforcement staff) and the Commissioners about a case, and there has been none in the [REDACTED] case.

The HCRC Position on S.B. No. 64

In relevant part, your email asks:

2. Why did Chair Ebesugawa and Director Hoshijo support SB 64, which excludes HEI and HECO from the employee protections, while Doe's case was active?
3. We are not aware of such support in 2018, 2019, 2020. Why this year?
4. Chair Ebesugawa wrote in support of SB 64, "It is noteworthy that the HRS § 329-121 definition of 'debilitating medical condition' is not identical to the HRS § 378-1 and HAR § 12-46-182 definition of 'disability,' so not every registered qualifying medical cannabis patient will necessarily be a person with a disability entitled to a reasonable accommodation (and not every person with a disability has a debilitating medical condition)."
 - a. Similar to our concerns in #2, why this year and at this time, as this relates to Doe case?
 - b. The "329" statutes legalized medical cannabis in 2000; 2015 amendments strengthened anti-discrimination protections. The Commission seems not to have been concerned until Doe submitted his case. Can you explain?

S.B. No. 64 would have **amended HRS Chapter 329, by amending § 329-125.5** to prohibit an employer from discriminating against a person in the hiring, termination, or condition of employment based on the person's status as a medical cannabis cardholder, or a registered qualifying medical cannabis

patient's positive drug test for cannabis components or metabolites, unless the patient was impaired on the premises of the place of employment during hours of employment. The new statutory protection expressly would not apply if hiring, or failure to terminate, impose a term or condition of employment or otherwise penalize an employee, would cause the employer to lose a monetary benefit or license-related benefit under federal law. And, the new statute would expressly allow employers to use a "fit for duty" test as a tool for a registered qualifying medical cannabis patient in a potentially dangerous occupation.

The newly created protection would not affect the fair employment law that the HCRC enforces, HRS Chapter 378, Part I, and would not diminish the right of an employee with a **disability** to request a reasonable accommodation. Put another way, it would not affect ██████████ HCRC complaint.

The HCRC testified in **support of the intent** of S.B. No. 64, which was to create a new protection against discrimination for employees who are registered qualifying medical cannabis patients based on a positive drug test for cannabis components or metabolites, unless the patient was impaired on the premises of the place of employment during hours of employment. The HCRC position makes a **distinction between support of the intent of the bill and support for the bill**, which would have indicated support for the specific terms and provisions of the bill. (copy of testimony attached).

The HCRC has testified in support of the intent of similar bills in 2020 (S.B. No. 2543), 2019 (H.B. No. 673 & S.B. No.1524), and 2018 (S.B. No. 2200 & H.B. No. 2729). Contrary to your assertion, the HCRC's position on these bills has been consistently in support of the intent, dating back to early 2018, well before ██████████ filed his HCRC complaint. In testimonies in support of the intent of those bills, the HCRC consistently noted that under its statutes it does not enforce the rights of employees who medical cannabis patients generally, but has jurisdiction over complaints of discrimination against persons with a disability, including the right to a reasonable accommodation. (copies of testimonies attached).

Conclusion

The story you plan to run on allegation of bias in the HCRC investigation and conflict of interest in the HCRC testimony on S.B. No. 64 has no basis in fact.

Yours truly,

William D. Hoshijo
Executive Director
Hawai'i Civil Rights Commission