IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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LIBERTY DIALYSIS-HAWAII, LLC,
a Delaware limited liability company,
Petitioner/Appellant-Appellant/Cross-Appellee,

vs.

RAINBOW DIALYSIS, LLC,
a Delaware limited liability company,
Respondent/Appellee-Appellee/Cross-Appellant,

and

STATE HEALTH PLANNING & DEVELOPMENT AGENCY,
DEPARTMENT OF HEALTH, STATE OF HAWAIʻI,
an administrative agency of the State of Hawaiʻi,
Respondent/Appellee-Appellee.

SCAP-12-0000018

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000018; CIV. NO. 11-1-0532-03)

June 27, 2013

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM POLLACK, J., JOINS

I would hold[1] first, that under its plain language,

[1] I concur with the majority's holding to the extent that it holds that the Administrator of SHPDA, Ronald E. Terry (Administrator Terry), was (continued...)

Hawaiʻi Administrative Rules (HAR) § 11-1-25 (2005)[2], as the Department of Health (DOH) rule governing disqualification, is applicable to Respondent/Appellee-Appellee State Health Planning & Development Agency (SHPDA) members who sit on the Reconsideration Committee. SHPDA's specific disqualification rule, § 11-185-32 (1981)[3], only applies to the disqualification

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[1](...continued)
permitted to participate in the Reconsideration Decision because the DOH disqualification rule, HAR § 11-1-25(a)(4), as applied to a motion to disqualify the administrator in a reconsideration proceeding, would conflict with HRS § 323D-47(5) (Supp. 2009). See Majority's opinion at 32.

[2] HAR § 11-1-25 provides that:

> § 11-1-25 Disqualification. (a) A hearings officer, director, or member of an attached entity is disqualified from hearing or deciding a contested case if the hearings officer, director, or member of the attached entity:
> (1) Has a substantial financial interest as defined by section 84-3, Hawaiʻi Revised Statutes [(HRS)], in a business or other undertaking that will be directly affected by the decision of the contested case;
> (2) Is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney;
> (3) Has participated in the investigation preceding the institution of the contested case proceedings or has participated in the development of the evidence to be introduced in the hearing; or
> (4) Has substantially participated in making the decision or action contested; or
> (5) Has a personal bias or prejudice concerning a party or matter that will prevent a fair and impartial decision involving that party or matter.
> . . . .

(Emphases added). See discussion infra.

[3] HAR § 11-185-32 provides:

> Sec. 11-185-32 Disqualification of hearing officer (a) No hearing officer shall preside at any public hearing relating to any matter in which the hearing officer, the hearing officer's spouse, or the hearing officer's child has (or within twelve months preceding the hearing, had) any substantial ownership, directorship, officership, employment, prospective employment for which negotiations

(continued...)

of hearing officers, not reconsideration committee members. Anne Trgystad (Trygstad) was not a hearing officer, but a member of the SHPDA Reconsideration Committee that issued the February 17, 2011 "Decision on the Reconsideration" (Reconsideration Decision). Because HAR § 11-185-32, a specific rule of SHPDA, on its face applies only to hearing officers, it does not apply to Trygstad, who was a Reconsideration Committee member. HAR § 11-185-32 thus "fail[s] to cover this particular practice and procedure" regarding members of the Reconsideration Committee. HAR § 11-1-1 (2005)[4]. Consequently, pursuant to HAR § 11-1-1, the DOH "rules [such as HAR § 11-1-25] shall apply." Id. (emphasis added). Following that mandate, Trygstad was subject

[3](...continued)

> have begun, medical staff, fiduciary, contractual, creditor, debtor, consultative, pecuniary, or business interest.
>
> (b) Where any other conflict of interest exists, the hearing officer shall be disqualified from presiding at the public hearing. The provisions of chapter 84, [HRS], and the decisions, advisory opinions, and informal advisory opinions of the state ethics commission shall serve as guidelines in determining whether a conflict of interest exists.

(Emphases added.) See discussion infra.

[4] HAR § 11-1-1(a) provides:

> § 11-1-1 Statement of scope and purpose. (a) This chapter governs the practice and procedure before the department of health, State of Hawaiʻi, provided that an attached entity may adopt and shall be governed by its own specific rules of practice and procedure if it has rulemaking authority, and provided that the director may adopt more specific rules of practice and procedure in proceedings for that program. Where such specific rules fail to cover particular practices and procedures, then these rules shall apply.

(Emphasis added.) See discussion infra.

to disqualification from participating in the Reconsideration Decision under HAR § 11-1-25, because she was "related within the third degree by . . . marriage" to Dr. George Talbot (Dr. Talbot), who may have been a representative of Respondent/Appellee-Appellee/Cross-Appellant Rainbow Dialysis, LLC (Rainbow), a party favored by the Reconsideration Decision.

Second, in my view, the circuit court of the first circuit (the court) erred when it affirmed SHPDA's decision denying the motion to disqualify Trygstad filed by Petitioner/Appellant-Appellant/Cross-Appellee Liberty Dialysis-Hawaiʻi LLC (Liberty), because SHPDA did not include any reasons on the record for its denial of Liberty's Motion to Disqualify Trygstad. Thus it is impossible to determine which disqualification rule SHPDA applied in reaching its conclusion and whether its findings were clearly erroneous or not, based on that rule. See In re Water Use Permit Applications, 105 Hawaiʻi 1, 27, 93 P.3d 643, 669 (2004) (Acoba, J., concurring) ("'Findings and conclusions by an administrative agency must be reasonably clear to enable the parties and the court to ascertain the basis of the agency's decision.'") (quoting Igawa v. Koa House Rest., 97 Hawaiʻi 402, 412, 38 P.3d 570, 580 (2001) (Acoba, J., concurring)); see also Nakamura v. State, 98 Hawaiʻi 263, 276, 47 P.3d 730, 743 (2002) (Acoba, J., concurring and dissenting) ("'An agency's finding must be sufficient to allow

the reviewing court to track the steps by which the agency reached its decision.'") (quoting Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw.App. 227, 230, 751 P.2d 1031, 1034 (App. 1988)). Therefore, respectfully, the court should have remanded the issue back to SHPDA to apply HAR § 11-1-25 in determining Liberty's Motion for Disqualification of Trygstad. See Hawaiʻi Revised Statutes (HRS) § 91-14(g) (1993) ("Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings[.]"). Accordingly, I respectfully dissent to the majority's holding that Trygstad was qualified to participate in the Reconsideration Decision. See majority's opinion at 36-42.

Third, I would hold that, should Trygstad have been disqualified, the failure to disqualify her would not be harmless. In deciding this question, a court should consider not just whether the decision maker cast the deciding vote, but should engage in a reasoned consideration of how the conflicted decision maker may have affected the outcome. If the conflicted decision maker would have had a substantial impact on the outcome, then he or she must be disqualified. In order to determine whether an individual had a substantial impact, three factors should be considered, "(1) whether the member disclosed the interest or the other [group] members were fully aware of it; (2) the extent of the member's participation in the decision; and

(3) the magnitude of the member's interest." Griswold v. City of Homer, 925 P.2d 1015, 1029 (Alaska 1996). Applying such considerations, if Trygstad was disqualified, her participation in the Reconsideration Decision was not harmless.

Fourth, with respect to who would have the burden of proof on the Reconsideration Decision if this case were remanded, I would hold that Rainbow has the burden of proof.

I.

To briefly recount the facts, Liberty currently provides dialysis services at two facilities on Maui, located in Wailuku and Kahana. Rainbow is and was a wholly owned affiliate of Kaiser Foundation Health Plan, Inc. (Kaiser).

On September 28, 2009, Rainbow filed a Certificate of Need application (CON Application) with SHPDA. The CON Application proposed two new dialysis facilities for Maui that would be operated by Rainbow. Liberty intervened in the SHPDA proceeding and opposed Rainbow's CON Application.

Pursuant to HRS § 323D-45 (2010)[5], Rainbow's CON

[5] HRS § 323D-45 provides, in relevant part:

(a) [T]he state agency shall refer every application for a certificate of need to the appropriate subarea council or councils, the review panel, and the statewide council. The subarea council and the review panel shall consider all relevant data and information submitted by the state agency, subarea councils, other areawide or local bodies, and the applicant, and may request from them additional data and information. The review panel shall consider each application at a public meeting and shall submit its recommendations with findings to the statewide council. The (continued...)

Application was reviewed by three different SHPDA advisory panels. On December 3, 2009, the CON Application was reviewed by the Tri-Isle Subarea Health Planning Council (Subarea Council) at a public meeting. At this public meeting, Dr. Talbot testified in support of the CON Application. He testified, inter alia, that, "I am the Kaiser Permanente physician-in-charge for Maui." Dr. Talbot is the brother-in-law of Trygstad, who was a member of the Tri-Isle Subarea Health Planning Council and was present at the public meeting. The council voted 4 to 1 in favor of recommending approval of the CON Application. Trygstad voted in favor of recommending approval.

Another advisory panel, the Certificate of Need Review Panel (Review Panel) reviewed the CON Application at a public meeting on December 11, 2009 and voted 5 to 0 in favor of recommending disapproval. Finally, on December 17, 2009, the Statewide Health Coordinating Council (Statewide Council) reviewed the CON Application and voted 7 to 4 in favor of recommending disapproval.

[5](...continued)

> statewide council shall consider the recommendation of the review panel at a public meeting and shall submit its recommendations to the state agency within such time as the state agency prescribes. The statewide council and the review panel may join together to hear or consider simultaneously information related to an application for a certificate of need.

(Emphasis added.)

SHPDA issued its Decision on the Merits on May 3, 2010. The Decision on the Merits concluded with an order stating that "[SHPDA] hereby APPROVES and ISSUES a CONDITIONAL certificate of need to [Rainbow], for the proposal described in [the CON Application]. The Decision on the Merits was signed by Administrator Terry.

On May 11, 2010 Liberty requested reconsideration of the Decision on the Merits pursuant to HRS § 323D-47(5) (2010)[6]. In this instance, reconsideration was required under HRS § 323D-47(5), because the decision of Administrator Terry in the Decision on the Merits differed from the recommendation of the Statewide Council. HRS § 323D-47 provides that the SHDPA administrator "shall be the chairperson of the reconsideration committee." As noted, Administrator Terry was the SHPDA administrator, so the statute would require that he serve as the

[6] HRS § 323D-47 provides, in pertinent part:

> The state agency may provide by rules adopted in conformity with chapter 91 for a procedure by which any person may, for good cause shown, request in writing a public hearing before a reconsideration committee for purposes of reconsideration of the agency's decision. The reconsideration committee shall consist of the administrator of the state agency and the chairpersons of the statewide council, the review panel, the plan development committee of the statewide council, and the appropriate subarea health planning council. The administrator shall be the chairperson of the reconsideration committee. A request for a public hearing shall be deemed by the reconsideration committee to have shown good cause, if:
> . . .
> (5) The decision of the administrator differs from the recommendation of the statewide council.
> . . . .

(Emphases added.)

chairperson of the Reconsideration Committee. HRS § 323D-47 also designates the four other members of the Committee, which in this case included each of the chairpersons of the Statewide Council, the Review Panel, the plan development committee of the Statewide Council, and the Subarea Planning Council. Trygstad was the member of the Reconsideration Committee representing the Subarea Planning Council.[7] The Reconsideration Committee convened on June 14, 2010, and voted to grant reconsideration.

On December 9, 2010, Liberty filed a Motion to Disqualify Administrator Terry from the Reconsideration Decision, alleging that he should be disqualified under HAR § 11-1-25 for two reasons. The bases for disqualification were that he "substantially participated in the underlying decision as the administrator of the SHPDA, the body tasked with reviewing and deciding on [CON] applications[,]" and "he [had] a personal bias or prejudice that [would] prevent a fair and impartial decision . . . ."

On the same date, Liberty also filed a Motion to Disqualify Trygstad. In the Memorandum in Support of its Motion, Liberty alleged that Trygstad's disqualification was required pursuant to HAR § 11-1-25, because "[s]he is related within the third degree by marriage to a party to the proceeding and/or a

[7] Originally, Elaine Slavinsky, the chairperson of the Tri-Isle Subarea Health Planning Council, was part of the Reconsideration Committee. She was recused and replaced by Trygstad.

party's representative[,]" and "[s]he has a personal bias or prejudice that [would] prevent a fair and impartial decision . . . ." Specifically, Liberty maintained that Trygstad's brother-in-law, Dr. Talbot, a relation within the third degree, served as the physician-in-charge of Maui for Kaiser, the party, and participated in the hearings with respect to Rainbow's CON Application.[8]

Rainbow opposed both Motions to Disqualify. With respect to Trygstad, Rainbow alleged that Dr. Talbot was not a party to the contested case proceeding or any party's representative because he was employed by Hawaiʻi Permanente Medical Group, a corporation that only contracts with Kasier. In support of its Memorandum in Opposition to Liberty's Motion to Disqualify Trygstad, Rainbow included a Declaration of Dr. Talbot, which stated:

> 1. I am employed by the Hawaii Permanente Medical Group ("HPMG"), a Hawaii corporation that contracts with [Kaiser] to provide physician services for members of [Kaiser] and other patients seen at Kaiser's medical facilities in Hawaiʻi.
>
> 2. I am currently the HPMG physician in charge of Maui and in that role, I oversee physician services for Kaiser's Maui clinics, which includes the Kaiser Wailuku Medical Clinic. I am not in charge of the administrative oversight of the Wailuku Medical Clinic, nor am I in charge of the affiliated health care services provided by non-physicians at the Wailuku Medical Clinic. The administrative operation of the Wailuku Clinic is overseen by employees of Kaiser Foundation Hospitals, Inc., a separate corporation that owns and/or manages Kaiser's

[8] Liberty further contended that Trygstad should be disqualified pursuant to, inter alia, HRS § 323-13.5 (2005), because she was employed by a health care provider as the coordinator of the Registered Nurse Community Project. This argument was not raised on appeal.

> hospital and clinic facilities and employs certain affiliated care providers for those facilities.

The Reconsideration Committee denied both of Liberty's disqualification motions.

A public hearing was held on January 3, 2011, and the hearing was presided over by Hearings Officer Andrew Tseu. On February 17, 2011, the Reconsideration Committee issued its Reconsideration Decision, which was signed by the five members of the Reconsideration Committee who had been appointed in accordance with HRS § 323D-47. The committee consisted of Administrator Terry and four other committee members, including Trygstad.

On March 17, 2011, Liberty filed a Notice of Appeal of SHPDA's Reconsideration Decision in the court. The appeal alleged, inter alia, that Administrator Terry and Trygstad should have been disqualified from participating in the Reconsideration Decision, and that the Reconsideration Committee "failed to apply a de novo standard of review . . . and, thereby improperly placed the burden of proof on [] Liberty . . . ."

The court held a hearing on September 27, 2011, during which it orally ruled that, "the court for the foregoing reasons thereby remands this case to SHPDA with instructions to hold the reconsideration committee hearing with an acting SHPDA administrator, not [Administrator] Terry, and appropriate acting chairpersons as necessitated under [HRS §] 323D-47 and HAR [§]

11-1-25." Both parties made arguments with respect to Trygstad's disqualification, and the court stated at the hearing that the case was remanded for SHPDA to hold the reconsideration hearing with "appropriate acting chairpersons as necessitated under [HRS §] 323D-7 and HAR [§] 11-1-25."

After the hearing, on September 29, 2011, Rainbow filed an ex parte motion for an expedited status conference, contending that this court's holding in Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Haw. 222, 624 P.2d 1351 (1981), and the ICA's holding in Hui Malama Aina O Koolau v. Pacarro, 4 Haw. App. 304, 666 P.2d 177 (App. 1983), indicated the failure to disqualify Administrator Terry was harmless because he did not cast the deciding vote. The court denied Rainbow's ex parte motion without a hearing on October 7, 2011, construing it as a motion for reconsideration, and on October 12, 2011 issued an order granting Liberty's appeal and remanding to the SHPDA with instructions to hold the reconsideration hearing with an acting SHPDA administrator other than Administrator Terry.

On October 18, 2011, Liberty submitted a proposed final judgment to the court[9] which was objected to by both Rainbow and SHPDA. Liberty then submitted a revised proposed final

[9] Liberty's original proposed final judgment is not contained in the record on appeal.

judgment[10] on October 28, 2011, and the court sua sponte requested supplemental briefing on, among other things, "issues related to Waikiki Resort Hotel[], 63 Haw. 222[, 624 P.2d 1352] and/or Hui Malama Aina O Koʻolau[], 4 Haw. App. 304[, 666 P.2d 177]."

SHPDA's supplemental brief stated that pursuant to the holdings of Waikiki Resort Hotel and Hui Malama Aina O Koʻolau, no new reconsideration hearing was needed, because even without the participation of Administrator Terry, "the Reconsideration Committee would be able to make a valid decision with fewer than all of the member to which it [was] entitled by [HRS] § 323D-47, provided it had the necessary quorum and majority." Liberty's supplemental brief argued that if the court were to consider Rainbow's untimely argument with respect to Waikiki Resort Hotel and Hui Malama Aina O Koʻolau, those cases are distinguishable. In its supplemental brief, Rainbow reiterated its arguments in its earlier ex parte motion for an expedited status conference, arguing that remand was not the appropriate remedy in light of the controlling decision of Waikiki Resort Hotel.

On December 13, 2011, the court issued an order that reversed its earlier position, and instead affirmed SHPDA's Reconsideration Decision. The court held that the

[10] Liberty's amended proposed final judgment also is not contained in the record on appeal.

Reconsideration Committee erred in failing to disqualify Administrator Terry, but that the failure to disqualify was harmless pursuant to Waikiki Resort Hotel. The court further affirmed the Reconsideration Committee's decision not to disqualify Trygstad. The court concluded that, inter alia, "the court cannot find that the Reconsideration Committee's determination that Dr. Talobt was not a party or party's representative . . . was clearly erroneous under HAR § 11-1-25(a)(2)[,]" and "the Reconsideration Committee's refusal to disqualify Trygstad on [the] basis [of Trygstad's alleged bias because Dr. Talbot was her brother-in-law] was not clearly erroneous[.]" The court entered its Final Judgment on December 13, 2011.

Liberty appealed to the ICA on January 10, 2012, and the parties submitted briefs to the ICA. Transfer was granted from the ICA to this court on September 28, 2012.

On appeal, Liberty raised the following four points of error:

> (1) The [] [c]ourt abused its discretion by reconsidering three of its prior orders and entertaining Rainbow's belated argument that the Reconsideration Committee's failure to disqualify [Administrator] Terry should be excused as harmless error under Waikiki [Resort Hotel].
> . . . .
> (2) The [] [c]ourt erred in concluding that the Reconsideration Committee's error in failing to disqualify [Administrator] Terry was harmless.
> . . . .
> (3) The Reconsideration Committee erred in refusing to disqualify [] Trygstad from serving on the Reconsideration Committee, and the [] [c]ourt erred in upholding this decision.

> . . . .
> (4) The Reconsideration Committee erroneously placed the burden of proof on Liberty rather than Rainbow.

(Emphasis added.)

On cross-appeal, Rainbow alleged that "[t]he circuit court erred when it determined in its December 13, 2011 Order that Administrator Terry should have been disqualified due to the application of HAR § 11-1-25 and based its Final Judgment on that portion of the December 13, 2011 Order." SHPDA did not file an appeal or cross-appeal, but did file a unified answering brief in response to both Liberty's and Rainbow's appeals.

II.

A.

First, as noted, HAR § 11-1-25 is the rule applicable to the matter of Trygstad's disqualification. Pursuant to its statutory authority, the DOH promulgated a number of administrative rules relating to DOH practices and procedures. Among these was HAR § 11-1-1 (2005), titled "Statement of scope and purpose" which discusses the applicability of the Chapter 1 rules to "attached entities." As noted before, HAR § 11-1-1(a) provides that:

> § 11-1-1 Statement of scope and purpose. (a) This chapter governs the practice and procedure before the department of health, State of Hawaiʻi, provided that an attached entity may adopt and shall be governed by its own specific rules of practice and procedure if it has rulemaking authority, and provided that the director may adopt more specific rules of practice and procedure in proceedings for that program. Where such specific rules fail to cover particular practices and procedures, then these rules shall apply.

(Emphasis added.) Chapter 1 defines an "attached entity" as "an administrative office, agency, board, or commission placed or established within or administratively attached to the [DOH]." HAR § 11-1-3 (2005). SHPDA, as an agency that is part of the DOH, is an "attached entity." See id. "[T]hese rules" refers to the DOH practice and procedure rules in Title 11, Section 1 of the HAR.

Relevant to the instant case, the DOH also promulgated practice and procedure rule HAR § 11-1-25, which, as related previously, provides:

> § 11-1-25 Disqualification. (a) A hearings officer, director, or member of an attached entity is disqualified from hearing or deciding a contested case if the hearings officer, director, or member of the attached entity:
>
> (1) Has a substantial financial interest as defined by section 84-3, [HRS], in a business or other undertaking that will be directly affected by the decision of the contested case;
>
> (2) Is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney;
>
> (3) Has participated in the investigation preceding the institution of the contested case proceedings or has participated in the development of the evidence to be introduced in the hearing; or
>
> (4) Has substantially participated in making the decision or action contested; or
>
> (5) Has a personal bias or prejudice concerning a party or matter that will prevent a fair and impartial decision involving that party or matter.
>
> . . . .

(Emphases added.)

SHPDA, as an attached entity of the DOH, also has its own rules of practice and procedure, also found in Title 11, at Chapter 185. See HAR § 11-185-1 ("The rules in this chapter govern the practice and procedure before the state health planning and development agency."). As stated, subchapter 2 of Chapter 185 is titled "Public Hearing" and contains a rule titled "Disqualification of hearing officer," (emphasis added), which states:

> Sec. 11-185-32 Disqualification of hearing officer (a) No hearing officer shall preside at any public hearing relating to any matter in which the hearing officer, the hearing officer's spouse, or the hearing officer's child has (or within twelve months preceding the hearing, had) any substantial ownership, directorship, officership, employment, prospective employment for which negotiations have begun, medical staff, fiduciary, contractual, creditor, debtor, consultative, pecuniary, or business interest.
>
> (b) Where any other conflict of interest exists, the hearing officer shall be disqualified from presiding at the public hearing. The provisions of chapter 84, [HRS], and the decisions, advisory opinions, and informal advisory opinions of the state ethics commission shall serve as guidelines in determining whether a conflict of interest exists.

(Emphases added.)

In this case, whether Trygstad should have been disqualified depends in part upon which disqualification rule applies, the DOH's rule, HAR § 11-1-25, SHPDA's rule, HAR § 11-185-32, or both. On their faces, both HAR § 11-1-25 and HAR § 11-185-32 are applicable to motions for disqualification in SHPDA proceedings. Under the Title 11 regulatory scheme, HAR § 11-1-25 is applicable generally to hearings officers, directors, and members of an entity attached, such as SHPDA, and to the DOH. HAR

§ 11-185-32, SHPDA's rule is also applicable to hearing officer disqualifications. However, on its face, HAR § 11-185-32 applies only to hearings officers, and not directors or members. Because HAR § 11-185-32 covers disqualification of hearings officers in SHPDA proceedings, it is a "specific rule[] of practice and procedure" that "govern[s]" in SHPDA proceedings. HAR § 11-1-1. Inasmuch as hearings officers are "specifically" covered by HAR § 11-185-32, HAR § 11-1-1 mandates that that part of HAR § 11-1-25 relating to hearings officers is superceded by HAR § 11-185-32. Thus, HAR § 11-185-32 controls over HAR § 11-1-25 with respect to hearings officers in SHPDA proceedings.

B.

1.

Based on the foregoing, HAR § 11-185-32, by its plain language, applies only to disqualifying a hearing officer from "presid[ing] at any public hearing." (Emphasis added.) Therefore, HAR § 11-185-32 is not applicable to "directors" or "members" of an attached entity. See HAR § 11-1-25. "'Where the statutory language is plain and unambiguous, our sole duty is to give effect to is plain and obvious meaning.'" Dejetly v. Kahoʻohalahala, 122 Hawaiʻi 251, 262, 226 P.3d 421, 432 (2010) (quoting Rees v. Carlisle, 113 Hawaiʻi 446, 452, 153 P.3d 1131, 1137 (2007)). With respect to the interpretation of regulations, "the general principles of construction which apply to statutes also apply to

administrative rules." Kalekini v. Yoshioka, 128 Hawaiʻi 53, 67, 283 P.3d 60, 74 (2012) (brackets omitted) (citations omitted). On its face, then, HAR § 11-185-32 does not cover practices and procedures for disqualification of individuals other than hearings officers in reconsideration decisions, and therefore, HAR § 11-1-1 applies. Where "specific rules fail to cover particular practices and procedures, then these rules shall apply." HAR § 11-1-1. As said, by "these rules," the DOH means the rules found in Title 11, Chapter 1, Rules of Practice and Procedure. By virtue of HAR § 11-1-1, HAR § 11-1-25 is one of "these rules."

HAR § 11-1-25 does expressly apply to directors and members. Hence, HAR § 11-1-25 would apply to members of SHPDA reconsideration committees. As a member of the Tri-Isle Subarea Council and the Reconsideration Committee, Trygstad is a "member" of an attached entity of the DOH. See HAR § 11-1-3 (defining "attached entity" as "an administrative office, agency board or commission placed or established within or administratively attached to the department"). Because HAR § 11-1-25 applies to members of attached entities, it applies to Trygstad. HAR § 11-1-25 then would apply to determine whether to disqualify Trygstad, as a member of a SHPDA Reconsideration Committee.

2.

As noted, Trygstad's brother-in-law, Dr. Talbot, testified at the public meeting of the Tri-Isle Subarea Council

and has a relationship with Kaiser. Under these facts, Trygstad could be disqualified from the Reconsideration Committee, pursuant to the DOH's rule, HAR § 11-1-25, in one of two ways. First, Trygstad could be disqualified because she "[i]s related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney[.]" HAR § 11-1-25(a)(2)[11]. As noted, Dr. Talbot is Trygstad's brother-in-law, a relationship "within the third degree by blood or marriage."[12] HAR § 11-1-25(a)(2). There is a factual dispute as to whether Dr. Talbot, based on his involvement in the Tri-Isle Subarea Council public meeting, and his employment status, is connected to Kaiser and Rainbow closely enough to constitute a "party's representative" pursuant to HAR § 11-1-25(a)(2).

[11] To reiterate, HAR § 11-1-25(a)(2) provides:

> (2) Is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney[.]

[12] "[R]elated within the third degree" is a disqualifying relationship found in a number of statutes and rules addressing conflicts of interest. See, e.g., HRS § 601-7 (Supp. 2004) ("No person shall sit as a judge in any case in which . . . [t]he judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant[.]"); HRS § 651C-1 (1993) ("'Relative' means an individual related within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined[.]"); HAR § 6-23-45 (2009) (Disqualifying a Department of Budget and Finance board member or hearing officer from hearing a case where they are related within the third degree by blood or marriage to a party or party's representative or attorney); HAR § 16-201-20 (1995) (Disqualifying a Department of Commerce and Consumer Affairs member of authority or hearings officer who is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney); HAR § 17-2-14 (1995) (Disqualifying a Department of Human Services director or hearing officer who is related within the third degree by blood or marriage to any party.).

The other way in which Trygstad could be disqualified would be pursuant to HAR § 11-1-25(a)(5), which requires disqualification where a "hearings officer, director, or member of an attached entity[,]" "[h]as a personal bias or prejudice concerning a party or matter that will prevent a fair and impartial decision involving that party or matter." Under subsection (a)(5), Trygstad could be disqualified if the involvement of her brother-in-law Dr. Talbot in the proceedings and his relationship with Rainbow created a bias or prejudice on the part of Trygstad that would influence her decision.

C.

The majority holds that with respect to SHPDA proceedings, SHPDA's disqualification rule, HAR § 11-185-32 applies to the exclusion of the DOH disqualification rule, HAR § 11-1-25. Majority's opinion at 40. HAR § 11-185-32, the majority maintains, is a specific rule that governs SHPDA's practices and procedures with respect to disqualifications. Majority's opinion at 37. According to the majority, since, pursuant to HAR § 11-1-1, an attached entity "shall be governed by its own specific rules of practice and procedure[,]" and the DOH Title 11, Chapter 1 rules only apply where the attached entity's rules "fail to cover particular practices and procedures," all disqualifications in SHPDA reconsideration proceedings are governed solely by HAR § 11-185-32. Majority's opinion at 36-37.

However, the majority's position conflicts with the plain language of HAR § 11-185-32. Both subsections in HAR § 11-185-32 are applicable only to hearings officers. HAR § 11-185-32(a) states that "[n]o hearing officer shall preside at a public hearing relating to any matter in which . . . [,]" (emphasis added), and HAR § 11-185-32(b) states that "[w]here any other conflict of interest exists, the hearing officer shall be disqualified . . . ." (Emphasis added).[13] On the other hand, an interpretation of the Title 11 rules that would apply HAR § 11-1-25 to disqualification of SHPDA reconsideration hearing members and directors, and HAR § 11-185-32 to disqualification of hearings officers, would ensure a fair procedure while recognizing the authority of SHPDA to promulgate its own rules of practice and procedure that cover specific circumstances.

III.

In this case, SHPDA's interpretation, adopted by the majority, characterizes each of the Reconsideration Committee members as "hearing officers." The majority maintains that

[13] The majority also contends that although Liberty argued before the circuit court that Reconsideration Members were not hearings officers, and therefore HAR § 11-185-32 should not apply to Reconsideration Members, it no longer presents that argument on appeal. Majority's opinion at 39-40. However, the position reflected in this opinion is consistent with Liberty's argument on appeal that both rules should be given effect. With respect to disqualification, HAR § 11-185-32 should apply to hearings officers, and HAR § 11-1-25 should apply to Reconsideration Committee members. While Liberty argues that both rules should apply for different reasons, the issue in this case is the interaction of provisions in and implementation of a regulatory scheme. Accordingly, this court must determine the appropriate application of that regulatory scheme based on a correct interpretation of the language of the rules.

SHPDA's interpretation of its own rules should be afforded deference. Majority's opinion at 40. However, as the majority acknowledges, an agency's interpretation of its own rules is not entitled to deference if its interpretation is "'plainly erroneous or inconsistent with the underlying legislative purpose.'" Kaleikini, 128 Hawaiʻi at 67, 283 P.3d at 74 (quoting In re Hawaiʻola O Molak Hawaiʻi, Inc., 103 Hawaiʻi 401, 425, 83 P.3d 664, 688 (2004)). SHPDA's interpretation of the term "hearing officer" in HAR § 11-185-32 is clearly erroneous inasmuch as it conflicts with the plain language of HAR § 11-185-32, and with SHPDA's regulatory scheme as a whole. Rather than simply acknowledging that SHPDA's attached entity rules, as adopted in the early 1980s[14], did not explicitly provide disqualification rules for reconsideration committee members, and that as a result, the general gap-filling rules, i.e. HAR § 11-1-25, should apply, SHPDA attempts to circumvent the plain language of the administrative scheme.

A.

The majority reasons that construing HAR § 11-85-32 in

[14] In support of its position, SHPDA argues that the SHPDA rules preceded the DOH rules. See Majority's opinion at 40. Respectfully, the timing of the rules has nothing to do with which rule takes precedence. Neither HAR § 1-11-25 nor HAR § 11-185-32 have been repealed, and thus both are valid and must be applied. Indeed, the fact that the DOH rules, which are arguably more restrictive with respect to disqualification (requiring disqualification based on relationships "within the third degree," for example), were adopted after the SHPDA rules (which require disqualification based on spousal and child relationships), evinces a trend toward more comprehensive conflict of interest rules, consistent with this opinion.

pari materia with HRS § 323D-47 and the other SHPDA rules leads to the conclusion that each of the reconsideration members is a "hearings officer." Majority's opinion at 40-41. The majority states that HRS § 323D-47 and HAR § 11-186-82(d) require that a reconsideration committee hold a public hearing, if good cause is shown for reconsideration. Id. In addition to the public hearing, reconsideration members also take part in a written reconsideration decision and file that decision. There is no dispute that the Reconsideration Committee hearing in this case was a public hearing. None of the actions attributable to the reconsideration committee, however, leads to the conclusion that they are also hearings officers. Thus, the materiality of these provisions to the majority's position is lacking.

HRS § 323D-47, the statute providing authority for rules related to reconsideration, HAR § 11-186-82, the SHPDA rule setting out reconsideration procedures, and HAR § 11-185-30, setting out the procedures for SHPDA public hearings generally, merely set forth the procedural requirements for reconsideration. These provisions do not sustain the majority's view that each member of the reconsideration committee is a hearing officer, but, as verified by the facts in this case, indicate to the contrary, that the hearing officer is one individual.

The majority's in pari materia argument is also, respectfully, inapposite because different authorities designate

the reconsideration committee members and the hearing officers. HRS § 323D-47 designates the members of the reconsideration committee by statute. See HRS § 323D-47 ("The reconsideration committee shall consist of the administrator of the state agency and the chairpersons of the statewide council, the review panel, the plan development committee of the statewide council, and the appropriate subarea health planning council.") (emphasis added). HRS § 323D-47 does not at any point indicate that all members of the reconsideration committee shall also serve as the hearing officers in the reconsideration committee. On the other hand, the hearing officer is designated by the agency. HAR § 11-185-31 provides that "[t]he agency shall designate the hearing officer who shall preside at the public hearing." (Emphasis added.) The "agency" referred to is SHPDA. See HAR § 11-185-2. Thus, reading the statutory scheme and rules together, i.e., in pari materia, in fact demonstrates that hearing officers and reconsideration members are not one and the same.

B.

The majority also maintains that the Reconsideration Members did "preside" at the public hearing, inasmuch as they made rulings on evidentiary objections and motions. Majority's opinion at 43. Respectfully, it would be a mischaracterization to say that the Reconsideration Committee members "presided" at the public hearing. The portions of the transcript that the majority

cites do not indicate any active participation in running the hearing itself by any members of the Reconsideration Committee other than Administrator Terry.[15] To the extent that the Reconsideration Committee as a whole voted on the motions and presentation of exhibits, it did so off the record and not during the hearing itself. Thus, the Reconsideration Committee members were present, but did not "preside" over the hearing.

The majority urges that nothing in HAR § 11-185-31, which states that "[t]he agency shall designate the hearing officer who shall preside at the public hearing[,]" specifically excludes all reconsideration committee members from the "hearing officer" disqualification provisions of HAR § 11-185-32. Majority's opinion at 41-42. However, this is unsurprising, because HAR § 11-185-31 does not specifically deal with reconsideration decisions, and, it would be repugnant to the plain language of HAR §§ 11-185-31 and -32 to find that each reconsideration committee member is a "hearings officer" in the first place.

C.

Furthermore, the rules governing CON Application proceedings, and the reconsideration committee specifically, in

[15] Mr. Wynhoff, as referenced in the transcript, is the attorney for the Reconsideration Committee.

Chapter 186[16], are separate and apart from the rules cited by the majority from Chapter 185 (including HAR §§ 11-185-30, -31, and -32), and make no reference to "hearing officers." In contrast, HAR § 11-186-3 defines "Reconsideration committee" as "the reconsideration committee as established in section 323D-47, [HRS]." As noted, HRS § 323D-47 does not state that reconsideration committee members are also all "hearing officers" in the reconsideration committee hearings. Consequently, the SHPDA rules applicable to CON proceedings do not support the view that the Reconsideration Committee members were also all hearing officers in the proceedings.

HAR § 11-186-51[17] is the conflicts of interest provision

[16] HAR § 11-186-1 provides, in part: "The rules in this chapter govern procedure before the state health planning and development agency, the statewide health coordinating council, the review panel, the reconsideration committee, the countywide review committee, and the subarea health planning councils." (Emphasis added.)

[17] HAR § 11-186-51 provides:

Sec. 11-186-51 Conflicts of interest.

> (a) No member of a subarea council, a countywide review committee, the review panel, or the statewide council shall vote on any matter respecting an applicant with which the member, the member's spouse, the member's child, or the member's parent has (or within the twelve months preceding the vote, had) any substantial ownership, directorship, officership, employment, prospective employment for which negotiations have begun, medical staff, fiduciary, contractual, creditor, debtor, or consultative relationship.
>
> (b) If such a relationship exists or has existed, the member shall make a written disclosure of the relationship before any action is taken with respect to the applicant by the subarea council, countywide review committee, review panel, or statewide council to which the member belongs and the member shall make the relationship public in any meeting in which action is to be taken with respect to the

(continued...)

in Chapter 186 that governs conflicts of members in actions by the committees named, none of which is the reconsideration committee. Although other provisions in Chapter 186 refer to the reconsideration committee, the plain language of HAR § 11-186-51(a) states that it only applies to members of "a subarea council, a countywide review committee, the review panel, or the statewide council . . . ." HAR § 11-186-51(b), in turn, provides that the conflict provisions in HAR § 11-186-51 only apply to "actions" taken "by the subarea council, countywide review committee, review panel, or statewide council to which the member belongs . . . ." (Emphases added.) This is also reiterated in subsection (c), which, again applies only to members of the subarea council, countywide review committee, review panel, or statewide council. HAR § 11-186-51(c). On its face, the conflicts rule applies to persons acting as members of the named committees in actions taken by those committees. The rule has nothing to do with the reconsideration committee or actions taken by the reconsideration committee. Thus, this conflicts provision

[17](...continued)
applicant.

(c) Where any other conflict of interest exists, a member of a subarea council, countywide review committee, review panel, or statewide council shall be disqualified from voting in the review of an application. The provisions of chapter 84, Hawaii Revised Statutes, and the decisions, advisory opinions, and informal advisory opinions of the state ethics commission shall serve as guidelines in determining whether a conflict of interest exists.

(Emphases added.)

does not apply to reconsideration committees inasmuch as specifically named committees would indicate a committee such as the reconsideration committee is excluded from the scope of HAR § 11-186-51. See Sierra Club v. Dep't of Transp. of State of Hawaiʻi, 120 Hawaiʻi 181, 233, 202 P.3d 1226, 1278 (2009) ("This court has consistently applied the rule of expressio unius est exclusio alterius - the express inclusion of a provision in the statute implies the exclusion of another - in interpreting statutes.") (citation omitted) (ellipses omitted).

D.

The majority appears also concerned that, if the DOH rule, HAR § 11-1-25 applies to reconsideration committee members, then SHPDA's rules lacked any disqualification provisions for reconsideration committee members for almost 20 years. Majority's opinion at 42. But if this were the case, it would not pose an "absurdity." As the court noted, due process requires that a decision maker be disqualified if that individual displays obvious animus or bias against a party.[18] The majority itself asserts that hearings officers would be subject to disqualification via due process where they exhibit bias or prejudice, or where there is an appearance of impropriety or partiality, in the absence of any

[18] The court's discussion of these due process requirements arose in the context of Administrator Terry's potential disqualification, however, such considerations would be equally applicable to Trygstad or the other Reconsideration Committee members.

governing disqualification statute or rule. See majority's opinion at 31 n.20, 38-40 (citing State v. Ross, 89 Hawaiʻi 371, 377, 974 P.2d 11, 17 (1998)). See also State v. Brown, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989) ("'[a] fair trial in a fair tribunal is a basic requirement of due process.'") (quoting In re Murchinson, 349 U.S. 133, 136 (1955)). Aside from due process, I note that other case law would apply. For example, "[t]he common law doctrine of incompatible offices prohibits an individual from serving in dual capacity 'if one office is subordinate to the other or the functions of the offices are inherently inconsistent an repugnant to each other.'" In re Water Use Permit Applications, 94 Hawaiʻi at 120, 9 P.3d at 433 (quoting State v. Villeza, 85 Hawaiʻi 258, 270, 942 P.2d 522, 532 (1997)).

Further, DOH exercised its authority to implement gap-filling rules in HAR Chapter 11, subchapter 1, to attached entities, recognizing that there may have been gaps in the procedural rules of such entities. See HAR § 11-1-1 ("Where such specific [attached entity] rules fail to cover particular practices and procedures, then these rules shall apply."). There is no indication that SHPDA had applied HAR § 11-185-32 to anyone other than hearing officers prior to the 2005 enactment of the current version of HAR Chapter 11, subchapter 1. The DOH's rules continue to be in force and effect today, regardless of the status of the administrative scheme between the enactment of the SHPDA

rules and the enactment of the DOH gap-filling rules. The intervening period does not justify the application of HAR § 11-185-32, pertaining to conflicts of hearing officers, to reconsideration committee members plainly covered by HAR § 11-1-25 as a result of HAR § 11-1-1.

E.

Both the SHPDA rules at Chapter 185 that govern SHPDA proceedings generally envision the hearing officer to have a particular role during public hearings. In Chapter 185, as noted, HAR § 11-185-31 provides that "[t]he agency shall designate the hearing officer who shall preside at the public hearing. The hearing officer shall have authority to take any and all actions necessary to the orderly and just conduct of the hearing." (Emphasis added.) Further, HAR § 11-185-35 states, "[t]o avoid unnecessary cumulative evidence at the public hearing, the hearing officer may limit the time for witnesses to testify upon a particular issue." (Emphasis added.) These provisions indicate that in this case, Hearing Officer Tseu was the hearings officer under the SHPDA rules, inasmuch as he was responsible for timekeeping and the orderly conduct at the public hearing on the reconsideration.

Nowhere in the hearing officer provisions does it state that the reconsideration members are "hearing officers," and nowhere in the transcripts does it indicate each reconsideration

member was a "hearing officer," as that term is described in the rules. Instead, in the hearings, Hearing Officer Tseu was consistently referred to as the "hearing officer." Trygstad, as a member of the Reconsideration Committee, was never referred to as a "hearings officer." That much is clear in the record, and cannot be reasonably disputed. Respectfully, to find otherwise would impose a legally absurd construction on SHPDA's regulatory scheme and on the nature of the proceedings that took place. See Sierra Club, 120 Hawaiʻi at 228, 202 P.3d at 1273 ("This court has stated that it is well-settled that statutory construction dictates that an interpreting court should not fashion a construction of statutory text that . . . creates an absurd or unjust result.") (internal quotation marks and citation omitted).

Reading the SHPDA rules in pari materia indicates that all reconsideration committee members are definitely not also all hearings officers. The agency's interpretation of Trygstad as a hearings officer, and the majority's affirmation of that interpretation, is contrary to the plain letter of the law - statutes and regulations, and the overall administrative scheme established by the rules. This is also evidenced by how the rules actually operated in this case, where Andrew Tseu was the designated hearing officer. Thus, SHPDA's interpretation of the rules is plainly erroneous and cannot be afforded deference by this court.

IV.

Second, respectfully, in my view, the court's affirmation of SHPDA's denial of Liberty's motion to disqualify Trygstad was incorrect. There is an ongoing factual dispute in the record as to the extent of Dr. Talbot's involvement with Kaiser. Additionally, there appears to be a factual disagreement with respect to Liberty's contention that Trygstad should have been disqualified pursuant to HAR § 11-1-25(a)(5) for other bias or prejudice resulting from her relationship with Dr. Talbot. "'Review of a decision made by a court upon its review of an administrative decision is a secondary appeal.'" Chung Mi Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawaiʻi 1, 9, 265 P.3d 470, 478 (quoting Brescia v. North Shore Ohana, 115 Hawaiʻi 477, 491, 168 P.3d 929, 943 (2007)). Accordingly, the court's determinations are reviewed de novo. Id.

As noted, during the agency proceedings, SHPDA had denied both of Liberty's motions to disqualify Terry and Trygstad. The court's Order affirming the Reconsideration Decision suggests that the agency provided reasons for its decisions on both motions. To reiterate, in fact, the agency did not state any reasons on the record for its decisions. Thus, it cannot be assumed that SHPDA applied HAR § 11-1-25.[19] However, the court

[19] In its Answering Brief on appeal, SHPDA briefly describes the proceedings on the motions for disqualification, and sets forth the party's (continued...)

appears to have assumed that SHPDA did apply HAR § 11-1-25, and thus the court did not consider whether, pursuant to HRS § 91-14(g)(4), the agency's determination was affected by an "other error of law,"[20] namely, applying the wrong disqualification rule. The court thus erred when it affirmed the Reconsideration Committee's retention of Trygstad.

In its Answering Brief, SHPDA explained that "[w]hile [SHPDA] would have analyzed the disqualification claim [regarding Trygstad] in terms of the provisions of [HRS] § 323D-47 and SHPDA's specific disqualification rule to reach the same conclusion for different reasons, [SHPDA] asserts that the []

[19](...continued)
arguments during the agency proceedings with respect to Administrator Terry and Trygstad's disqualification. The brief states that, regarding Administrator Terry's disqualification, "SHPDA countered that (1) [HRS] § 323D-47 [], provides that the Administrator issues the Decision on the Merits, participates on the Reconsideration Committee an serves as its chairperson; (2) SHPDA's specific rule of practice and procedure, [HAR] chapter 11-185 [], did not require the Administrator's disqualification; and (3) Liberty failed to produce any evidence of the Administrator's alleged personal bias or prejudice other than the conditional granting of Rainbow's CON [a]pplication in the Decision on the Merits." (Emphasis added.) However, based on the record, it appears that SHPDA's brief meant to designate those as Rainbow's arguments rather than SHPDA's arguments.

[20] HRS § 91-14(g) provides, in relevant part, that:

> (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:
> . . .
> (4) Affected by other error of law []
> . . . .

On review of an administrative decision, conclusions of law are reviewed under, inter alia, subsection (4). Sierra Club v. Office of Planning, 109 Hawaiʻi 411, 414, 126 P.3d 1098, 1101 (2006).

[c]ourt's rulings were not clearly erroneous . . . ." (Emphasis added.) Thus, on appeal, SHPDA alleged that HAR § 11-1-25, relating to third degree relationships, should not apply to Trygstad.

As a result, this case must be remanded to SHPDA, see HRS § 91-14(g), for the agency to apply HAR § 11-1-25 in making an on the record determination as to whether or not Trygstad should have been disqualified because her brother-in-law, Dr. Talbot, may have been a "party's representative," see HAR § 11-1-25(a)(2), or because she had a "personal bias or prejudice" concerning the matter as a result of Dr. Talbot's involvement, see HAR § 11-1-25(a)(5).

V.

Third, Trygstad's disqualification was not harmless. On appeal, Liberty contends that the "[c]ourt erred in concluding that the Reconsideration Committee's error in failing to disqualify Administrator Terry was harmless." The majority, in concluding that neither Administrator Terry nor Trygstad needed to be disqualified, does not reach this argument. However, because I would remand to SHPDA to determine whether Trygstad's disqualification from the Reconsideration Decision was required, the court's holding with respect to Waikiki Resort Hotel must be addressed.

The court held that in Waikiki Resort Hotel, this court "squarely addressed, and rejected, the theory that the vote of one member who should have been disqualified contaminates the votes of the remaining members, where . . . a majority decision still resulted with those remaining members." In this case, all four members of the Reconsideration Committee voted in favor of the Reconsideration Decision. In my view, however, the court interpreted the holding in Waikiki Resort Hotel too broadly, and that, in some circumstances, the vote of one member who should have been disqualified may contaminate the votes of the other qualified members.

A.

In Waikiki Resort Hotel, the plaintiff challenged the decision and order of the Building Board of Appeals of the City and County of Honolulu (the Board), which had affirmed the issuance of a building permit. Id. at 231, 624 P.2d at 1361. Plaintiff raised the question, inter alia, of whether the Board erred in denying plaintiff's petition that the building permit be declared void and revoked, because one of the Board members (Kellett) who participated in the decision to deny the petition, had a conflict of interest. Id.

At a board meeting prior to the ultimate decision, Kellett disclosed that he would be negotiating a contract, as a general contractor, to construct a steel structure in the project

covered by the building permit at issue. Id. at 246, 624 P.2d at 1370. Kellet had "stated that he felt he could 'render a full and impartial vote,' but wanted the Board to be aware of 'the possible conflict.'" Id. After considering the issue at the meeting, the Board voted that Kellett did not have to disqualify himself and could be a participant at the hearing. Id. At the time of the vote, seven of the eight members of the Board were present, and all seven voted in favor of the defendant. Id. at 247, 624 P.2d at 1370. At the next meeting, six members of the Board were present, and all six voted to approve the Board's findings of fact, conclusions of law, and the decision and order. Id.

This court considered "whether Kellett's participation in the Board action and in the Board decision and order . . . vitiated the Board decision and order, although, even without counting his vote, the Board action . . . had the affirmative votes of seven members, or two more than the five votes required under the applicable ordinance provision, and the Board decision and order had the affirmative votes of six members, or one more than the required five votes." Id. It was acknowledged that the "decisions are not uniform, even in cases where the participating member was clearly disqualified because of his present and immediate interest in the result or by reason of violation of applicable conflict of interest provision of a statute, charter,

ordinance, or regulation." Id. Further, this court concluded that the Board's action was "in accord with" the reasoning in Marshall v. Ellwood City Borough, 41 A. 994 (1899) and "the facts in [Waikiki Resort Hotel] are practically identical with the facts recited in the quoted statement [from Marshall][,]" and sustained the Board's vote. Id. at 249, 624 P.2d at 1371.[21]

But, other than to say, "[w]e are in accord with the foregoing reasoning," this court did not further discuss the quote. Rather, it was not clear if Kellett in fact should have been disqualified. Id. at 249, 624 P.3d at 1371. Waikiki Resort Hotel explained that, "there is some question as to whether the section [that would disqualify an appointed officer of the city or county under certain circumstances] applied to Kellett, in that, at the time he participated in the Board decision and order, he did not possess, and had not yet acquired any conflicting interest, the matter disclosed by him to the Board being prospective and contingent." Id. at 250, 624 P.2d at 1372. Thus, it appears this court's affirmation of the vote was

[21] The language quoted from Marshall stated in part that,

> [w]hile it must be conceded that, if a majority of those voting for the ordinance, or even one vote, if that vote determined the passage of the ordinance, would establish the invalidity of the ordinance, we cannot think that such a consequence would result from the mere fact that there was only one member of the council who had an opposing interest, and the ordinance was passed by a majority of legally competent members without any reference to his vote.

Id. at 248-49, 624 P.3d at 1371 (quoting Marshall, 41 A. at 995).

conditioned by the question of whether Kellett was in fact in conflict at the time of the vote.

Furthermore, this court observed that there was a dispute in Waikiki Resort Hotel over whether "Kellett was clearly disqualified from participating in the Board decision and order" in the first place. Id. at 249, 624 P.2d at 1371. Pursuant to the Honolulu City and County Charter, an individual with a conflict of interest was required to file a written disclosure, but "upon the filing of the required disclosure, such member was eligible to vote on the proposal." Id. (Emphasis added.)

Also, this court's citation to Marshall does not mean that this court adopted a per se rule for all future cases. In the quoted passage from Marshall, the Marshall court explained that, "'[w]e know of no reason, in the present case, why the invalid vote of one member of the council should be held to invalidate the perfectly legal vote of the other four members.'" Id. at 248, 624 P.2d at 1371 (quoting Marshall, 41 A. at 995) (emphasis added).

B.

Waikiki Resort Hotel thus does not mandate, as a singular proposition, that an error in failing to disqualify any decision maker in an administrative decision is harmless so long as that individual did not cast the deciding vote. Rather, the impact of an erroneous failure to disqualify a member of an

administrative board should be considered on a case by case basis. As Waikiki Resort Hotel points out in the quoted Marshall passage, "[i]t would be an astonishing proposition to submit that an ordinance in a body of fifty or one hundred members which was passed by a considerable majority of perfectly qualified votes, should be declared illegal because it had received the supporting vote of one member who was disqualified." Id. at 248, 624 P.2d at 1371 (quoting Marshall, 41 A. at 995). Rather, a case by case inquiry must be conducted to determine whether, taking the facts and circumstances of the decision-making into account, an individual may have had an influence on the outcome that extended beyond his or her vote.

> [S]everal strong reasons exist for invalidating decisions even when a tainted decision maker's vote was numerically unnecessary for the decision. First, courts invalidating such decisions have noted that collegial decision making ideally involves the exchange of ideas and views, often with the intent of persuading toward a particular position.[] The actual contribution of any particular decision maker cannot be measured with precision, but frequently extends significantly beyond the actual vote cast.[] For this reason, a significant threat to accuracy can exist even when a particular vote was numerically unnecessary for the decision.
>
> For similar reasons legitimacy concerns also exist even when a vote is numerically unnecessary. Although legitimacy concerns are less substantial in such circumstances, the perception of collegial decision making and the potential influence of a tainted decision maker on others would violate "appearance of fairness" standards. Thus, for both accuracy and legitimacy reasons the better view is that even when a vote is numerically unnecessary for a decision, courts should still invalidate it.

Mark W. Cordes, "Policing Bias and Conflicts of Interest in Zoning Decisionmaking," 65 N.D. L. Rev. 161, 212 (1989) (emphases added).

The supreme court of Alaska adopted an analogous approach in Griswold, 925 P.2d at 1028.[22] In that case, there were six voting members of the Homer City Council, and five voted in favor of a particular ordinance on its first reading, with one member absent. Id. at 1027. On the second and final reading, again five voted in favor of the ordinance and one was absent. Id. The supreme court held that one of the voting members had a conflict of interest that would have required disqualification from the voting. Id.

The Griswold court declined to adopt what it characterized as a "vote-counting" approach, namely, one that would uphold the vote where a disqualified member's participation and vote will not invalidate the result because the required majority exists without the vote of the disqualified member. Id. at 1027 (citing Waikiki Resort Hotel, 63 Haw. at 247, 624 P.2d at 1371; Singewald v. Minneapolis Gas Co., 142 N.W.2d 739 (1966); Anderson v. City of Parsons, 496 P.2d 1333 (1972); Eways v. Reading Parking Auth., 124 A.2d 92 (1956)). In rejecting this approach, Griswold reasoned that "[a] council member's role in the adoption or rejection of an ordinance cannot necessarily be measured solely by that member's vote. A conflicted member's

[22] The Griswold court stated that, "[w]e decline to follow the vote-counting approach adopted in Waikiki [Resort Hotel][.]" 925 P.2d at 1028. However, as discussed above, a precise reading of the holding in Waikiki Resort Hotel does not mandate the per se vote-counting approach referred to in Griswold.

participation in discussion and debate culminating in the final vote may influence the votes of the member's colleagues." Griswold further stated that, "[m]oreover, the integrity required of public officeholders demands that the appearance of impropriety be avoided; the approach adopted in Waikiki [Resort Hotel] will not always do so." Id. at 1028 (citations omitted).

The Alaska supreme court also rejected the "automatic invalidation" approach, wherein "a vote cast by a disqualified member vitiates the decision in which the member participated, even if the vote does not change the outcome of the decision." Id. (citing Waikiki Resort Hotel, 624, P.2d at 1370; Piggott v. Borough of Hopewell, 91 A.2d 667 (1952); Baker v. Marley, 170 NE.2d 900 (1960); Buell v. City of Bremerton, 495 P.2d 1358 (1972)). It reasoned that "[t]he vote and participation of a conflicted member will not invariably alter the votes of other members or affect the merits of the council's decision." Id. "This is especially true," the Griswold court noted, "if the conflict is disclosed or well-known, allowing other members to assess the merits of the conflicted member's comments in light of his or her interest." Id. The Alaska court concluded that "[a]utomatic invalidation has the potential for thwarting legislative enactments which are not in fact the result of improper influence." Id.

Instead of following either of these approaches,[23] that court reasoned that "[i]n determining whether the vote of a conflicted member demands invalidation of an ordinance, courts should keep in mind the two basic public policy interests served by impartial decision-making: accuracy of decisions, and the avoidance of the appearance of impropriety."[24] Id. (citing Cordes, supra, at 212).

In my view, an approach to decisions involving

[23] Other jurisdictions have similarly rejected the all-or-nothing approaches of automatic invalidation or invalidation only where the disqualified member cast the deciding vote. See Hanig v. City of Winner, 692 N.W.2d 202, 210 (S.D. 2005) (holding that where there was a failure to disclose a conflict of interest by a council member, the plaintiff was entitled to a new hearing); Sohocki v. Colorado Air Quality Control Comm'n, 12 P.3d 274, 279 (Colo. App. 1999) (adopting the balancing test set out in Griswold).

[24] I would take a somewhat different approach from the method adopted by the Alaska supreme court. That court emphasizes disclosure, and requires that there be an "intolerable" appearance of impropriety before a vote or action must be invalidated. See Griswold, 925 P.2d at 1029. Griswold adopted the following test:

> If the interest [of a conflicted member] is undisclosed, the ordinance will generally be invalid; it can stand only if the magnitude of the member's interest, and the extent of his or her participation, are minimal. If the interest is disclosed, the ordinance will be valid unless the member's interest and participation are so great as to create an intolerable appearance of impropriety. The party challenging the ordinance bears the burden of proving its invalidity.

Id. (Emphasis added). However, Cordes favors disqualification over disclosure. Cordes, supra, at 214 (noting that "perceptions of fairness and legitimacy are only partly addressed by disclosure."). Also, whether the appearance of impropriety is "intolerable" is difficult to measure and strongly subjective. "Substantial," on the other hand, is a commonly used legal term of art. See, e.g., Black's Law Dictionary 1565-66 (9th ed. 2009) (defining, inter alia, "substantial-capacity test," "substantial-cause test," "substantial-certainty test," "substantial-continuity doctrine," "substantial equivalent," and "substantial-evidence rule"). Thus, rather than adopting the "intolerable appearance of impropriety" standard in determining when disqualification is appropriate, I would require that the decision maker's impact on the decision be "substantial."

disqualified members that is grounded in an accuracy and legitimacy rationale would lead to fairer results. In order to maintain legitimacy and accuracy, "disqualification rather than disclosure is the preferable approach." Cordes, supra, at 214. Disqualification maintains the appearance of fairness, because it remedies any perception of "the potential influence of a tainted decision maker." Id. at 216. However, invalidation of the agency's vote is not required in every case. Where the threat to the legitimacy of a decision is de minimis, there is no need for disqualification. For example, where a large number of decision makers vote on a particular measure and the "decision appears inevitable[,]" "the administrative burden of invalidating and remanding a decision outweighs any threat to substantive results and perceptions of fairness." Id.

On the other hand, "a significant threat to accuracy can exist even when a particular vote [is] numerically unnecessary for [a] decision." Id. Where the decision maker would have a substantial impact on the decision making process, the vote should be invalidated regardless of whether the disqualified member casts the deciding vote. In order to determine where a particular decision maker would have a substantial impact, a consideration of the three factors set forth in Griswold becomes apropos: (1) whether the member disclosed the interest or the other group members were fully

aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest. Griswold, 925 P.2d at 1029.

As compared to an accuracy and legitimacy approach, a "vote-counting" rule that would uphold a decision regardless of disqualification, so long as the disqualification would not have applied to the deciding vote would depreciate the substantial effect or influence a disqualified member may have on the other members of the voting group, especially when such disqualification may be motivated by improper motive such as self interest, bias, or prejudice. Correlatively, as compared to an accuracy and legitimacy approach, an "automatic invalidation" rule that would invalidate a vote every time a disqualified member took part in the vote would engender the impractical and unreasonable result of declaring illegal a decision adopted "by a considerable majority of perfectly qualified votes," because the supporting vote of one, or a few members were disqualified. Waikiki Resort Hotel, 63 Haw. at 248, 624 P.2d at 1371.

C.

Assuming that Trygstad should have been disqualified, I would hold that Trygstad's participation in the Reconsideration Decision would render it void. In this case, Trygstad would have had a substantial impact on the decision. As to factor (1), in this case it appears that Trygstad did in fact disclose her

brother-in-law's employment on the record for the Reconsideration Hearing. However, a number of other facts relevant to factors (2) and (3) indicate that Trygstad had a substantial impact.

The Reconsideration Committee was convened because the decision of the Administrator differed from the recommendation of the Statewide Council. HRS § 323D-47(5). In fact, two of the three SHPDA advisory panels had recommended that the CON Application be rejected, but Administrator Terry had conditionally approved the CON Application in his Decision on the Merits. As a participant in the Tri-Isle Subarea Health Planning Council, Trygstad had voted in favor of the CON Application. On reconsideration, the Reconsideration Committee was composed of only five members. Thus, Trygstad's vote represented twenty percent of the vote on the Reconsideration Decision.

On January 3, 2011, the Reconsideration Committee held a public hearing. The Reconsideration Committee then had forty-five days to file a decision. The Reconsideration Decision stated that "[t]he Reconsideration Committee . . . has considered the written and oral testimony, exhibits, arguments and other filings submitted by [Rainbow], [Liberty], [SHPDA] and other affected persons, the recommendations of the Tri-Isle Subarea Health Planning Council, the Certificate of Need Review Panel, and the Statewide Health Coordinating Council." The Reconsideration Decision consisted of Findings of Fact,

Conclusions of Law, Order and Written Notice and was signed by all five members of the Reconsideration Committee.

Under these circumstances, Trygstad's participation in the decision substantially impacted the ultimate decision of the Reconsideration Committee during the deliberation process. "[T]he actual contribution of any particular decision maker cannot be measured with precision, but frequently extends significantly beyond the actual vote cast.[]" Cordes, supra, at 212. The size of the Reconsideration Committee in this case was small, only consisting of five members. Furthermore, the deliberation process was out of the public view during the period between the public hearing and when the Reconsideration Committee was required to file a decision. Finally, it is undisputed that Trygstad's brother-in-law, Dr. Talbot, participated in prior public hearings and testified in support of Rainbow's CON Application. Thus, Trygstad's impact on the decision was substantial. Under such circumstances, the Reconsideration Decision would be set aside, and a new Reconsideration Decision with a reconstituted Reconsideration Committee ordered.

VI.

Because I would remand the case, Liberty's fourth point of error with respect to the allocation of the burden of proof must also be discussed. On appeal to the court and before this

court, Liberty alleged that the burden of proof was improperly placed on Liberty for the Reconsideration Decision.[25]

HRS § 91-10(5) (2003) provides that, "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion." (Emphasis added.) As noted, Rainbow initiated the CON proceedings by filing its CON Application with SHPDA. However, Liberty initiated the Reconsideration Decision by its request for a public hearing. See HRS § 323D-47. Thus, applying HRS § 91-10(5), the operative question is what constitutes "the proceeding," the CON Application as a whole, or the Reconsideration Decision.

With respect to the CON Application, Rainbow had the burden of proof to show that its proposal adequately satisfied the factors set forth in HRS § 323D-43 (2010). SHPDA rule HAR § 11-186-42 affirmatively establishes this burden, stating that "[t]he applicant for a certificate of need . . . shall have the burden of proof[.]" Liberty argues that the Reconsideration Decision was part of the "proceeding" on the CON Application, and therefore the burden did not shift to Liberty subsequent to the Decision on the Merits.

[25] Liberty does not challenge the court's conclusion that Liberty's failure to allege error in allocating the burden of proof before the Reconsideration Committee precludes it from raising this point of error as a ground for reversal of the Reconsideration Decision on appeal. Thus, this point of error is addressed only for advisement if the case were to be remanded.

HRS § 323D-47 supports Liberty's view inasmuch as it provides a number of circumstances in which a request for a public hearing is supported by "good cause." For example, a request "shall be deemed by the reconsideration committee to have shown good cause," if:

> (1) It presents significant, relevant information not previously considered by the state agency;
> (2) It demonstrates that there have been significant changes in factors or circumstances relied upon by the state agency in reaching its decision;
> (3) It demonstrates that the state agency has materially failed to follow its adopted procedures in reaching its decision;
> (4) It provides such other bases for a public hearing as the state agency determines constitutes good causes; or
> (5) The decision of the administrator differs from the recommendation of the statewide council.

HRS § 323D-47. It is not disputed that the burden is on the person requesting a public hearing before a reconsideration committee to show good cause. Id. Once good cause has been shown however, the committee "shall schedule a public hearing for reconsideration of the decision." HAR § 11-186-82(d) (1981).

Because, at the time of the hearing, the decision on the CON application is literally being considered again, it will once more be the responsibility of the party that filed the application to show that its application should be approved. Thus, in the instant case, once Liberty would successfully demonstrate good cause for a reconsideration hearing pursuant to HRS § 323D-47, the burden of proof would be on Rainbow to support its application once again. On remand for a new reconsideration

decision by a reconstituted reconsideration committee, Rainbow would therefore have the burden of proof.

VII.

For the foregoing reasons, I would vacate the court's December 13, 2011 final judgment, which affirmed the SHPDA Reconsideration Committee's February 17, 2011 Reconsideration Decision, and remand to the court with instructions to remand the case to SHPDA for further proceedings consistent with the principles expressed herein. For these reasons, I respectfully concur in part, and dissent in part.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack