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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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ALOHACARE, Petitioner/Plaintiff-Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAI'I,
Respondent/Defendant-Appellee.

NO. SCWC-29630

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29630; CIV. NO. 08-1-1531)

MAY 11, 2012

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART
AND DISSENTING IN PART, IN WHICH NAKAYAMA, J., JOINS

I concur in the majority's conclusion that AlohaCare cannot seek review of its Hawai'i Revised Statutes (HRS) chapter 103F procurement protest pursuant to HRS chapter 103D. Majority opinion at 17-21. I also concur in the majority's conclusion that AlohaCare does not have a property interest in the contract at issue that implicates due process protections. Majority opinion at 31.

However, for the reasons set forth in my concurring and dissenting opinion in Alaka'i Na Keiki, Inc. v. Matayoshi, ___ Hawai'i ___, ___ P.3d ___ (2012) (Recktenwald, C.J., concurring in part and dissenting in part), I respectfully dissent from the majority's conclusion that agency decisions on protests regarding the procurement of health and human services are reviewable pursuant to the declaratory judgment statute, HRS § 632-1.¹ Majority opinion at 31. Instead, I would hold that the legislature clearly intended to preclude judicial review of these protest decisions under the health and human services procurement code, HRS chapter 103F. I would further hold that preclusion of judicial review does not raise separation of powers concerns in the circumstances presented here. Because the legislature has the power to establish the jurisdiction of the courts, see Haw. Const. art. VI, § 1 ("The several courts shall have original and appellate jurisdiction as provided by law[.]"), the legislature may, with certain limitations described in my concurring and dissenting opinion in Alaka'i, exclude agency decisions from judicial review.

Finally, I note that the majority's conclusion that protest decisions are reviewable under the declaratory judgment

¹ I also dissent from the majority's conclusion that there appears to be no rational basis for precluding judicial review of AlohaCare's procurement protest. Majority opinion at 33. As explained in my concurring and dissenting opinion in Alaka'i, the legislature intended that the procurement process under HRS chapter 103F be simple and efficient, H. Stand. Comm. Rep. No. 940, in 1997 House Journal, at 1461, which provides a rational basis for precluding judicial review in these circumstances.

statute undermines this court's caselaw concerning HRS § 91-14, which generally limits judicial review of administrative agency action to decisions and orders in contested cases, unless review is otherwise provided by law. Additionally, this conclusion will introduce uncertainty into the procurement of health and human services contracts. In order to promote the prompt and final resolution of disputes involving the procurement of those contracts, HRS chapter 103F provides that a protest must be filed within five working days, and a request for reconsideration must be filed within five working days of the written protest decision. HRS §§ 103F-501 and 103F-502. However, under the majority's approach, procurement decisions will now be subject to challenge much later under the more generous statutes of limitations applicable to declaratory judgment actions.

Accordingly, I respectfully dissent. Instead, I would affirm the judgment of the Intermediate Court of Appeals, which affirmed the Circuit Court of the First Circuit's January 8, 2009 judgment and order dismissing AlohaCare's appeal for lack of jurisdiction.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

