

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the result reached by the majority, but write separately to explain my analysis. My decision turns largely on the limited authority of the Hawai'i Merit Appeals Board (Board) to evaluate challenges to the examination process filed by applicants who are not selected for civil service positions and the standard of review applied by courts in evaluating agency decisions, which accords a presumption of validity to such decisions.

I.

Appellants, who were each employed as an Adult Corrections Officer (ACO) with the Department of Public Safety (Department), applied for promotions to supervisory ACO IV or V positions. The Department did not select the Appellants for the promotions, finding them temporarily unsuitable for the promotions. The Department's determination that the Appellants were temporarily unsuitable for the promotions was based on its policy of finding ACOs who had been suspended for violation of the Department's Standards of Conduct within the past two years to be unsuitable for promotion to supervisory ACO IV or V positions. The Department's justification for this policy is that ACOs applying for promotion to positions in which they will be required to supervise other ACOs and enforce the Standards of Conduct must, at minimum, have established their personal ability to comply with the Standards of Conduct for a sufficient period of time before they are considered fit for permanent promotion to the supervisory positions. The Department believes that there is a direct relationship between an applicant's recent violation of the Standards of Conduct in a manner that was serious enough to merit a suspension and the applicant's ability to properly and safely perform the demanding responsibilities of an ACO IV and V that includes the supervision of other ACOs.

II.

Appellants appealed their non-selection for the promotions to the Board, pursuant to Hawai'i Administrative Rules

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(HAR) § 14-25.1-1(b)(1) (2003), which authorizes the Board to decide appeals raising challenges to the examination process filed by applicants not selected for civil service positions.¹ In such appeals, the Board does not review the actions taken by the appointing authority, the Department in this case, *de novo*. Instead, the Board's evaluation of the Department's actions in the examination process was limited, as the HAR provide that the Board "shall generally confine itself to the issue of whether legal requirements were met, rules were properly applied, and appropriate procedures were followed, pursuant to [Hawaii Revised Statutes (HRS)] chapter 91." HAR § 14-25.1-4(u) (2003).² Appellants had the burden of proof in their appeals to the Board. See HRS § 91-10(5) (2012); HAR 14-25.1-4(t) (2003).

The Board's decisions under its limited authority to evaluate the Department's actions were, in turn, subject to judicial review pursuant to HRS § 91-14(g) (2012),³ which provided:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or

¹The term "examination" is defined by HAR § 14-21.1-5 (2003) to mean "any test or accepted personnel assessment technique used to measure the fitness and ability of applicants for employment" and may include "background and suitability determinations."

²Where the Board finds that the applicable requirements and procedures were not followed, its remedy is restricted to remanding the case and requiring that "the process and action be redone in accordance with applicable requirements and procedures." HAR § 14-25.1-4(u).

³In 2016, the Legislature made technical, nonsubstantive amendments to HRS § 91-14(g). See Act 48, § 5 (May 10, 2016).

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- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

As the Hawai'i Supreme Court has stated, judicial review of agency decisions "is further qualified by the principle that the agency's decision carries a presumption of validity and [one seeking to overturn the agency's decision] has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Korean Buddist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998). The principle which accords a presumption of validity to decisions of administrative agencies acting within their spheres of expertise and imposes a heavy burden on one seeking to overturn the decision is necessary "to preserve the function of administrative agencies in discharging their delegated duties and the function of [the courts] in reviewing agency determinations[.] Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 639, 675 P.2d 784, 789 (1983) (quoting In re Hawaii Electric Light Co., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979)).

This court reviews the Circuit Court's decision upon its review of the Board's decision *de novo*, applying the same standards of review applied by the Circuit Court in its primary judicial review of the Board's decision. Korean Buddist, 87 Hawai'i at 229, 953 P.2d at 1327; AlohaCare v. Ito, 126 Hawai'i 326, 341, 271 P.3d 621, 636 (2012).

III.

Appellants argue that the Circuit Court erred in upholding the Board's conclusion that Appellants failed to prove that the Department violated any applicable law, rule, policy, procedure, or practice governing the examination process. Appellants assert that the Board's conclusion violated the merit

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principle. In particular, Appellants challenge the validity of the Department's unwritten policy of finding ACOs who had been suspended for violation of the Department's Standards of Conduct within the past two years to be unsuitable for promotion to supervisory ACO IV or V positions. Appellants contend that in making its suitability determination, the Department should have considered the individual circumstances of their suspensions on a case-by-case basis, instead of applying the policy on a categorical basis to make their recent suspensions an automatic bar to the promotions. They also contend that the Department should have publically disclosed the policy so that they would have been aware of it.⁴

In my view, there are pros and cons to the Department's decision to adopt the policy as a categorical, bright-line bar to a supervisory promotion. Appellants concede that the Department has the discretion to make suitability determinations based on employment records and has the authority to use prior disciplinary action based on a violation of the Standards of Conduct to determine that an ACO is unsuitable for promotion. However, the Department's application of the policy on a categorical basis precludes the Department from considering whether mitigating or unusual circumstances exist which would show that the applicant was suitable for promotion notwithstanding the recent suspension for violating the Standards of Conduct. On the other hand, the application of a categorical policy can serve to promote impartial decisionmaking and the equal treatment of applicants.

Contrary to Appellants' suggestion, there is no requirement that all employment decisions be made on a case-by-case basis. Employers often use categorical factors in making employment decisions, such as imposing minimum educational requirements or experience levels or requiring an applicant to

⁴Appellants assert, and the Department does not appear to dispute, that Appellants had no notice of this policy before they applied for the promotions.

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

achieve a minimum test score in order to be eligible for a position. The relevant question is not whether an employer uses categorical, bright-line tests in making employment decisions, but whether there is a rational reason for the categorical policy it adopts.

In this case, the Department cited reasonable justifications for its categorical policy, including the importance of the Standards of Conduct and the need for a supervisory ACO to ensure that other ACOs comply with the Standards of Conduct. It was not unreasonable for the Department, in the exercise of its judgment, to determine (1) that there is a direct correlation between an ACO's compliance with the Standards of Conduct and his or her suitability for a permanent promotion to a supervisory ACO IV or V position and (2) that an ACO who had recently been suspended for violating the Standards of Conduct was temporarily unsuitable for such a promotion. An ACO who had just been suspended for violating the Standards of Conduct would have demonstrated a recent personal inability or unwillingness to comply with the Standards of Conduct and could have difficulty in commanding the respect and obedience of other ACOs in ensuring compliance with those standards.

While there may be advantages to having the Department consider the particular circumstances of each suspension for violating the Standards of Conduct in evaluating an applicant's suitability, I agree with the majority that Appellants have failed to show that the Department's policy violated the merit principle.⁵ In addition, the Appellants have failed to demonstrate that the Department's decision to adopt the policy as a categorical bar to a permanent supervisory promotion was arbitrary or capricious.

⁵I also agree with the majority that the Department's policy was not a "rule" subject to the rule-making requirements of the Hawaii Administrative Procedures Act, HRS Chapter 91.

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

I believe that it would have been better for the Department to publically disclose its policy so that Appellants would have known that a recent suspension for violating the Standards of Conduct would render them temporarily unsuitable for a promotion. Disclosure of the policy would have permitted Appellants to modify their behavior and take actions in response to the policy. However, Appellants do not show that disclosure of the policy was required. In any event, Appellants had an incentive to avoid adverse disciplinary suspensions and the opportunity to grieve the suspensions if they believed their suspension was unwarranted. They also had the opportunity to challenge and overturn the policy if they could show in their appeal to the Board that the Department's actions violated applicable laws or procedures.

In my view, Appellants have failed to overcome the heavy burden placed on those seeking to overturn the decisions of administrative agencies acting within their spheres of expertise. Given the presumption of validity that attaches to such agency decisions, I cannot say that the Board erred in upholding the Department's reliance on its policy in not selecting Appellants for promotion to the ACO IV or V positions. I therefore concur in the majority's affirmance of the Circuit Court's decision, which affirmed the decision of the Board.