IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ALOHACARE, Petitioner/Appellant-Appellant,

vs.

GORDON I. ITO, INSURANCE COMMISSIONER, STATE OF HAWAIʻI DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, Respondent/Appellee-Appellee,

and

UNITED HEALTHCARE INSURANCE COMPANY, dba EVERCARE; WELLCARE HEALTH INSURANCE OF ARIZONA, INC., dba OHANA HEALTH PLAN AND AFFILIATES; and DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAIʻI, Respondents/Intervenors-Appellees-Appellees.

NO. SCAP-30276

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(ICA NO. 30276; CIV. NO. 09-1-1514)

January 25, 2012

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

In my view, (1) an "interested" person, who may judicially appeal a declaratory order issued by an agency under

Hawaiʻi Revised Statutes (HRS) § 91-8 (1993),[1] is one who is affected by or involved with any statute, rule, or order under that administrative agency's jurisdiction; (2) Petitioner/Appellant-Appellant AlohaCare (AlohaCare), as an "interested person," was thus entitled, pursuant to HRS § 91-8, to appeal the order of the Insurance Commissioner (Commissioner) of the Department of Commerce and Consumer Affairs (DCCA) denying AlohaCare's petition for a declaration that under "statutory provision[s]" administered by the DCCA, a Health Maintenance Organization (HMO) license was a necessary requirement for the performance of managed health care services under contracts administered by the Department of Health and Human Services (DHS), to the circuit court of the first circuit (the court); (3) however, AlohaCare had no standing, under HRS § 91-8, to appeal the Commissioner's order with respect to its request that the said contracts awarded to United Healthcare Insurance Company, dba Evercare (United), and Wellcare Health Insurance of Arizona,

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[1] HRS § 91-8, states as follows:

> **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.

(Emphases added.)

HRS § 91-1 (1993) provides that "'[p]ersons' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

Inc., dba Ohana Health Plan (Ohana) be declared invalid, but (4) a declaration as to the validity of the contracts could have been cognizable in a court action for declaratory judgment under HRS § 632-1 (1993).

Thus, I concur in upholding the Commissioner's order; however, I disagree with the majority's view that AlohaCare had to be a "person aggrieved" in order to judicially appeal the Commissioner's declaratory order under HRS § 91-8, and that AlohaCare had standing to raise the validity of the award of said contracts in the appeal of the Commissioner's declaratory order. Respectfully, the majority misapplies the meaning of the term "person aggrieved" under HRS § 91-14, which until today meant a party appealing from a decision made in a contested case hearing. Under the majority's view, aggrieved person is a status necessary for appealing a declaratory order, although that order is not the product of a contested case hearing.

Additionally, the majority interposes an injury-in-fact standing requirement not found in HRS chapter 91 on parties appealing from a declaratory order issued pursuant to HRS § 91-8. The result is that the majority incorrectly decides AlohaCare's objection to United's and Ohana's bids on the merits, thereby exceeding the jurisdiction afforded the Commissioner, the circuit court, and this court in an HRS § 91-8 appeal. In sum, respectfully, the majority erects barriers to review of

declaratory orders entered under HRS § 91-8 that did not exist before and were not contemplated under HRS chapter 91.

I.

The relevant facts of this case, briefly recited, follow. AlohaCare, among other entities, including United and Ohana, responded to a Request for Proposals (RFP) by the DHS inviting qualified and properly licensed health care plans to bid on contracts providing services for the State's Medicaid aged, blind, or disabled members. The RFP was entitled, "QUEST Expanded Access (QExA) Managed Care Plans to Cover Eligible Individuals who are Aged, Blind, or Disabled."[2] In February 2008, the DHS awarded contracts to bidders United and Ohana. AlohaCare, the only bidder with an HMO license, was not awarded a contract.

Approximately two weeks after the contracts were awarded, AlohaCare protested the granting of the contracts to the

[2] Pursuant to the Medicaid Act, each state that elects to participate in the Medicaid program must submit a plan to the Centers for Medicare and Medicaid Services, and upon the plan's approval, the state receives a certain amount of federal funding. Although a state's plan is required to conform with federal guidelines to receive funding, in some circumstances compliance may be waived for demonstration projects. See G. v. Hawaii, 676 F. Supp. 2d 1046, 1052 (D. Haw. 2009) (providing a detailed and thorough background of the Medicaid regulations and the history of the proposal process). The State of Hawaiʻi established a demonstration project, also known as the QExA program, and submitted a waiver application so that it could receive federal funding. The demonstration project was approved. "The QExA Program was intended to provide primary, acute, and long-term care services, including home-and community-based services [to aged, blind, or disabled] beneficiaries using a managed care model." Id. at 1052-53. "[U]nder a managed care model, the state contracts with [managed care organizations], which assume the responsibility of providing Medicaid services through their own employees or by contracting with independent providers of such services." Id. at 1052.

then-DHS director, Lilian Koller, under HRS § 103F-501 (Supp. 2008), which prescribes the procedure for protesting an award of a health and human services contract.[3] On March 12, 2008, Koller upheld the procurement award and dismissed the protest. AlohaCare's request for reconsideration pursuant to HRS § 103F-502 (Supp. 2008)[4] was denied. That decision was appealed to the court, which, upon the DHS's motion to dismiss, dismissed the case for lack of "subject matter jurisdiction,"[5] and entered judgment on January 8, 2009. [ROA 08-1-1531 at 225] AlohaCare appealed that decision, and the appeal is currently pending before the Intermediate Court of Appeals (the ICA).[6]

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[3] HRS § 103F-501 (Supp. 2008) provides, in pertinent part, that "[a] person who is aggrieved by an award of a contract may protest a purchasing agency's failure to follow procedures established by this chapter, rules adopted by the policy board, or a request for proposals in selecting a provider and awarding a purchase of health and human services contract, provided the contract was awarded under [HRS §] 103F-402 or [HRS §] 103F-403." (Emphasis added). The protest may be resolved by "[t]erminating the contract which was awarded[.]" HRS § 103F-501(c)(2).

[4] HRS § 103F-502 states in pertinent part, "A request for reconsideration may be made only to correct a purchasing agency's failure to comply with section 103F-402 or 103F-403, rules adopted to implement the sections, or a request for proposal, if applicable." HRS § 103F-502(b).

[5] The court's order did not state its rationale. However, the DHS had filed a motion to dismiss the complaint, and the court granted the DHS's motion to dismiss. The DHS argued in its motion that, although AlohaCare sought judicial review based on, inter alia, HRS §§ 103F-501 and 103F-502, those statutes did not vest the court with jurisdiction. Given that a decision resolving a protest award "shall be final and conclusive unless a request for reconsideration is submitted to the chief procurement officer[,]" HRS § 103F-501(e), a decision issued on such a request for reconsideration "shall be final and conclusive[,]" HRS § 103F-502, and "[t]he procedures and remedies provided for in this part, . . . shall be the exclusive means available for persons aggrieved in connection with the award of a contract to resolve their concerns[,]" HRS § 103F-504, the DHS maintained that the legislature did not intend for judicial review of such a protest and allowing "legal remedies . . . would be inconsistent with the legislature's intent[.]"

[6] But see Alakaʻi Na Keiki, Inc. v. Hamamoto, No. 29742, 2011 WL 2002224, at *6-7 (App. May 24, 2011) (Since "[t]he Legislature, in enacting (continued...)

On October 28, 2008, AlohaCare filed a petition for a hearing and for declaratory relief with the Commissioner pursuant to HRS § 91-8 and Hawaiʻi Administrative Rules (HAR) § 16-201-2,[7] arguing that an HMO license is required for an entity performing the activities called for under the QExA contracts, and, in its memorandum accompanying the Petition, stating that "the work to be conducted under [the QExA contracts] is covered only by Hawaii's [HMO] statute [(HRS chapter 432D)] and therefore can legally be performed only by entities that hold Hawaiʻi HMO licenses."

AlohaCare requested that the Commissioner, inter alia, (1) declare that Ohana was not a licensed entity in Hawaiʻi and was therefore ineligible to carry out the duties required under

[6](...continued)
Chapter 103F, determined that the judiciary had no power to review procurement grievance procedures under Chapter 103F[,]" the circuit court "did not have the authority to review [the agency's] decision and underlying actions."). Without presaging the accuracy of this decision, the validity of the Commissioner's jurisdiction and licensing requirements would not appear to be expressly abrogated by HRS chapter 103F.

[7] HAR § 16-201-2 in pertinent part contains the following definitions:

> "Aggrieved person" means any person who shall be adversely affected by an action, decision, order, or rule of the authority or who shall be adversely affected by the action or conduct of any person if the action or conduct is within the authority's jurisdiction to regulate, and shall also include any person who requires the authority's permission to engage in or refrain from engaging in an activity or conduct which is subject to regulation by the authority.
> . . . .
> "Declaratory relief" means the authority's declaration as to the applicability or non-applicability with respect to a factual situation of any rule or order of the authority or of a statute which the authority is required to administer or enforce.

HAR § 16-201-2 does not define interested party.

the contract; and (2) issue an order that Ohana cease and desist operations under the contract until it became appropriately licensed.[8] The petition named the Commissioner as the sole respondent.

AlohaCare asserted that it was an "interested party" under HRS § 91-8, and an "aggrieved person" under HAR § 16-201-2 because it was "the only applicant for a contract under the QExA RFP to have an [HMO] license." According to AlohaCare, the Commissioner had authority[9] to act on the petition because the petition concerned "the lack of a required State license, [and] the lack of a valid QExA contract[.]" Finally, AlohaCare urged

[8] AlohaCare did not make any explicit allegations concerning United. However, AlohaCare's contention that an HMO license was required under Hawaiʻi law to perform the QExA contract applied equally to United, which subsequently intervened in the proceedings to argue that an HMO license was not required. Inasmuch as the Commissioner made findings regarding the issue, it can be assumed that the parties implicitly agreed that AlohaCare's arguments applied equally to both United and Ohana.

[9] AlohaCare cited HAR § 16-201-1, entitled "Purpose, scope, and construction" which provides in pertinent part:

> This chapter is intended to provide uniform rules of administrative procedure to govern all proceedings brought before any authority of the department of commerce and consumer affairs, State of Hawaiʻi, the purpose of which is to obtain:
> (1) A determination of any contested or controverted matter within the authority's jurisdiction, through an evidentiary hearing;
> (2) A declaration as to the applicability, with respect to a factual situation, of any rule or order of the authority or of any statute which the authority is required to administer or enforce[.]

(Emphases added.)

HAR § 16-201-2 defines "authority" as "the director of commerce and consumer affairs, commissioner of securities, insurance commissioner, commissioner of financial institutions, and any board or commission attached for administrative purposes to the department of commerce and consumer affairs with rulemaking, decision making, or adjudicatory powers." (Emphasis added.)

the Commissioner to end the contractors' "unauthorized insurer and related activities[.]"

The Commissioner allowed United, Ohana, and the DHS to intervene in the proceedings. Those entities filed memoranda in opposition to the petition. A hearing was held on March 18, 2009.

On June 2, 2009, the Commissioner issued his decision, findings of fact, conclusions of law, and order, stating that AlohaCare was an interested party with standing to file the petition and an aggrieved person within the meaning of the applicable agency regulations; that the Commissioner did not have authority to determine whether the contracts were valid; and that an HMO license was not required for performance of the QExA contracts:

> CONCLUSIONS OF LAW
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> 1. [AlohaCare] is an "interested party" and so had standing to file this Petition for declaratory relief pursuant to [HAR] § 16-201-48[10].]
> 2. [AlohaCare] is also an "aggrieved person" within the meaning of HAR § 16-201-2, because [it] will be "adversely affected" by a decision of the Commissioner with respect to the type of license required to offer

[10] HAR § 16-201-48 provides:

> The department or any interested person may petition the authority for a declaratory ruling as to the applicability of any statutory provision or of any rule or order adopted by the authority to a factual situation. Each petition shall state concisely and with particularity the facts giving rise to the petition, including the petitioner's interest, reasons for filing the petition, and the names of any potential respondents, the provision, rule, or order in question, the issues raised, and petitioner's position or contentions with respect thereto.

(Emphasis added.)

the QExA plan since a finding by the Commissioner that [United] and/or [Ohana] are properly licensed to perform the services required under the QExA contracts in issue . . . is effectively a finding that those entities can compete against Petitioner for an award of the QExA contract in issue.

3. HAR § 16-201-50(1)[11] requires that a petition for declaratory relief be denied where "[t]he matter is not within the jurisdiction of the authority" and where "[t]he petition is based on hypothetical or speculative facts of either liability or damages." Cf. Citizens Against Reckless Development v. Zoning Bd. of Appeals (ZBA), 114 Hawaiʻi 184, 194-96, 159 P.3d 143, 153-54 (2007) (explaining that an administrative agency has discretion to deny declaratory relief on a ground enumerated in an agency rule). The Petition raised issues of interpretation of the Hawaiʻi Insurance Code that are within the jurisdiction of the Hawaiʻi Insurance Commissioner to interpret.

4. . . . [D]etermining the validity of the QExA contracts is not the business of insurance and is outside the jurisdiction of the Commissioner. Except for relief in the form of a declaration that neither [United] nor [Ohana] are properly licensed to perform services required under the QExA contract, all other claims for relief based upon allegations of the Petition regarding the validity of the contracts entered into by [the] DHS with [United and Ohana] are denied as beyond the jurisdiction of the authority. HAR § 16-201-50(1)(C).

. . . .

6. The issue to be decided in this matter is whether a license issued pursuant to the Health Maintenance Organization Act, HRS Chapter 432D ("the HMO Act") is required to perform the QExA contract. If so, neither [United] nor [Ohana] are properly licensed to perform the services required under the QExA contracts.

7. The determination of the issue to be decided in this matter involves interpretation of HRS §§ 431:1-201,

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[11] HAR § 16-201-50(1) provides:

The authority, as expeditiously as possible after the filing of a petition for declaratory relief, shall:
(1) Deny the petition where:
(A) The petition fails to conform substantially with section 16-201-48 or is not supported by a memorandum of law in support of the petition;
(B) The petition is frivolous;
(C) The matter is not within the jurisdiction of the authority;
(D) The petition is based on hypothetical or speculative facts of either liability or damages;
(E) There is a genuine controversy of material fact, the resolution of which is necessary before any order or declaratory relief may issue; or
(F) There is any other reason justifying denial of the petition.

> 431:1-205 and HRS Chapters 432D, 432E, and 432:10A. All of these statutes are within the jurisdiction of the [Commissioner].
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> . . . .
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> 29. . . . There is no legal basis for concluding that an HMO license is required for [United and Ohana] to offer the QExA plan.
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> ORDER
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> . . . .
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> 2. An HMO license is not required to offer the QExA managed care plan. The QExA managed care plan may be offered by any risk-bearing entity licensed by the Insurance Division, [DCCA.]

(Emphases added.)

On July 2, 2009, AlohaCare appealed the Commissioner's ruling to the court, pursuant to HRS § 91-1[12] and HRS § 91-14.[13]

In addition to arguing the merits, the DHS moved to dismiss the suit, contending that AlohaCare lacked standing to appeal the decision because AlohaCare was not an aggrieved person. According to the DHS, AlohaCare had not been injured by the Commissioner's decision. Furthermore, in the DHS's view, AlohaCare's alleged "agency appeal[]" purportedly was an "attempt to use th[e] [court] to conduct a private action based on alleged violations of [HRS] Chapter 432D." AlohaCare responded that it was aggrieved under HRS § 91-14 because the Commissioner's decision deprived AlohaCare of a contract for which it was the only legally qualified applicant, and amounted to a revocation of

[12] HRS § 91-1 (1993) provides definitions for purposes of HRS chapter 91.

[13] HRS § 91-14(a) (Supp. 2004) provides, in pertinent part, that "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter[.]" (Emphasis added.)

AlohaCare's license without due process. In Reply, the DHS countered that "AlohaCare was not awarded the contract for reasons wholly unrelated to the decision of the [Commissioner]." United and Ohana did not file any pleadings with the court on the DHS's motion, but did join the motion.

At the court hearing on September 16, 2009, AlohaCare explained that in the proceedings before the Commissioner, its two bases to gain standing were as an interested party, "a very broad term," and as an aggrieved party, "any person who is required by the -- needs the authority's permission, in effect, to do business, i.e. AlohaCare needs the authority of the . . . Commissioner to do business." According to AlohaCare, it could appeal the Commissioner's declaratory order because that decision caused injury to "AlohaCare's business in the future[.]" (Emphasis added.) "[A]nyone who may be licensed as an indemnity carrier," AlohaCare asserted, "is a now [sic] competitor of AlohaCare who [sic] has a great number of additional burdens that [indemnity carriers] do not have, not the least of which is putting up two million dollars[14] and being subject to numerous regulations[.]" On the other hand, AlohaCare argued that, if the Commissioner or the court ruled that the contract could only be awarded to HMOs, then the contracts let to United and Ohana would be void, and the competition for the contracts would begin again.

[14] AlohaCare appears to have been referring to the requirement that an entity have an "initial net worth of $2,000,000[,]" HRS § 432D-8, before being awarded an HMO license.

The court responded that the argument that the contracts could be declared void should be "set aside" because the contract had "already been awarded." The court inquired if AlohaCare was entitled to bring the action under HRS § 91-8, which is "intended to interpret law for the future[.]" (Emphasis added.) United responded that although a party need only be an interested party to seek a declaratory ruling, "the law has said only that [a] subset of interested persons that are [sic] actually aggrieved that have [sic] sufficient interest in the outcome . . . [are] allowed access to the courts in an appeal."

AlohaCare subsequently argued that Lingle v. HGEA, 107 Hawaiʻi 178, 111 P.3d 587 (2005), allowed a judicial appeal of an agency ruling disposing of a declaratory petition. The court issued a minute order, stating that "[t]he court is persuaded on the basis of the rationale in [Lingle] that the court has jurisdiction over this matter[.]" On October 22, 2009, the court issued an order denying the DHS's motion to dismiss for AlohaCare's lack of standing.

As to the merits, the court affirmed the Commissioner's decision. Judgment was entered on December 28, 2009. After filing an appeal, AlohaCare applied for transfer from the Intermediate Court of Appeals to this court, which was accepted.

II.

AlohaCare raised three points on appeal, essentially contending that the Commissioner erroneously determined that an

HMO license is not required for the QExA contracts. The DHS replied, inter alia, that AlohaCare was not an "aggrieved person" and, thus, did not have standing to challenge the Commissioner's decision. (Citing E & J Lounge Operating Co. v. Liquor Comm'n of City & County of Honolulu, 118 Hawaiʻi 320, 346 n.35, 189 P.3d 432, 458 n.35 (2008) (noting that although HRS § 91-14 does not define a "person aggrieved," such a person "appears to be essentially synonymous with someone who has "suffered 'injury in fact.'" (quoting Ariyoshi v. Haw. Pub. Emp't Relations Bd., 5 Haw. App. 533, 540, 704 P.2d 917, 924 (1985))). E & J Lounge explained that, to have suffered an injury in fact, a person must have "suffered an actual or threatened injury as a result of the defendant's wrongful conduct," which was "fairly traceable to the defendant's actions," and could be relieved by "a favorable decision[.]" Id.

According to the DHS, AlohaCare's injury of being an unsuccessful bidder was not "fairly traceable" to the Commissioner's actions because the Commissioner had no involvement in the awarding of the contract and issued his decision after the contract had been awarded. The DHS also maintained that a favorable decision would not provide relief because, whether this court affirmed the agency decision, remanded for further proceedings, or reversed and modified the decision, AlohaCare would not be awarded the QExA contract. Finally, the DHS argued that the Commissioner did not recognize

AlohaCare's "true purpose" of attempting to "overturn a decision of the Procurement Officer, and evade the exclusive remedy set by the state legislature[,]" an improper reason to seek a declaratory ruling.

Along the lines of the DHS's argument, the Commissioner maintained that "AlohaCare d[id] not have a sufficient interest in any competitive advantage its HMO license might provide to enable it to resort to the courts . . . in an attempt to limit the rights and privileges of other entities holding other categories of licenses issued by the [Commissioner]." In the Commissioner's view, because no legal interest was injured by the decision, AlohaCare lacked standing.[15] United also filed an answering brief, but did not address standing.

AlohaCare submitted two reply briefs, one responding to the jurisdictional arguments raised by the DHS and the Commissioner, and the other addressing the arguments raised by United. In the former, pertinent here, AlohaCare maintained that

[15] Notably, this position appears inconsistent with the Commissioner's conclusion that AlohaCare was an "aggrieved" person. It is well established that a party will not be permitted to take a position "in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action[,]" Roxas v. Marcos, 89 Hawaiʻi 91, 124, 969 P.2d 1209, 1242 (1998), which would appear to prohibit the Commissioner from arguing that AlohaCare was not aggrieved. However, inasmuch as whether AlohaCare has standing is a question which an appellate court must independently review to ascertain whether jurisdiction exists, the Commissioner's "blowing hot and cold[,]" id. (internal quotation marks and citation omitted), on this issue does not affect the analysis of whether jurisdiction existed. See Ditto v. McCurdy, 103 Hawaiʻi 153, 157, 80 P.3d 974, 978 (2003) ("[I]t is well settled that an appellate court is under an obligation to ensure that it has jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction.").

AlohaCare was an aggrieved party because its HMO "license . . . [that] defined and limited who its competition would be has been taken away without due process [by the Commissioner's decision]." Relying on Lingle, AlohaCare asserted that the legislature's intent with respect to HRS § 91-8 "stating that rulings disposing of declaratory actions have the same status as other agency orders was to make them appealable to the [court] under HRS § 91-14."

III.

The Commissioner, the parties,[16] and the majority are incorrect in positing that a party must be "aggrieved" in order to judicially appeal a declaratory decision by an agency, and the court was correct in relying on Lingle. HRS § 91-8 provides, in pertinent part, that "[a]ny 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."[17] (Emphases added.) With respect to such orders, HRS § 91-8 mandates that "[o]rders disposing of [declaratory] petitions in

[16] AlohaCare maintains that it was both an interested party and an aggrieved party, and its right to appeal was afforded under both HRS §§ 91-8 and 91-4, apparently in response to the argument that "aggrieved" status was necessary to judicially appeal the Commissioner's decision. The argument that AlohaCare had to be "aggrieved," as AlohaCare and the court recognized, was implicitly rejected in Lingle.

[17] HRS § 91-8 also states that "[e]ach agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition."

such cases shall[18] have the same status as other agency orders."[19] (Emphases added.) For the reasons that follow, inasmuch as HRS § 91-8 agency declaratory orders are accorded the same status as contested case orders that are appealable to a court by way of HRS § 91-14, a person who files a petition seeking a declaratory order need only be an "interested" person under HRS § 91-8, and not an aggrieved person, to appeal that order to the circuit court.

A.

On its face, HRS § 91-8 expressly grants interested persons the right to petition an agency for a declaratory order. HRS chapter 91, the Hawaiʻi Administrative Procedures Act (HAPA), defines "[p]ersons" broadly, as "including individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies." HRS § 91-1. However, "interested" is not defined in the HAPA. Thus, "[w]e may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." Schefke v. Reliable Collection Agency,

[18] See Dejetley v. Kahoʻohalahala, 122 Hawaiʻi 251, 263, 226 P.3d 421, 433 (2010) ("This court has held that 'shall' indicates mandatory language.") (Internal citation omitted.); see also Gray v. Admin. Dir. of the Court, State of Hawaiʻi, 84 Hawaiʻi 138, 150, 931 P.2d 580, 592 (1997) ("The word 'shall' is generally construed as mandatory in legal acceptation.").

[19] In near like terms, the applicable agency rule here, HAR § 16-201-48, provides in pertinent part that "any interested person may petition the authority for a declaratory ruling as to the applicability of any statutory provision or of any rule or order adopted by the authority to a factual situation."

Ltd., 96 Hawaiʻi 408, 424, 32 P.3d 52, 68 (2001) (internal quotation marks and citations omitted). "Interested" is defined as "being affected or involved[.]" Merriam Webster's Collegiate Dictionary 610 (10th ed. 1993). Based on the plain language of the statute, then, interested persons are those "affected" by, or "involved" with, id., the applicability of "any statutory provision or of any rule or order of the agency[,]" HRS § 91-8.[20]

As set forth in our case law, the applicability of a statutory provision, or rule, or order of an agency may be sought only with respect to an agency action that has not yet been determined. This court has explained that "the legislature acted intentionally when it chose the term 'applicability' to denote a special type of procedure, whereby an interested party could seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined."[21] ZBA,

[20] A review of agency rules defining "interested" person shows that "interested" person is defined quite broadly. See, e.g., HAR § 4-42-52 (any "interested party" is "any person having a financial interest in the product involved in an inspection"); HAR § 4-143-3 (with respect to standards for coffee, defining "'[i]nterested party' [as] any person who has a financial interest in the product for which inspection is requested"); HAR § 13-275-2 (with respect to regulations governing procedures for historic preservation of governmental projects, "interested persons" are "those organizations and individuals that are concerned with the effect of a project on historic properties"); HAR § 16-96-2-1 (defining interested person as any person "with a substantial interest in the outcome of any proceeding conducted by the director").

[21] Similarly, HAR § 16-201-2 provides that declaratory relief is permissible when the authority can issue a "declaration as to the applicability or non-applicability with respect to a factual situation of any rule or order of the authority or of a statute which the authority is required to administer or enforce." HAR § 16-201-2 (emphasis added).

114 Hawaiʻi at 197-98, 159 P.3d at 156-57 (emphasis added).[22] The "[u]se of the declaratory ruling procedural device only makes sense where the applicability of relevant law is unknown, either because the agency has not yet acted upon particular factual circumstances, or for some other reason the applicability of some provisions of law have not been brought into consideration." Id. at 197, 159 P.3d at 156 (emphasis added). Thus, a declaratory ruling seeks "advance determinations of applicability, rather than review of already-made agency decisions." Id. at 198, 159 P.3d at 157. In other words, applicability denotes an "advance" determination of how a statutory provision, rule, or order may apply to the interested person's "circumstances[.]" Id. at 197, 159 P.3d at 156.

Consequently, a person appealing an agency order issued pursuant to HRS § 91-8 must satisfy two requirements. First, the person must be an "interested person." Cf. RGIS Inventory Specialist v. Haw. Civ. Rights Comm'n, 104 Hawaiʻi 158, 162-63, 86 P.3d 449, 452-53 (2004) (holding that agency employee was not an "interested person" and thus did not satisfy the standing requirements of HRS § 91-8). Second, the "interested person" must be seeking an advance determination of whether and in what way some statute, or agency rule, or order applies to the factual

[22] The legislature acted "intentionally," ZBA, 114 Hawaiʻi at 197-98, 159 P.3d at 156-57, because there are many other ways for an "interested person" to review already-made decisions. For example, an "interested person" may petition for the "repeal" of rules, HRS § 91-6, or obtain a judicial declaration on the "validity" of any agency rule, HRS § 91-7.

situation raised (and must not be seeking review of concrete agency decisions). ZBA, 114 Hawaiʻi at 197, 159 P.3d at 156. An "interested person" is then permitted to appeal the agency's decision utilizing the procedure in HRS § 91-14. See Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594.

B.

In contrast, an "aggrieved person" is "[a]ny person aggrieved by a final decision and order in a contested case" who by virtue of such status is "entitled to judicial review . . . under [HRS chapter 91]." HRS § 91-14 (emphasis added). In appellate review of contested cases generally, "the pertinent inquiry at the outset is whether there was a final decision and order in a contested case from which an appeal could have been taken." Mahuiki v. Planning Comm'n, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982). A contested case is defined in HRS § 91-1(5) (1993) 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." Initially, then, "the agency must be required by law to hold a hearing[23] before a decision is rendered." Lingle, 107 Hawaiʻi at 184, 111 P.3d at 593. An agency hearing is required by law if there is a "statutory, rule-based, or constitutional mandate for a hearing."

[23] An "agency hearing" is defined as a "hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." HRS § 91-1(6) (Repl. 1993).

E & J Lounge, 118 Hawaiʻi at 330, 189 P.3d at 442 (internal quotation marks and citation omitted).

A party must have participated in a contested case hearing in order to subsequently appeal as a "person aggrieved." See Int'l Bhd. of Painters & Allied Trades, Drywall Tapers, Finishers & Allied Workers v. Befitel, 104 Hawaiʻi 275, 88 P.3d 647, 653 (2004)(explaining that, under HRS § 91-14, "[t]o be entitled to judicial review of the [agency] decision, appellees must have participated in a 'contested case' hearing") (internal citation and quotation marks omitted); Sierra Club v. Haw. Tourism Auth. ex rel. Bd. of Dirs., 100 Hawaiʻi 242, 277, 59 P.3d 877, 912 (2002) (concluding that "[t]he original legislative history of [the Hawaiʻi Environmental Procedures Act] . . . contemplated that a plaintiff would be considered an 'aggrieved party' with standing [to appeal] only if the party had exhausted available administrative review processes by participating in a contested case hearing, as specified in [HRS chapter 91]" (citing Stand. Comm. Rep. No. 956-74, in 1974 Senate Journal, at 1126-27)); Alejado v. City & Cnty. of Honolulu, 89 Hawaiʻi 221, 226, 971 P.2d 310, 315 (App. 1998)("[w]ithout participation in a 'contested case' hearing, a party cannot be 'aggrieved' and therefore has no right to appeal") (internal citation omitted). Thus, to appeal under HRS § 91-14, a party must have participated in a hearing that is mandated by law and that occurs prior to judicial review. See id.

IV.

A.

Plainly, the legislature drew a distinction between the term "interested person" in HRS § 91-8 and "person aggrieved" in HRS § 91-14. If the legislature had intended that only "persons aggrieved" could appeal a declaratory order, the legislature would have employed that language in HRS § 91-8. See Jou v. Hamada, 120 Hawaiʻi 101, 113, 201 P.3d 614, 626 (App. 2009) (noting that "the Legislature knows how to definitively eliminate the right to appeal an administrative decision when that is its intent[]"). We can "therefore presume that the legislature acted intentionally when it chose the term" ZBA, 114 Hawaiʻi at 197, 159 P.3d at 156, "interested" in designating a status separate and apart from "aggrieved[.]" Id. (presuming that the legislature employed the term "applicability" in HRS § 91-8 to denote a "special" procedure to allow an interested part to seek agency advice, given the "panoply of review options available to interested parties, each specified to a different type of agency action"). In specifically employing the term "interested" in the context of declaratory petitions, rather than the term "aggrieved," the legislature established a broader platform for "persons" petitioning for relief under HRS § 91-8 as opposed to HRS § 91-14.

B.

In the instant case, AlohaCare was an interested person

to the extent that it asked whether an HMO license was necessary for the performance of the QExA contracts. In its Petition and memorandum accompanying the Petition, AlohaCare queried whether an HMO license issued under HRS chapter 432D[24] was necessary for performance of a QExA contract. In this regard, AlohaCare satisfied the definition of an interested person. AlohaCare, as an HMO-licensed entity, was "affected by" HRS chapter 432D, a statute under the jurisdiction of the DCCA. See HRS § 431:2-101 (establishing the insurance division within the DCCA). AlohaCare "petition[ed] an agency[,]" the DCCA, by its Insurance Commissioner, "for a declaratory order" regarding the "applicability" of the "statutory provision[s]" of HRS chapter 432D to performance of the QExA contracts, pursuant to HRS § 91-8 with respect to, inter alia, future contracts.

V.

A.

Because AlohaCare was an interested person that sought and received an agency declaratory order under HRS § 91-8, AlohaCare could judicially appeal that decision under the procedure set forth in HRS § 91-14. HRS § 91-8 provides that "[o]rders disposing of" petitions seeking declaratory rulings "shall have the same status as other agency orders." (Emphasis added.) The only "other agency orders" referred to in the HAPA

[24] Chapter 432D, titled Health Maintenance Organization Act, sets forth the requirements for establishing and maintaining an HMO, and the powers of an HMO.

are orders "rendered by an agency in a contested case" under HRS § 91-14. See Lingle, 107 Hawaiʻi at 188, 111 P.3d at 597 (Acoba, J., concurring) (construing statutes in pari materia to provide meaning to the term "other agency orders" in HRS § 91-8). Inasmuch as declaratory orders share "the same status," HRS § 91-8, as contested case orders under HRS § 91-14, "they, like contested case orders [under HRS § 91-14], are subject to judicial review." Id. (explaining that declaratory orders are reviewable because they have the same status as contested case orders). Orders disposing of declaratory petitions under HRS § 91-8, then, are independently subject to judicial review and may be appealed pursuant to the judicial review procedure in HRS § 91-14.

B.

Lingle established that an appellant may appeal a declaratory order that "d[id] not result from a contested case[,]" Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594, and, thus, impliedly determined that a person appealing a HRS § 91-8 order need not be a party "aggrieved" as mandated in HRS § 91-14 with respect to "contested cases." Insofar as Lingle held that an appellant may appeal a declaratory order because such an order has the same status as a contested case order, and this court exercised jurisdiction, it would appear that an appellant need not be aggrieved to appeal a declaratory order.

Furthermore, if sought, "judicial review of declaratory rulings is statutorily mandated[,]" id. at 190 n.8, 111 P.3d at 599 n.8 (Acoba, J., concurring), and review is not limited to situations where the order itself causes "aggrievement" or "injury in fact[,]" E & J Lounge, 118 Hawaiʻi at 346 n.35, 189 P.3d at 458 n.35. Hence, similar to Lingle, although the declaratory order in the instant case did "not result from a contested case[,]"[25] AlohaCare may appeal that decision under HRS § 91-8 because it is an interested person. See Vail v. Emps. Ret. Sys., 75 Haw. 42, 47, 856 P.2d 1227, 1231 (1993) (explaining that the plaintiff had "requested a declaratory order from the agency as to the applicability of HRS § 88-42 to his situation[]" of whether he qualified for full-time membership credit in the State of Hawaii's Employees' Retirement System, and then had filed a complaint for judicial review of the declaratory order in the circuit court using the procedure of HRS § 91-14, without discussing whether the plaintiff was aggrieved); Kim v. Emps. Ret. Sys., 89 Hawaiʻi 70, 968 P.2d 1081 (App. 1998) (reviewing an appeal of a declaratory ruling issued under HRS § 91-8).

C.

Legislative intent confirms that interested persons may

[25] Here, AlohaCare's petition for a declaratory ruling did not result from a contested case hearing, since the Commissioner had authority to deny the petition without holding a hearing. See HAR § 16-201-50 (allowing the Commissioner to exercise discretion when determining whether to deny the petition, set it for argument, or assign it to a hearings officer for further proceedings).

appeal declaratory orders and that such appeals are not limited to aggrieved persons who have suffered an injury in fact. The House Judiciary Committee stated that a "basic purpose" of HAPA was to "provide for judicial review of agency decisions and orders on the record[.]" Hse. Stand. Com. Rep. No. 8, in 1961 House Journal, at 655 (emphasis added). Inasmuch as a declaratory petition seeks a "declaratory order," HRS § 91-8 (emphasis added), the basic "purpose" of providing for judicial review is implemented by allowing judicial appeals of declaratory orders. See Lingle, 107 Hawaiʻi at 190, 111 P.3d at 599 (Acoba, J., concurring) (noting that the emphasized language in the House Judiciary Committee Report "confirms that judicial review was contemplated for declaratory ruling orders").

The Model Act, from which the HAPA is derived, also provides insight with respect to the legislature's intent. The Model Act affords judicial review of declaratory orders, confirming the position that judicial review of declaratory orders is statutorily mandated. The 1946 Model Act "provided for judicial review of . . . declaratory rulings" in stating that "[e]ach agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition." Frank E. Cooper, State Administrative Law 241 (1965) (internal quotation marks omitted). Cooper explained that whatever "ruling the agency made," the denial or granting of a declaratory petition "would have the same status as any other

final order of the agency[,]" meaning that "the refusal of the agency to make a ruling could be appealed to the courts[,]" or the ruling would be "a matter of formal record" that was appealable. Id. at 243.

Judicial review of a declaratory ruling is also supported by Section 204 of the Revised Model State Administrative Procedures Act (MSAPA) (2010). Similar to HRS § 91-8, that section provides that, "[a] person[26] may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether or in what manner a rule, guidance document, or order issued by the agency applies to the petitioner." MSAPA § 204(a) (emphases added). Like HRS § 91-8, an agency's declaratory order "has the same status and binding effect as an order issued in an adjudication and is subject to judicial review under Section 501."[27] MSAPA §

[26] Section 102 of MSAPA defines "'[p]erson' [as] an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity."

[27] Section 501 entitled, "RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE[,]" provides as follows.

> (a) In this [article], "final agency action" means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding. The term does not include agency action that is a failure to act.
> (b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person that meets the requirements of this [article] is entitled to judicial review of a final agency action.
> (c) A person entitled to judicial review under subsection (b) of a final agency action is entitled to judicial review of an agency action that is not final if postponement of

(continued...)

204(e) (emphases added).

Indeed, the commentary to Section 204 of the MSAPA specifically refers to HRS § 91-8, distinguishing "person" from "aggrieved person":

> This section is a revised version of 1961 MSAPA section 8, and 1981 MSAPA Section 2-103 and Hawai'i Revised Statutes, Section 91-8. This section embodies a policy of creating a convenient procedural device that will enable parties to obtain reliable advice from an agency. . . . The term "person" in Subsection (a) is broader than the term aggrieved person for judicial review in Article 5,[28] and is also broader than the term person toward whom agency action is directed in adjudication under Article 4.

(Emphasis added.) Hence, the term "person," referring to one seeking a declaratory order, is intended to be "broader than the term aggrieved person." Commentary to MSAPA § 204. Under section 204(e) of the MSAPA, an agency's declaratory order "is subject to judicial review under Section 501." Thus, the MSAPA supports the view that a person can appeal a declaratory order without having to be aggrieved.

VI.

A.

In the instant case, the Commissioner construed

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[27](...continued)
judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.
(d) A court may compel an agency to take action that is unlawfully withheld or unreasonably delayed.

(Brackets in original.)

[28] Article 5 discusses the right to judicial review; section 5 states that a person aggrieved or adversely affected by the agency action and one that has standing under the law of the state can seek judicial review of a final agency decision.

AlohaCare's petition as seeking an "advance" determination. The Commissioner stated that he could declare that the QExA contract holders did not have the necessary licenses, but could not hold the contracts void or illegal. The Commissioner also stated that "[t]he issue to be decided is whether . . . an [HMO license under] HRS Chapter 432D is required to perform the QExA contract." AlohaCare properly filed a petition seeking clarification of an issue involving "the applicability of" an HMO license issued under HRS chapter 432D to the QExA contract that was "unknown," because "for some . . . reason the applicability of [an HMO license] . . . ha[d] not been brought into consideration[.]" ZBA, 114 Hawaiʻi at 197, 159 P.3d at 156. Accordingly, the Commissioner could construe AlohaCare's request as seeking a declaratory order of a future nature.

B.

However, AlohaCare was not an interested person under the declaratory provision of HRS § 91-8 insofar as AlohaCare sought to have the contracts voided.[29] The RFP is not a "statutory provision or [] any rule or order," HRS § 91-8, of the DCCA, but instead was issued by the DHS, and, thus, AlohaCare was not "affected by" or involved with any statutory provision, rule, or order under the DCCA's jurisdiction. Cf. Fasi, 60 Haw. 436, 442-43, 591 P.2d 113, 117 (1979) (noting that, "[i]n order to

[29] Although AlohaCare mentioned only Ohana in its petition to the Commissioner, its arguments included United.

fall within the scope of § 91-8, the question presented [in] the petition ha[s] to relate to a statutory provision or a rule or order of the [agency]," and "ha[s] to be one which would be relevant to some action which the [agency] might take in the exercise of the powers granted by [statute]"); see also HRS § 103F-501 (stating that a "person who is aggrieved by an award of a contract may protest a purchasing agency's failure to follow procedures established by this chapter, . . . or a request for proposals in selecting a provider and awarding a purchase of health and human services contract").

Whether Ohana complied with the RFP was not an issue that the Commissioner could have considered. Since the RFP was not a statutory provision, rule, or order administered by the DCCA, it was outside of his jurisdiction. See ZBA, 114 Hawaiʻi at 200, 159 P.3d at 159 ("Because HRS § 91-8 only allows for declaratory rulings as to questions of 'applicability,' an administrative agency has no discretion to issue rulings under this section that do not bear on such questions."). In this regard, AlohaCare may have been seeking review of an "already-made agency decision[][,]" i.e., the DHS's decision to deny AlohaCare's protest, which was an improper use of the declaratory ruling procedure. Id. at 197, 159 P.3d at 156.

Moreover, since seeking to "void" the existing QExA contracts did not involve a ruling on the "applicability" of "any statutory provision or of any rule or order of the agency[,]" HRS

§ 91-8, AlohaCare was not an interested person who properly brought the declaratory petition to the Commissioner with respect to such relief. Consequently, AlohaCare's request for a declaration that the contracts as awarded were void was not an "interpretation" of any "relevant statutes, rules, or orders[,]" Fasi, 60 Haw. at 444, 591 P.2d at 118, under the Commissioner's jurisdiction but, instead, a remedy that the Commissioner lacked the power to provide. Cf. Commissioner's conclusion (noting that "determining the validity of the QExA contracts is not in the business of insurance and is outside the jurisdiction of the Commissioner[;]" and AlohaCare's claims "based upon allegations . . . regarding the validity of the contracts entered into by DHS [and United and Ohana] are denied as beyond the jurisdiction of the authority.").

However, to the extent that AlohaCare sought a declaratory order as to whether an HMO license was necessary for QExA contracts, AlohaCare properly sought an "advance determination[]" or "agency advice," ZBA, 114 Hawaiʻi at 197-98, 159 P.3d at 156-57, as to how the insurance licensing scheme "would apply to [the] particular circumstances" that had "not yet [been] determined[.]" Id. The issue of whether performance under the QExA contracts required an HMO license was an advance determination because that issue had not been decided by the Commissioner up to that point. Id. Thus, AlohaCare, as an interested person, could judicially appeal the Commissioner's

decision with respect to that declaration. Accordingly, I concur in affirming the court's judgment.[30]

VII.

However, in my view, AlohaCare could have brought a complaint directly challenging the validity of the specific contracts due to the lack of an HMO license, which would have been cognizable in a court action for declaratory judgment under HRS § 632-1 (1993).[31] HRS § 632-1 provides that declaratory

[30] As to that part of AlohaCare's appeal that is properly before this court, I agree with the majority's determination that the Commissioner correctly declared that an HMO license is not required for the performance of the QExA contracts. The majority opinion thoroughly reviewed AlohaCare's arguments in this respect.

[31] HRS § 632-1 provides as follows:

> **Jurisdiction; controversies subject to.** In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for[.] Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.
>
> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general

(continued...)

judgment relief may be granted "where the court is satisfied that antagonistic claims are present between the parties involved[.]" In the instant case, AlohaCare could have sought a declaratory judgment action against United, Ohana, the DHS, and the Commissioner, because there were "antagonistic claims" among AlohaCare, United, and Ohana, based on statutes administered by the Commissioner, concerning the DHS contracts. Although HRS § 632-1 provides that "[w]here . . . a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed[,]" that language posed no problem for AlohaCare, inasmuch as, for the reasons discussed supra, a declaratory petition before the Commissioner under HRS § 91-8 could not have resulted in the remedy sought by AlohaCare of invalidating the contracts.

Likewise, a protest by AlohaCare before the DHS pursuant to HRS chapter 103F could not obtain the "remedy" of a declaration that the contracts were void because the contract awardees lacked HMO licenses. Ostensibly whether an HMO license is required for the performance of the QExA contracts would not involve the DHS's "failure to follow procedures" under HRS

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[31](...continued)

> common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

(Emphases added).

chapter 103, "failure to follow" "rules" adopted by the policy board, or "failure to follow" the "request for proposals", and, thus, AlohaCare could not seek its remedy before the DHS under HRS § 103F-51. See Dejetley, 122 Hawaiʻi at 269, 226 P.3d at 439 (noting that HRS § 632-1 was intended to afford citizens greater relief and, thus, did not appear to preclude the petitioner from bringing a declaratory judgment action, even though quo warranto relief, a common law remedy, was available).

VIII.

The majority asserts that (1) HRS § 91-14(a) provides for review of "contested cases" and requires that a person be "aggrieved" by a final decision and order in a contested case to appeal that decision, majority opinion at 32-33; (2) AlohaCare was "aggrieved" by the Commissioner's decision, majority opinion at 33-37; (3) an aggrieved person is one who has suffered an "injury in fact" from the agency decision, majority opinion at 33-34; and (4) AlohaCare is aggrieved, majority opinion at 37. The majority's position on standing seemingly rests on the incorrect premise that the proceeding before the Commissioner was equivalent to a contested case. I must respectfully disagree.

A.

As to the majority's first assertion, the majority is correct enough that HRS § 91-14(a) provides the means by which judicial review of administrative contested cases can be obtained by an aggrieved person, majority opinion at 32-33. But that is

immaterial inasmuch as this is not a contested case, and, thus, AlohaCare need not be an aggrieved party in order to appeal.

The instant case is not a contested case because HRS § 91-8 "do[es] not require the [agency] to hold a hearing prior to issuing a ruling on a declaratory petition[,]" Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594, and, thus, there is no statute at issue that "mandate[s]" a hearing, E & J Lounge, 118 Hawaiʻi at 330, 189 P.3d at 442. Furthermore, the rule at issue here, HAR § 16-201-50, does not "mandate" a hearing insofar as it confers discretion to either "[d]eny the petition[,]" without having a hearing, "[s]et the petition for argument[,]" or "[a]ssign the petition to a hearings officer for further proceedings[.]" Because "the absolute right to . . . a hearing is not provided by" the rule, Bush v. Hawaiian Homes Comm'n, 76 Hawaiʻi 128, 135, 870 P.2d 1272, 1279 (1994), there is no "regulatory mandate" for a hearing. Id. Finally, there is no constitutional right to a hearing. In this regard, the hearing would have been required by law only if "due process mandated such a hearing." Id. "The claim to a due process right to a hearing requires that the particular interest which the claimant seeks to protect be 'property' within the meaning of the due process clauses of the federal and state constitutions." Id. A property interest must involve "a legitimate claim of entitlement" and must be more than an "abstract need or desire[.]" Id. In the instant case, AlohaCare lacked a

"property" interest because, at most, AlohaCare had a "unilateral expectation" of being awarded the QExA contract and not a "claim of entitlement[.]" Id. at 136, 870 P.2d at 1280. Because the Commissioner was not "required by law" to hold a hearing, the proceeding before the Commissioner did not constitute a contested case proceeding.

Furthermore, a contested case must determine the legal rights, duties, or privileges of specific parties. E & J Lounge, 118 Hawaiʻi at 330, 189 P.3d at 442. In the instant case, it does not appear that the Commissioner could have determined the "legal rights, duties, or privileges," id., of AlohaCare or the other parties inasmuch as HRS § "91-8 does not authorize an agency to determine private rights[,]" or the legal rights duties, and privileges, of "specific parties" but is "designed to provide a means for securing from an agency its interpretation of relevant statutes, rules and orders[,]" where the "only parties necessary to a proceeding under [§] 91-8 are the petitioner and the agency." Fasi, 60 Haw. at 444, 591 P.2d at 118 (emphasis added). Id.

B.

Likewise, the majority's second assertion, that AlohaCare can appeal because it was aggrieved under HRS § 91-14 by the Commissioner's decision, rests on the same incorrect proposition. Majority opinion at 32-37. The majority states that HAPA's statement of purpose does not clarify the

legislature's intent with regard to standing and does not evidence an intent to impose a lower standing threshold on declaratory orders than on orders in contested cases. See majority opinion at 40 n.34. But if the legislature intended to allow for judicial review of only some orders (those in which the petitioner satisfied the criteria in contested cases), the legislature would have said so. The legislature could have said that it intended to allow review only of certain orders. It did not do so. Instead, as noted, the legislature's pronouncement was broad--HAPA was intended to "provide for judicial review of agency decisions and orders." Hse. Stand. Com. Rep. No. 8, in 1961 House Journal, at 655 (emphasis added); see also Sierra Club, 100 Hawaiʻi at 264, 59 P.3d at 899 (noting that HAPA applies to judicial review of "contested case hearings [under HRS § 91-14], or declaratory judgments by the circuit court on the validity of an agency rule, [under] HRS § 91-7, or a declaratory order from an agency regarding 'the applicability of any statutory provision or of any rule or order of the agency,' [under] HRS § 91-8").

In this regard, it cannot be said that AlohaCare did not argue that it had standing to appeal as an "interested person" under HRS § 91-8. See majority opinion at 19 n.15, 32 n.26 (stating that AlohaCare did not contend that it had standing to appeal as an interested person under HRS § 91-8). As the majority itself acknowledges, AlohaCare "argued [on appeal to the

court] that the Insurance Commissioner's determination that AlohaCare had 'two bases for standing below,' i.e., as an interested party and as an aggrieved party, was not clearly erroneous." [Id. at 21] AlohaCare also stated to the court that "AlohaCare is an aggrieved party, and, as such, it is afforded the right to appeal by HRS §§ 91-8 and 91-14." (Emphasis added.)

To reiterate, whether a party appealing a declaratory order is "aggrieved" by a "final decision and order in a contested case[,]" HRS § 91-14(a), is irrelevant to whether the party may appeal a declaratory order, inasmuch as declaratory orders under HRS § 91-8 have the "same status" as contested case orders with respect to appeals and, thus, are independently subject to judicial review. Lingle, 107 Hawaiʻi at 188, 111 P.3d at 597 (Acoba, J., concurring). The majority claims that because none of the parties in Lingle contested the appellant's standing to appeal, whether an appellant must be "aggrieved" or merely "interested" was not before the court in Lingle. See majority opinion at 38-40.

But standing is a jurisdictional question, and appellate courts have an independent obligation to ensure jurisdiction over each case. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986). This court in Lingle was well aware that the case before it involved a challenge to its jurisdiction. See 107 Hawaiʻi at 184, 111 P.3d at 593 (reviewing challenge to circuit court's jurisdiction under HRS § 91-14). Nevertheless,

it did not hold that a party could appeal a declaratory order entered under HRS § 91-8 only if the party was "aggrieved" pursuant to HRS § 91-14. Again, instead, Lingle held that, "read together, HRS §§ 91-8 and 91-14 conferred jurisdiction upon the circuit court" to review an order disposing of a petition for a declaratory ruling. Id. at 185, 111 P.3d at 594 (emphasis added).

The majority asserts that Lingle, Vail, and Kim do not resolve expressly or impliedly whether an "interested person" may appeal a declaratory order that did not result from a contested case. See majority opinion at 39-40. This is not correct. The petitioners in Lingle, Vail, and Kim sought declaratory orders under HRS § 91-8. Lingle, 107 Hawaiʻi at 185-86, 111 P.3d at 594-95; Vail, 75 Hawaiʻi at 47-59, 856 P.2d at 1231-37; see Kim, 89 Hawaiʻi at 71-73, 968 P.2d at 1081-84. Their appeals were entertained by way of the procedure in HRS § 91-14, without any discussion regarding whether the petitioners were persons aggrieved or participated in contested case hearings. Id. Since HRS § 91-8 allows "interested persons" to seek a declaratory order, it follows that the petitioners in Lingle, Vail, and Kim were "interested persons" who were allowed to pursue their appeals by way of HRS § 91-14. Id. Lingle, Vail, and Kim, thus, answered the question whether an "interested person" under HRS § 91-8 may appeal a declaratory order utilizing the procedure in HRS § 91-14 in the affirmative. Id.; see also Lingle, 107

Hawaiʻi at 185, 111 P.3d at 594 ("[Appellant], however, contends that the [agency's] order need not result from a contested case and that, read together, HRS §§ 91-8 and 91-14 conferred jurisdiction upon the circuit court. We agree.") (Emphases added).

C.

As to the third assertion, the majority fails to explain why AlohaCare had to have suffered an injury in fact in order to appeal. For the reasons discussed in this opinion above, plainly, AlohaCare need not demonstrate such an injury under HRS § 91-8.

It is only in the contested case context that an aggrieved person "appears to be essentially synonymous with someone who has suffered 'injury in fact.'" E & J Lounge, 118 Hawaiʻi at 346 n.35, 189 P.3d at 458 n.35 (quoting Ariyoshi v. Haw. Pub. Emp't Relations Bd., 5 Haw. App. at 540, 704 P.2d at 924). Within this framework, there is no requirement that an interested person appealing "by way of the procedure in HRS § 91-14," demonstrate an "injury-in-fact." See Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594. HRS § 91-14 is merely the procedural vehicle by which an interested party can appeal an order issued under HRS § 91-8. See Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594. Hence, being "aggrieved" or incurring a legal injury is not a condition for appeal under HRS § 91-8.

Under the majority's holding, however, interested parties must satisfy a new, substantive requirement in order to appeal. Now an interested party must show that it has suffered an "injury-in-fact" in order to seek judicial review even though a party need not show "injury-in-fact" to seek a declaration from an agency in the first place and this court has routinely entertained appeals of agency orders issued pursuant to HRS § 91-8, see Lingle, 107 Hawaiʻi at 185, 111 P.3d at 594.

To reiterate, an interested person should not have to show "injury-in-fact" inasmuch as the term "interested person" is more expansive than "person aggrieved." Cf. Richard v. Metcalf, 82 Hawaiʻi 249, 253, 921 P.2d 169, 173 (1996) ("[S]omeone who would have, or already has, qualified as an 'aggrieved person' under HRS § 91-14 (1993) certainly qualifies as an 'interested person' under HRS § 91-7[32]."); Life of the Land v. Land Use Comm'n of State of Hawaiʻi, 63 Haw. 166, 178, 623 P.2d 431, 441 (1981) (noting that "plaintiffs were deemed 'aggrieved persons' in a prior case with similar allegations . . . and further discussion here relative to their status as 'interested persons' [under HRS § 91-7] would definitely be redundant"). If only aggrieved parties who have suffered injury-in-fact could appeal declaratory rulings, as the majority effectively holds, one would

[32] HRS § 91-7(a) provides in pertinent part, "Any interested person may obtain a judicial declaration as to the validity of an agency rule . . . by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business."

have to posit that there is a class of petitioners that is "interested" enough to bring a petition seeking declaratory relief, but not sufficiently "aggrieved" to appeal an adverse agency order. Plainly this cannot be inasmuch as agency orders procured under HRS § 91-8 have the same status as other agency orders, such as contested case orders. See HRS § 91-8 ("Orders disposing of petitions in [declaratory relief] cases shall have the same status as other agency orders."); see also Lingle, 107 Hawaiʻi at 184, 111 P.3d at 593 (same); id. at 188-89, 111 P.3d at 597-98 (Acoba, J., concurring) (explaining that orders disposing of petitions for declaratory rulings have the same status as a final order in a contested case). Hence, the majority view is contrary to HRS § 91-8, which, by its own terms, provides a vehicle for interested persons to seek clarification from the agency regarding the applicability of statues or rules administered by the agency without being aggrieved. ZBA, 114 Hawaiʻi at 197-98, 159 P.3d at 156-57.

D.

As to the majority's fourth assertion, again, inasmuch as AlohaCare need not be aggrieved, whether AlohaCare's purported injury was "fairly traceable" to the Commissioner's decision or not is immaterial. In the same vein, the majority's assertion that a "[favorable] decision" for Alohacare "might eventually result in the voiding of the contracts by DHS," majority opinion at 37 n.30, is in my view irrelevant, insofar as AlohaCare lacked

standing to challenge whether the contracts were void in the appeal from the Commissioner's HRS § 91-8 ruling.[33] In the absence of AlohaCare's standing on this issue, the court could not rule on whether the contracts were void and the "possibility" that AlohaCare "would be relieved of competition from United and Ohana in bidding for such contracts," see majority opinion at 37, is immaterial. See Kahoʻohanohano v. State, 114 Hawaiʻi 302, 324, 162 P.3d 696, 718 (2007) ("[S]tanding is a jurisdictional issue that may be addressed at any stage of a case[.]") (Internal quotation marks and citation omitted).

As shown, supra, the instant proceeding did not result from a contested case, and, thus, AlohaCare has not been aggrieved[34] from a "final decision and order in a contested case." HRS § 91-14. Thus, respectfully, the majority's

[33] To emphasize, the Commissioner could not determine whether the contracts were null and void because the RFP and QExA contracts were not a statutory provision, rule, or order administered by the DCCA, and, thus, were outside of the Commissioner's jurisdiction. See ZBA, 114 Hawaiʻi at 200, 159 P.3d at 159 ("Because HRS § 91-8 only allows for declaratory rulings as to questions of 'applicability,' an administrative agency has no discretion to issue rulings under this section that do not bear on such questions.").

[34] HRS § 91-8 provides this court with jurisdiction to review a declaratory order, although "the procedure in HRS § 91-14," Lingle, 107 Hawaiʻi at 190, 111 P.3d at 599 (Acoba, J., concurring), would set forth the procedural requirements in bringing the appeal. AlohaCare brought its declaratory petition seeking a declaratory order pursuant to HRS § 91-8 and, thus, was mistaken in bringing its appeal pursuant to HRS § 91-1 and HRS § 91-14 insofar as an "aggrieved status" was raised. However, AlohaCare's appeal can be construed as brought under HRS § 91-8, but utilizing the procedure in HRS § 91-14(b), since in its Statement of the Case before the circuit court Alohacare stated that the action arose "under [HAPA] Chapter 91" and that the court "[had] jurisdiction pursuant to HRS § 91-14(b)." AlohaCare argued both 91-8 and 91-14 in light of the disputed question of the basis for judicial review. Hence, AlohaCare's reference to HRS § 91-14 can be accepted as including the procedural requirements for seeking judicial review of an HRS 91-8 order, pursuant to case law.

assumption that AlohaCare needed to have been aggrieved by the Commissioner's decision to appeal is wrong. See Lingle, 107 Hawaiʻi at 184, 111 P.3d at 593 (noting that a party need not appeal from a contested case hearing to appeal a declaratory order).

IX.

For the reasons stated herein, I concur with the determination that the court had jurisdiction to hear the declaratory petition under HRS § 91-8 insofar as AlohaCare had standing to appeal the question of whether an HMO license was necessary for the performance of the QExA contracts. Accordingly, I would affirm the court's judgment. However, I cannot agree that AlohaCare had to have been an aggrieved party in order to appeal the declaratory order or that, under the facts and for the reasons discussed above, AlohaCare had standing to seek a declaration that the contracts were void because it was "aggrieved," as the majority apparently holds.

/s/ Simeon R. Acoba, Jr.