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

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-12-0000018; CIV. NO. 11-1-0532-03)

JUNE 27, 2013

RECKTENWALD, C.J., NAKAYAMA, AND McKENNA, JJ.,
WITH ACOBA, J., DISSENTING, WITH WHOM POLLACK, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, C.J.

This appeal requires us to consider whether the Department of Health's general administrative rules concerning disqualification apply to State Health Planning & Development Agency (SHPDA) committees that are established to reconsider the agency's approval of a Certificate of Need. Briefly stated, SHPDA granted Rainbow Dialysis, LLC a conditional Certificate of Need to establish two outpatient dialysis facilities at Kaiser Foundation Health Plan, Inc., facilities on Maui. Another Maui dialysis provider, Liberty Dialysis-Hawaii, LLC, sought reconsideration of SHPDA's decision. Thereafter, a five-member Reconsideration Committee unanimously approved Rainbow's conditional Certificate of Need.

Liberty appealed the Reconsideration Decision to the circuit court, arguing that SHPDA Administrator Ronald E. Terry and another Reconsideration Committee member, Anne Trygstad, should have been disqualified from participating in the Reconsideration Decision under the Department of Health rules. Liberty also argued that the Reconsideration Committee failed to review Rainbow's application de novo, and thereby improperly placed the burden of proof on Liberty. The circuit court affirmed, holding that the SHPDA Administrator should have been disqualified, but that his participation in the Reconsideration

Decision was harmless.[1] The circuit court rejected Liberty's remaining points of error.

On appeal to this court, Liberty argues that Administrator Terry's participation was not harmless and, in any event, Rainbow did not timely raise this argument. Liberty also argues that the Reconsideration Committee erred in refusing to disqualify Trygstad. Finally, Liberty argues that, if this court remands for a new reconsideration hearing based on Liberty's disqualification arguments, it also should advise the Reconsideration Committee that Rainbow bears the burden of proof on remand. Rainbow cross-appealed, and argues that the circuit court erred in determining that Administrator Terry should have been disqualified.

We hold that neither Administrator Terry nor Trygstad was disqualified from participating in the Reconsideration Decision. With regard to Administrator Terry, Liberty relies on Hawaiʻi Administrative Rules (HAR) § 11-1-25(a)(4), a Department of Health rule that prohibits a hearings officer from hearing or deciding a contested case in which he or she "substantially participated in making the decision or action contested[.]" However, in crafting the reconsideration statute, Hawaiʻi Revised Statutes § 323D-47, the legislature clearly intended that the SHPDA administrator participate in both the initial decision on a

[1] The Honorable Karl K. Sakamoto presided.

Certificate of Need, and in any reconsideration of that decision. Because HAR § 11-1-25(a)(4) conflicts with this intent, it would be invalid if applied in the circumstances here. Accordingly, we hold that HAR § 11-1-25(a)(4) is inapplicable.

With regard to Trygstad, Liberty relies on HAR § 11-1-25(a)(2), a Department of Health rule that provides for disqualification where a hearings officer, director or member is "related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney[.]" Liberty alleges that Trygstad's brother-in-law is the "Kaiser Permanente physician-in-charge for Maui," and testified as a Kaiser representative in three SHPDA advisory panel hearings prior to the initial decision on Rainbow's application, and that, accordingly, Trygstad should have been disqualified from the Reconsideration Committee. We hold that HAR § 11-1-25 is inapplicable to the SHPDA reconsideration proceedings. SHPDA's more specific rule, HAR § 11-185-32, governs disqualification practices and procedures in these proceedings, and does not require that Trygstad be disqualified.

Because our resolution of these issues is dispositive, we do not address Liberty's remaining points of error. Based on the foregoing, we affirm the circuit court's judgment, which affirmed the Reconsideration Decision.

I. Background

The following factual background is taken from the

record on appeal.

A. Rainbow's Certificate of Need application

Rainbow filed a Certificate of Need (CON) application[2] with SHPDA for the establishment of two outpatient dialysis facilities on Maui. Rainbow is and was a wholly owned affiliate of Kaiser Foundation Health Plan, Inc. (Kaiser). Rainbow's two facilities would be located in or near existing Kaiser clinics in Wailuku and Lahaina. Rainbow asserted that internalizing dialysis services within Kaiser's health care system would improve management of patient care, provide benefits to patients in isolated parts of West Maui, bring competition to the dialysis market and lower prices, create savings over the dialysis services then being provided by Liberty, allow for more robust provision of services for QUEST patients, and allow Kaiser to pass savings on to the community in the form of financial and in-kind donations to community partners.

Liberty opposed Rainbow's CON application, asserting that the application failed to meet several criteria for the grant of a CON. Additionally, Liberty asserted that it has provided dialysis services on Maui since 2006, and that there were several reasons that Kaiser's dialysis expenditures had increased, including an increase in the number of Kaiser patients

[2] "'Certificate of need' means an authorization, when required pursuant to section 323D-43, to construct, expand, alter, or convert a health care facility or to initiate, expand, develop, or modify a health care service." Hawaiʻi Revised Statutes (HRS) § 323D-2 (2010).

receiving dialysis, regulatory changes, and inflation. Liberty also asserted that its mission "includes providing a safety net[,]" and that its ability to continue to provide services was dependent on its ability "to spread the real costs across a broad base of commercial patients[.]" Liberty asserted that Rainbow's proposal would jeopardize Liberty's "ability to maintain its current scope of services for persons who are not insured by Kaiser." Specifically, "[i]f the small percentage of patients with commercial insurance declines or disappears, Liberty [] will be unable to continue to subsidize operations in more remote regions or care for a substantial portion of the underinsured or uninsured patients who currently receive care from Liberty []."

As required under HRS § 323D-44(a),[3] three separate SHPDA advisory panels considered Rainbow's CON application: the Tri-Isle Subarea Health Planning Council, the CON Review Panel, and the Statewide Health Coordinating Council (SHCC). Each advisory panel held public meetings in which they received extensive testimony both for and against the proposal, and each issued non-binding recommendations. By a 4-1 vote, the Tri-Isle Subarea Health Planning Council recommended approval of the application. By a 5-0 vote (with one abstention), the CON Review Panel recommended denial of the application. By a 7-4 vote, the

[3] Pursuant to HRS § 323D-44(a) (2010), SHPDA "shall transmit the completed [CON] application to the appropriate subarea councils, the review panel, the statewide council, appropriate individuals, and appropriate public agencies."

SHCC recommended denial of the application.

On May 3, 2010, SHPDA, through Administrator Terry, filed a Decision on the Merits, approving Rainbow's application and issuing a conditional CON. In so doing, SHPDA imposed three conditions on Rainbow. First, Rainbow was required to submit a "detailed long-term implementation plan" regarding how it and Kaiser would allocate cost reductions to the public and community. Second, Rainbow was required to provide a written acknowledgment that failure to fulfill the implementation plan would constitute a breach of the HAR and could result in withdrawal of the CON. Finally, Rainbow was required to enter into a joint and several written undertaking with Kaiser to provide chronic renal dialysis services to Hana and Molokai, should Liberty cease providing services in those communities within 10 years of the Decision on the Merits. Rainbow subsequently informed SHPDA by letter that it accepted the conditions set forth in the conditional CON and modified its application accordingly.

Liberty sought reconsideration of the Decision on the Merits pursuant to HRS § 323D-47(5)[4] and HAR § 11-186-82.[5]

[4] HRS § 323D-47 (Supp. 2009) provides in relevant 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

(continued...)

Liberty argued that there was good cause for reconsideration because SHPDA's decision differed from the recommendation of the SHCC.

Pursuant to HRS § 323D-47, a five-member Reconsideration Committee was convened, composed of Administrator Terry, and the chairpersons of the SHCC, the CON review panel, the plan development committee of the SHCC, and the Tri-Isle Subarea Health Planning Council. On June 14, 2010, four of the five Reconsideration Committee members convened a public meeting and voted to convene a public hearing for reconsideration of the Decision on the Merits.[6] SHPDA appointed Andrew Tseu as Hearings Officer "to facilitate pre-hearing conferences and hearing procedures for the Reconsideration Committee."

Prior to the hearing on Liberty's reconsideration request, Liberty filed a motion to disqualify Administrator Terry

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[4](...continued)

> 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:
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> . . . .
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> (5) The decision of the administrator differs from the recommendation of the statewide council.

[5] HAR § 11-186-82(a) (1988) provides procedures for requesting reconsideration, and for the reconsideration process.

[6] Elaine Slavinsky, chairperson of the Tri-Isle Subarea Health Planning Council, participated in the June 14, 2010 meeting, but later recused herself and was replaced by Anne Trygstad.

from the Reconsideration Committee pursuant to HAR § 11-1-25(a)(4) and (5),[7] on the ground that he could not sit in review of his own decision and had a personal bias or prejudice that would prevent him from rendering a fair and impartial decision. Specifically, Liberty argued:

> In the present matter, HAR § 11-1-25 mandates Terry's disqualification from the reconsideration hearing because, not only did Terry substantially participate in the certificate of need review process but, as the SHPDA administrator, he was the ultimate decision-maker on the Application. Moreover, Terry unilaterally approved the Application despite the recommended rejections by the CON Review Panel and Statewide Council, without providing a written explanation as required by agency rule. Terry further has a personal bias or prejudice which will prevent a fair and impartial decision on this contested case.[8]

Rainbow opposed Liberty's motion. Rainbow argued that HRS § 323D-47 mandates that the SHPDA administrator serve as a member of the Reconsideration Committee, even if the administrator is reviewing his or her own decision. Rainbow also argued that, to the extent HAR § 11-1-25 conflicts with HRS § 323D-47, HRS § 323D-47 governs. Additionally, Rainbow argued

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[7] HAR § 11-1-25 (2005) provides in pertinent part:

> 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:
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> . . . .
>
> (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.

[8] Liberty argued, inter alia, that Administrator Terry exhibited personal bias or prejudice by approving the CON application despite the votes to reject the application by the CON Review Panel and the SHCC.

that the SHPDA disqualification rules set forth in HAR chapters 11-185 and 11-186 applied, rather than HAR § 11-1-25. Finally, Rainbow argued that Liberty's allegation of Administrator Terry's personal bias was "unfounded and frivolous."

Liberty also filed a motion to disqualify a second Reconsideration Committee member, Anne Trygstad, pursuant to HAR § 11-1-25(a)(2).[9] Liberty alleged that Trygstad is the sister-in-law of Dr. George Talbot, who Liberty described as Kaiser's "physician-in-charge of Maui[.]" Liberty argued that Kaiser was a party to the proceeding and/or a party's representative, and that Dr. Talbot offered testimony in favor of Rainbow's CON application at the hearings before each of the three review panels. Liberty also argued that Trygstad should be disqualified pursuant to HAR § 11-1-25(a)(5) because she had a personal bias or prejudice due to her relationship to Dr. Talbot.

Rainbow opposed Liberty's motion to disqualify Trygstad. Along with its motion, Rainbow submitted a declaration from Dr. Talbot in which he 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.
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> 2. I am currently the HPMG physician in charge of Maui and in that role, I oversee the 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

[9] HAR § 11-1-25(a)(2) (2005) requires disqualification if a person is "related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney[.]"

> 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 the Kaiser Foundation Hospitals, Inc., a separate corporation that owns and/or manages Kaiser's hospital and clinic facilities and employs certain affiliated care providers for those facilities.
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> 3. I am the brother-in-law of Anne Trygstad. Other than testimony I presented to the Tri-Isle Subarea Council at its December 3, 2009 public meeting on [Rainbow's CON] Application, at which Ms. Trygstad was present, I have had no communication with Ms. Trygstad in the past two or three years.
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> 4. I own a home in the same subdivision as Ms. Trygstad owns a home. The subdivision consists of over 20 separate houses. My house is at the opposite end of the subdivision from the house owned by Ms. Trygstad.
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> 5. I did not participate in the preparation of the Rainbow CON Application. My only involvement in the CON proceedings has been as a witness, not as a party. I am not an employee or representative of Rainbow.

The Reconsideration Committee denied Liberty's disqualification motions. The Reconsideration Committee did not state its reasoning on the record.

Following a reconsideration hearing,[10] the Reconsideration Committee issued its Decision unanimously approving the conditional certification of Rainbow's application. The Reconsideration Committee found that "[i]t was unconstested that Liberty had the burden of proof in this Reconsideration

[10] Thirty-one individuals presented testimony at the hearing. Each individual was afforded a maximum of two and a half minutes to testify. Ten individuals testified against the CON. One individual testified as a neutral. Twenty individuals testified in favor of the CON, including Dr. Talbot and six other individuals who identified themselves as being professionally affiliated with a Kaiser entity.

In addition, several parties were afforded five minutes to testify. First, representatives of Liberty and of Unite Here! Local 5, which also sought reconsideration of the Decision on the Merits, testified against the CON for five minutes each. Subsequently, the President and Executive Medical Director of Hawaii Permanente Medical Group testified in favor of the CON on behalf of Rainbow, also for five minutes.

proceeding pursuant to HRS § 91-10(5) because Liberty initiated the Reconsideration proceeding and acknowledged in writing its burden of proof." The Reconsideration Committee also made detailed findings and conclusions regarding the ways in which Rainbow's CON application either met the CON criteria, or would meet the criteria if modified by the conditions set forth in the Committee's decision. Accordingly, the Reconsideration Committee ordered that a conditional CON be approved and issued, with Rainbow to modify its proposal to incorporate the following conditions: that (1) Kaiser members be permitted to receive dialysis services from Liberty "for as long as they wish"; (2) Rainbow accept all dialysis patients regardless of ability to pay; and (3) Rainbow and Kaiser provide chronic renal dialysis services to Hana and Molokai, should Liberty cease providing services to those communities within 10 years of the Decision on the Merits.

B. Circuit court appeal

Liberty appealed the Reconsideration Decision to the circuit court, raising numerous points of error. Relevant to the issues on appeal, Liberty argued in its opening brief that the Reconsideration Committee erred in denying its motions to disqualify Administrator Terry and Trygstad. Liberty also argued that the Reconsideration Committee failed to review Rainbow's application de novo, and "thereby improperly placed the burden of proof on Appellant Liberty in contradiction of HAR § 11-186-

42[.]"

The circuit court held a hearing on Liberty's appeal and orally ruled that "Administrator Terry should have automatically disqualified himself from sitting on the reconsideration committee and his failure to do so was error." Accordingly, the circuit court stated that it would remand to SHPDA with instructions to hear the reconsideration request with an acting SHPDA administrator other than Terry.

Rainbow subsequently filed an ex parte motion for an expedited status conference to address this court's holding in Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Haw. 222, 624 P.2d 1353 (1981), and the ICA's holding in Hui Malama Aina O Koʻolau v. Pacarro, 4 Haw. App. 304, 666 P.2d 177 (1983). Rainbow argued that, pursuant to these cases, an agency's decision will not be invalidated on the ground that a disqualified official participated in the decision, so long as the decision was passed by a majority of legally competent members. Accordingly, Rainbow argued, Liberty failed to meet its burden of establishing a legal basis for remand. Liberty opposed the motion, arguing, inter alia, that Rainbow's arguments were untimely, the motion was procedurally improper, and Waikiki Resort Hotel was distinguishable.

The circuit court construed Rainbow's motion as a motion for reconsideration, and denied it without a hearing on the ground that Rainbow "waived its right to assert those cases

and make related arguments due to failure to cite those cases in its answering brief." The circuit court subsequently issued a written order granting Liberty's appeal on the ground that Administrator Terry should have been disqualified, and remanding to SHPDA with instructions to hold the reconsideration hearing with an acting SHPDA administrator other than Administrator Terry.

Liberty thereafter attempted to draft a proposed final judgment. Rainbow objected to Liberty's proposed final judgment because, inter alia, the circuit court had not resolved all of the issues and claims raised in Liberty's appeal. SHPDA also objected to Liberty's proposed final judgment and submitted its own proposed final judgment, which would have granted judgment in favor of Liberty on its first claim for relief relating to Administrator Terry and dismissed all other claims. Liberty subsequently submitted a revised proposed final judgment.

While Liberty's revised proposed final judgment was pending, the circuit court sua sponte requested supplemental briefing on, inter alia, "whether all remaining issues should be decided on the merits, including issues related to Waikiki Resort Hotel . . . and/or Hui Malama Aina O Koʻolau[.]" Following the receipt of supplemental briefing and a hearing, the circuit court issued an order affirming the Reconsideration Decision in its entirety. The circuit court reiterated its conclusion that the

Reconsideration Committee erred in failing to disqualify Administrator Terry, but held that the error was harmless pursuant to Waikiki Resort Hotel. The circuit court also affirmed the Reconsideration Committee's retention of Anne Trygstad on the ground that the Reconsideration Committee's determination that Dr. Talbot was not a party or a party's representative was not clearly erroneous. Finally, the circuit court concluded that Liberty was judicially estopped from contesting its burden of proof because it had represented to the Reconsideration Committee that Liberty bore the burden of proof. The circuit court also affirmed on other issues unrelated to this appeal.

The circuit court filed its Final Judgment on December 13, 2011, entering judgment in favor of SHPDA and Rainbow and against Liberty. Liberty timely filed a notice of appeal on January 10, 2012.

C. Appeal to this court[11]

Liberty raises four points of error in its appeal:

> (1) The Circuit Court abused its discretion by reconsidering three of its prior orders and entertaining Rainbow's belated argument that the Reconsideration Committee's failure to disqualify Terry should be excused as harmless error under Waikiki.
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> . . . .
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> (2) The Circuit Court erred in concluding that the Reconsideration Committee's error in failing to

[11] This court granted Liberty's application to transfer its appeal from the Intermediate Court of Appeals (ICA) to this court.

> disqualify Ronald Terry was harmless.[12]
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> . . . .
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> (3) The Reconsideration Committee erred in refusing to disqualify Anne Trygstad from serving on the Reconsideration Committee, and the Circuit Court erred in upholding this decision.
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> . . . .
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> (4) The Reconsideration Committee erroneously placed the burden of proof on Liberty rather than Rainbow.[13]

Rainbow raises a single point of error in its appeal: "The 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." (Record citations omitted). Rainbow argues that "HRS [c]hapter 323D, and HRS § 323D-47 in particular, make clear that the SHPDA Administrator can and should participate in the Decision on the Merits and serve on the Reconsideration Committee that reviews such decisions." (Emphasis in original).

Although "Rainbow agrees with the ultimate ruling of the circuit court in entering Final Judgment in favor of Rainbow," it nonetheless seeks review of its point of error to

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[12] Because we conclude that neither Administrator Terry nor Trygstad was disqualified, we do not reach Liberty's points of error regarding the harmlessness of Administrator Terry's participation.

[13] Liberty acknowledges that, before the Reconsideration Committee, it "erroneously took the position that, because it had requested reconsideration, it bore the burden of proof." Liberty also acknowledges that it is estopped from taking a contrary position on appeal, and from raising this issue as an independent ground for reversal. Nevertheless, Liberty argues that, if this court remands for reconsideration before a new Reconsideration Committee based on Liberty's disqualification arguments, we should also order the Reconsideration Committee to apply the "proper allocation of the burden of proof[.]" Because we affirm the Reconsideration Decision, we do not reach this point of error.

ensure that "Liberty (and others) cannot use the circuit court's erroneous holding regarding HAR § 11-1-25 and the Administrator's 'disqualification' from the Reconsideration Committee as law of the case here or through offensive use of collateral estoppel in any other proceedings."

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. SHPDA's answering brief generally supported Rainbow's arguments in both the appeal and the cross-appeal.

II. Standards of Review

A. Review of agency decisions

Review of a decision made by the circuit court upon its review of an administrative decision is a secondary appeal. Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawaiʻi 1, 9, 265 P.3d 470, 478 (2011) (citation omitted). The circuit court's decision is reviewed de novo. Id. The agency's decision is reviewed under the standards set forth in HRS § 91-14(g). Id. HRS § 91-14(g) (1993) provides:

> (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:
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> (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
> (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
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> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." Sierra Club v. Office of Planning, 109 Hawaiʻi 411, 414, 126 P.3d 1098, 1101 (2006) (citation, internal quotation marks and brackets omitted).

B. Statutory interpretation

"Statutory interpretation is a question of law reviewable de novo." Kaleikini v. Yoshioka, 128 Hawaiʻi 53, 67, 283 P.3d 60, 74 (2012) (citation omitted).

C. Interpretation of agency rules

General principles of statutory construction apply in interpreting administrative rules. Id. "As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." Id. (citation omitted). While an agency's interpretation of its own rules is generally entitled to deference, this court "does not defer to agency interpretations

that are plainly erroneous or inconsistent with the underlying legislative purpose." Id. (citation and internal quotation marks omitted).

III. Discussion

A. Administrator Terry was not disqualified from participating in the Reconsideration Decision

In order to determine whether Administrator Terry was disqualified from participating in the Reconsideration Decision, this court must consider whether the Department of Health (DOH) rule regarding disqualification, HAR § 11-1-25(a)(4), is applicable to the Reconsideration Committee members.[14] As explained in detail below, HAR § 11-1-25(a)(4) prevents a hearings officer from hearing or deciding a contested case in which he or she "substantially participated in making the decision or action contested[.]" Because Administrator Terry made the initial decision to approve Rainbow's CON application, Liberty argues that he was disqualified from the reconsideration hearing.

Rainbow argues that this rule is inapplicable here because it would conflict with HRS § 323D-47, which, Rainbow argues, requires the Administrator to issue the initial decision on a CON application, chair any resulting reconsideration committee, and participate in the reconsideration decision.

[14] It is undisputed that HAR § 11-1-25, if applicable, would require disqualification of Administrator Terry in the circumstances presented here.

Rainbow also argues that the more specific SHPDA disqualification rule, HAR § 11-185-32, applies in lieu of the DOH disqualification rule, and would not require Administrator Terry's disqualification in the circumstances of the instant case.

Liberty argues that there is no conflict between the DOH rule and HRS § 323D-47 because nothing in HRS § 323D-47 requires the SHPDA Administrator to personally issue a decision on a CON application. In addition, Liberty argues that the SHPDA disqualification rule does not displace the DOH rule because it covers only a narrow category of disqualifications and does not conflict with the DOH rule.

As set forth below, the legislature, in enacting HRS § 323D-47, envisioned that the SHPDA Administrator would participate in both the initial decision on a CON application and any subsequent reconsideration decision. However, HAR § 11-1-25(a)(4) would preclude the SHPDA Administrator from participating in both of these decisions. Accordingly, HAR § 11-1-25(a)(4) conflicts with HRS § 323D-47, and would be invalid if applied in the circumstances presented here. Moreover, HAR § 11-1-25(a)(4) is inapplicable because the more specific disqualification rule contained in HAR § 11-185-32 governs SHPDA hearings officers in CON proceedings. Liberty does not argue that Administrator Terry should have been disqualified pursuant to HAR § 11-185-32, and nothing in this rule would appear to

require Administrator Terry's disqualification. Accordingly, Administrator Terry was not disqualified from participating in the Reconsideration Decision.

1. The legislature envisioned that the SHPDA administrator would issue the initial decision on a CON application and participate in any reconsideration of that decision

HRS § 323D-47 governs requests for reconsideration of SHPDA's decision on a CON application, and provides in relevant 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:
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> . . . .
>
> (5) The decision of the administrator differs from the recommendation of the statewide council.

(Emphasis added).

Rainbow argues that this provision requires the SHPDA administrator to sit in reconsideration of his or her own decision because it requires that the administrator issue the initial decision on a CON application, as well as "be a member of, [and] also serve as the chairperson of, any Reconsideration Committee tasked with deciding a challenge to a decision by the Administrator which differs from the recommendation of the SHCC."

Liberty argues that this provision does not require the administrator to personally issue the initial decision on a CON application and, thus, does not require that the administrator sit in reconsideration of his or her own decision.[15]

Liberty is correct that nothing in HRS § 323D-47, nor any other provision of chapter 323D, explicitly states that the administrator must personally issue the initial decision on a CON application. See HRS chapter 323D. Rather, HRS chapter 323D repeatedly references the CON being issued by the "state agency," see, e.g., HRS § 323D-43(a); HRS § 323D-44(b), meaning SHPDA, see HRS § 323D-2. Similarly, the relevant administrative rules state that the decision on the merits will be issued by "the agency," and do not specify that the agency must act through its administrator. HAR § 11-186-70.

Nevertheless, the plain language of HRS § 323D-47 reflects the legislature's understanding that the administrator is responsible for issuing the decision on a CON application on behalf of the agency. Pursuant to HRS § 323D-47, a person may request a hearing "for purposes of reconsideration of the agency's decision" on a CON application where, inter alia, "[t]he

[15] Liberty does not dispute that the administrator has the power to issue a decision on a CON application, but rather argues that the administrator is not required to personally issue such a decision. For example, Liberty argues that the administrator may delegate any such decision making authority to another, in order to preserve his or her ability to sit on the reconsideration committee. However, as set forth below, the statute reflects the legislature's intent that the administrator participate in both decisions.

decision of the administrator differs from the recommendation of the statewide council." (Emphasis added). Thus, HRS § 323D-47 appears to view the decision of the agency and the decision of the administrator as being one and the same.

Moreover, even assuming there is an ambiguity as to whether the legislature understood that the administrator was responsible for the initial decision on a CON application, this interpretation is supported by legislative history. HRS § 323D-47 was enacted along with the rest of chapter 323D in 1977. 1977 Haw. Sess. Laws Act 178, § 2 at 366-67. Under the 1977 version of the statute, the decision on a reconsideration request was made by the agency itself, rather than by a reconsideration committee. Id. At that time, the statute did not provide that a disagreement between the administrator's decision and the SHCC's recommendation provided a good cause basis for reconsideration. Id.

HRS chapter 323D was substantially amended in 1987. 1987 Haw. Sess. Laws Act 270, §§ 1-18 at 825-33. Two bills to amend HRS chapter 323D were introduced during the 1987 legislative session: Senate Bill 749, and House Bill 1025.[16] S.B. 749, 14th Leg., Reg. Sess. (1987); H.B. 1025, 14th Leg.,

[16] Senate Bill 213 also was introduced during the 1987 session, and would have repealed HRS chapter 323D and abolished SHPDA and the CON process on the ground that it "inhibits, rather than promotes, health care cost containment." S.B. 213, 14th Leg., Reg. Sess., § 1 at 1, § 7 at 8 (1987). Senate Bill 213 favored "a policy of increased, relatively unfettered competition in the health care industry[.]" Id., § 1 at 2.

Reg. Sess. (1987). Senate Bill 749, which ultimately did not become law, would have amended the reconsideration process to require that the decision on a reconsideration request be made by the CON Review Panel, rather than the agency. S.B. 749, S.D. 1, § 10 at 12-14. In addition, Senate Bill 749 would have added as a ground for reconsideration that "[t]he decision of the administrator differs from the decision of the [SHCC]." Id., § 10 at 13 (emphasis added).

The Senate Health Committee noted that the initial proposal would "[a]uthorize the review panel to veto a decision by the state agency regarding a certificate of need application[.]" S. Stand. Comm. Rep. No. 574, in 1987 Senate Journal, at 1132. However, testimony was received in opposition to this proposal. SHPDA testified, "We do not agree with giving the Review Panel veto authority over the administrator's CON decisions[.]" SHPDA, Testimony to the Senate Health Committee on S.B. 749, 14th Leg., Reg. Sess. (Feb. 23, 1987) (emphasis added). The Department of Health also testified, "While we are sympathetic to the idea of some appeals mechanism over the SHPDA Administrator's decision, we believe that use of the review panel may build unnecessary conflict into the Agency's operation." Department of Health, Testimony to the Senate Health Committee on S.B. 749, 14th Leg., Reg. Sess. (Feb. 23, 1987) (emphasis added). Accordingly, the Senate Health Committee amended the bill to delete "the review board veto power but granted the review board

the authority to hear and rule on requests for reconsideration of a state agency decision[.]" S. Stand. Comm. Rep. No. 574, in 1987 Senate Journal, at 1132.

Meanwhile, House Bill 1025, as initially introduced, did not contain any amendments that would have affected the CON reconsideration process.[17] See H.B. 1025, 14th Leg., Reg. Sess. (1987). However, when the bill crossed over to the Senate, the Senate Health Committee received testimony from SHPDA regarding the reconsideration process:

> As the law now stands, the only appeal (short of court) of an Agency's decision is to request the Agency itself to reconsider. The Senate version would give the reconsideration authority to the Review Panel. The Agency does not believe that the Review Panel should have the ultimate authority. We suggest the reconsideration authority rest with a small committee made up of the administrator, and the chairpersons of the Statewide Council, the Review Panel, the Plan Development Committee, and the appropriate Subarea Health Planning Council. This would provide a check and balance system with the administrator retaining a strong position but with the possibility of having his decision changed under limited circumstances.

SHPDA, Testimony to the Senate Health Committee on H.B. 1025, H.D. 1, 14th Leg., Reg. Sess., at 3 (Mar. 27, 1987) (emphasis added).

Along with its testimony, SHPDA submitted proposed amendments to HRS § 323D-47, which would have provided for a

[17] The purposes of the bill included removing parts of the law that were no longer pertinent due to the repeal of related federal legislation; reforming the CON process by allowing some proposals to bypass the full review process; increasing data gathering, analysis, and reporting; tasking SHPDA with looking at emerging health issues; and extending the subarea councils' authority. H. Stand. Comm. Rep. No. 63, in 1987 House Journal, at 1111; see also H. Stand. Comm. Rep. No. 703, in 1987 House Journal, at 1439.

reconsideration committee consisting of "the administrator 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." Id., attachment, § 13 at 20. Under SHPDA's proposal, the administrator would be the chairperson of the reconsideration committee. Id., attachment, § 13 at 20-21. In addition, SHPDA proposed adding as a ground for reconsideration that "[t]he decision of the administrator differs from the recommendation of the statewide council." Id., attachment, § 13 at 21.

The Healthcare Association of Hawaii (HAH) testified regarding SHPDA's proposed amendments:

> With respect to a reconsideration committee under section 13 of the agency's proposed draft, this is clearly the best proposal we have seen seeking to address the controversy surrounding some past decisions by the agency. HAH does, however, believe that the ultimate responsibility for a decision of the agency should rest with the administrator, as it currently does.

HAH, Testimony to the Senate Health Committee on H.B. 1025, H.D. 1, 14th Leg., Reg. Sess., at 2 (Mar. 30, 1987) (emphasis added).

The Senate Health Committee amended the bill, consistent with SHPDA's proposal, to "[p]rovide[] for a reconsideration panel for CON's consisting of the administrator of the statewide agency, the chairperson of the statewide council, the appropriate subarea councils, the review panel, and the plan development committee of the statewide council, with the SHPDA administrator as chairperson of the panel[.]" S. Stand.

Comm. Rep. No. 1089, in 1987 Senate Journal, at 1365. The final bill enacted into law is in all relevant respects substantively identical to that proposed by SHPDA. Compare SHPDA, Testimony to the Senate Health Committee on H.B. 1025, H.D. 1, 14th Leg., Reg. Sess., attachment, § 13 at 20-21 with HRS § 323D-47. Accordingly, with these amendments, the legislature added the provision that required the good cause determination to be made by a reconsideration committee, rather than solely by the agency. 1987 Haw. Sess. Laws Act 270, § 13 at 832. In addition, the legislature added the provision that specified that a person may request a hearing "for purposes of reconsideration of the agency's decision" where "[t]he decision of the administrator differs from the recommendation of the statewide council." Id. (emphasis added).

At the time the legislature amended the statute, the CON review process had been in place for approximately ten years. The testimony in support of the 1987 amendments indicates that the legislature was aware that the SHPDA administrator was responsible for the agency's decisions on a CON application prior to these amendments. See HAH, Testimony to the 1987 Legislature on H.B. 1025, H.D. 1, 14th Leg., Reg. Sess., at 2 (Mar. 30, 1987) ("[T]he ultimate responsibility for a decision of the agency should rest with the administrator, as it currently does."); SHPDA, Testimony to the Senate Health Committee on H.B. 1025, H.D. 1, 14th Leg., Reg. Sess., at 3 (Mar. 27, 1987) ("This would

provide a check and balance system with the administrator retaining a strong position but with the possibility of having his decision changed under limited circumstances.").

Accordingly, the legislative history reflects that the legislature was aware of the administrator's participation in the initial CON decision, but nonetheless deliberately included the administrator in the reconsideration committee to maintain the administrator's "strong position" with regard to CON applications. Accordingly, HRS § 323D-47 reflects the legislature's intent that the administrator participate in both the initial decision on the merits and the reconsideration decision.

2. HAR § 11-1-25(a)(4) conflicts with HRS § 323D-47

Despite the clear legislative intent for the administrator to participate in both the decision on the merits and the reconsideration decision, application of HAR § 11-1-25(a)(4) to the Reconsideration Committee would prohibit the administrator from carrying out both of these duties. HAR § 11-1-25 provides in relevant part:

> (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:
> . . . .
> (4) Has substantially participated in making the decision or action contested[.]

An agency's authority "is limited to enacting rules which carry out and further the purposes of the legislation[.]"

Puana v. Sunn, 69 Haw. 187, 189, 737 P.2d 867, 870 (1987). "It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement." Agsalud v. Blalack, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985) (citations omitted); see also Tamashiro v. Dep't of Human Servs., 112 Hawaiʻi 388, 427, 146 P.3d 103, 142 (2006). As applied here, HAR § 11-1-25(a)(4) would prohibit the SHPDA administrator from carrying out his or her duties as intended by the legislature and as reflected in HRS § 323D-47. Because, HAR § 11-1-25(a)(4) conflicts with HRS § 323D-47, it would be invalid if applied to CON reconsideration proceedings.[18]

Nevertheless, Liberty argues that this interpretation of the statute would lead to the absurd requirement that no one other than the administrator could make the initial CON decision and participate on behalf of SHPDA in the reconsideration proceedings. However, nothing in the statute would require the SHPDA administrator to personally issue the decision on a CON application and a reconsideration in all cases. The SHPDA rules indicate that a decision may be made by the administrator or the acting administrator. HAR § 11-185-2 (1981) ("'Administrator' means the administrator or the acting administrator of the state health planning and development agency."). Accordingly, it would

[18] HAR § 11-1-25(a)(4) is a general DOH rule that presumably applies to various types of proceedings. Neither party suggests that the rule would be invalid if applied to other proceedings where the legislature has not expressed its intent for a hearings officer, director, or member to review a decision in which he or she substantially participated.

appear that the agency's decision making authority rests with the office, rather than the individual office holder. Thus, for example, if the administrator issued the decision on the merits, but then left his or her position, the acting administrator or a new administrator would participate in the reconsideration decision. HAR § 11-185-2; HRS § 323D-47.

In addition, as discussed in detail below, SHPDA's own disqualification rule, HAR § 11-185-32 (1981), provides that a hearings officer may be disqualified for certain conflicts of interest:

> 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 the 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, 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.

Thus, if the administrator were disqualified from the initial decision on the merits pursuant to HAR § 11-185-32, an acting administrator could participate in both the decision on the merits and the reconsideration decision. HAR § 11-185-2; HRS § 323D-47.

Moreover, unlike HAR § 11-1-25(a)(4), HAR § 11-185-32 does not conflict with the legislature's intent behind the

reconsideration process set forth in HRS § 323D-47. Although the legislature generally intended the administrator to participate in both the decision on the merits and the reconsideration decision, it also presumably was aware of prohibitions against conflicts of interest for public officers and employees, see HRS § 84-14(a),[19] and would not have intended that the administrator participate in a decision where such a conflict existed.[20] HAR § 11-185-32 is consistent with HRS § 84-14. Compare HAR § 11-185-32 with HRS § 84-14.

Significantly, these conflict of interest provisions

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[19] HRS § 84-14(a) (1993) provides:

> No employee shall take any official action directly affecting:
>
> (1) A business or other undertaking in which he has a substantial financial interest; or
>
> (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.
>
> A department head who is unable to disqualify himself on any matter described in items (1) and (2) above will not be in violation of this subsection if he has complied with the disclosure requirements of section 84-17; and
>
> A person whose position on a board, commission, or committee is mandated by statute, resolution, or executive order to have particular qualifications shall only be prohibited from taking official action that directly and specifically affects a business or undertaking in which he has a substantial financial interest; provided that the substantial financial interest is related to the member's particular qualifications.

[20] In addition, as discussed in detail below, SHPDA hearings officers would also be subject to disqualification where they exhibit bias or prejudice, or there is an appearance of impropriety or partiality. Cf. State v. Ross, 89 Hawaiʻi 371, 377, 974 P.2d 11, 17 (1998).

are much more limited than those set out in HAR § 11-1-25. Under HAR § 11-185-32 and HRS § 84-14, the administrator is able to participate in both the decision on the merits and the reconsideration decision, so long as he or she is not disqualified by a limited category of personal interests. In contrast, application of HAR § 11-1-25, as Liberty urges, would turn this limited exception into the rule, disqualifying the administrator from participation in all reconsideration decisions in which he or she has made the initial decision on behalf of SHPDA on the CON application. Such a blanket rule is contrary to the legislature's intent, and HAR § 11-1-25(a)(4) therefore cannot be applied in the instant case. See Agsalud, 67 Haw. at 591, 699 P.2d at 19.

In sum, HAR § 11-1-25(a)(4) would conflict with HRS § 323D-47 if applied in the instant case. Instead, the SHPDA disqualification rule contained in HAR § 11-185-32 applies in lieu of HAR § 11-1-25. Liberty has not asserted that Administrator Terry should have been disqualified pursuant HAR § 11-185-32, and we find no basis for his disqualification under this provision.[21] Accordingly, the circuit court erred in

[21] Liberty argued below that Administrator Terry should be disqualified pursuant to HAR § 11-1-25(a)(5) based on personal bias or prejudice because he approved Rainbow's CON application despite votes against the application by the CON Review Panel and the SHCC. However, these allegations are not sufficient to cause a reasonable person to question Administrator Terry's impartiality. See Ross, 89 Hawaiʻi at 380, 974 P.2d at 20. First, the recommendations of the CON Review Panel and the SHCC were not binding on Administrator Terry. HAR § 11-186-45(e) (1981). Second, another review panel, the Tri-Isle Subarea Health Planning Council, recommended

(continued...)

concluding that Administrator Terry was disqualified from participating in the Reconsideration Decision.

B. Trygstad was not disqualified from participating in the Reconsideration Decision

Liberty argues that Trygstad should have been disqualified from sitting on the Reconsideration Committee pursuant to HAR § 11-1-25(a)(2).[22] Liberty alleges that Trygstad should be disqualified because her brother-in-law, Dr. George Talbot, is the "Kaiser Permanente physician-in-charge for Maui" and testified on behalf of Rainbow in support of its CON application. Accordingly, Liberty argues, Dr. Talbot was a "party's representative" and, therefore, Trygstad's disqualification was mandatory.

Rainbow argues that HAR § 11-1-25 is inapplicable to SHPDA proceedings, and that the more specific SHPDA disqualification rule, HAR § 11-185-32, should apply instead.[23]

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[21](...continued)
approval of the application. Third, the conditions that Administrator Terry imposed on Rainbow's application address some of the concerns that led the CON Review Panel and SHCC to recommend denying the application. Finally, four other independent members of the Reconsideration Committee agreed to approve Rainbow's CON application, despite the recommendations of the CON Review Panel and the SHCC.

[22] HAR 11-1-25(a)(2) provides for disqualification where a hearings officer, director or member "[i]s related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney[.]"

[23] HAR § 11-185-32(a) also addresses disqualification based on family relationships, but to a more limited degree, providing for disqualification where:

> the hearing officer, the hearing officer's spouse, or the hearing officer's child has (or within the twelve

(continued...)

Rainbow also argues that Dr. Talbot was not a representative of Kaiser as envisioned under HAR § 11-1-25 because Dr. Talbot's employer (Hawaii Permanente Medical Group (HPMG)), and Kaiser are "separate corporate entities."

We conclude that HAR § 11-1-25 is inapplicable here because the more specific SHPDA disqualification rule contained in HAR § 11-185-32 governs SHPDA hearings officers.

The DOH rules of practice and procedure are contained in HAR chapter 11-1. HAR § 11-1-1 (2005) provides a "Statement of scope and purpose" for HAR chapter 11-1, and provides in relevant part:

> (a) This chapter governs the practice and procedure before the department of health, State of Hawaii, 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 for any specific program, and those more specific rules shall govern the 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).

Here, SHPDA is an "attached entity" of the DOH with rulemaking authority. HAR § 11-1-3 (2005); HRS § 323D-44(b). Accordingly, SHPDA has authority pursuant to HAR § 11-1-1 to adopt its own specific rules of practice and procedure. SHPDA

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[23](...continued)
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.

exercised this authority by adopting HAR chapter 11-185. Accordingly, chapter 11-185 "shall govern the practice and procedure" in SHPDA proceedings, unless it "fail[s] to cover particular practices and procedures[.]" HAR § 11-1-1.

As discussed above, HAR § 11-185-32 is SHPDA's general disqualification rule, and provides in relevant part:

> (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 the 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, 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.[24]

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[24] HAR chapter 11-186 governs the CON process, and also contains a separate conflict of interest provision that is substantially similar to HAR § 11-185-32:

> (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 applicant.

(continued...)

Liberty argues that this rule does not displace "the more comprehensive provisions" of HAR § 11-1-25 because HAR §§ 11-1-25 and 11-185-32 do not conflict. However, Liberty's argument is misplaced. In general, where rules overlap in their application but do not irreconcilably conflict, effect will be given to both, if possible. See Cnty. of Hawaiʻi v. C&J Coupe Family Ltd. P'ship, 120 Hawaiʻi 400, 405, 208 P.3d 713, 718 (2009). However, HAR § 11-1-1 qualifies this general rule by stating that, "specific rules of practice and procedure for any specific program . . . shall govern the practice and procedure in proceedings for that program." Thus, HAR § 11-1-1 applies only where "such specific rules fail to cover particular practices and procedures[.]" (Emphasis added). As a result, the relevant question is not whether HAR §§ 11-185-32 and 11-1-25 conflict,

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[24](...continued)

> (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.

HAR § 11-186-51.

Because Trygstad participated in the Reconsideration Committee as a representative of the Tri-Isle Subarea Health Planning Council, this provision also could be read to apply to her disqualification. See HAR § 11-186-51(a) (providing that a member of a subarea council shall not vote "on any matter respecting an applicant" where the member has a conflict of interest). However, HAR § 11-186-51 also could be read as applying solely to actions taken "by the subarea council, countywide review committee, review panel, or statewide council[,]" but not the Reconsideration Committee. See HAR § 11-186-51(b). Because HAR §§ 11-186-51 and 11-185-32 do not differ materially, and because SHPDA's and Rainbow's arguments rely on HAR § 11-185-32, we need not resolve whether HAR § 11-186-51 also applies.

but rather whether HAR § 11-185-32 "fail[s] to cover" disqualification practices and procedures, such that HAR chapter 11-1 applies. Because HAR § 11-185-32 does cover disqualification practices and procedures for SHPDA hearings officers, it applies in lieu of HAR § 11-1-25.

Nevertheless, Liberty argues that HAR § 11-1-25 applies because it covers a broader range of disqualifications than HAR § 11-185-32. However, this argument is not supported by HAR § 11-1-1. HAR chapter 11-1 is not intended to fill every gap in an attached entity's more specific rules. Rather, it applies only where an attached entity's rules do not "cover particular practices and procedures[.]" Here, SHPDA's rules cover disqualification practices and procedures. Accordingly, DOH's general disqualification rule does not apply, even though it would provide for disqualification under a broader range of circumstances. This is logical given that, in certain circumstances, such as those presented here, the general DOH rules may conflict with the legislature's intent that certain practices or procedures be performed by specific administrative authorities.

Liberty also argues that, because HAR § 11-185-32 contains no express prohibition against a biased or prejudiced hearings officer, application of only HAR § 11-185-32 would allow a hearings officer who harbored a bias or prejudice against a party to sit on the Reconsideration Committee. Liberty further

argues that, if the phrase "any other conflict of interest" in HAR § 11-185-32(b) is read broadly to include bias or prejudice, it must also be read to include all of the bases for disqualification contained in HAR § 11-1-25.

These arguments are unpersuasive. First, bias or prejudice is a form of conflict of interest. See, e.g., Daiichi Hawaii Real Estate Corp. v. Lichter, 103 Hawaiʻi 325, 339-40, 82 P.3d 411, 425-26 (2003) ("Under Hawaiʻi law, 'evident partiality' sufficient to vacate an arbitration award may be demonstrated when a conflict of interest exists with the arbitrator. . . . Hawaiʻi courts have explained that evident partiality not only exists when there is actual bias on the part of the arbitrator, but also when undisclosed facts demonstrate a 'reasonable impression of partiality.'") (citation omitted) (emphasis added). Accordingly, it is not necessary to resort to HAR § 11-1-25 to conclude that "conflict of interest" includes "bias or prejudice."

Second, bias or prejudice would be a basis for disqualification even if the Department of Health and SHPDA failed to promulgate any rules regarding disqualification. This is because due process requires disqualification where "circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on [the adjudicator's] impartiality." Ross, 89 Hawaiʻi at 377, 974 P.2d at 17 (citation

and ellipses omitted).[25] Otherwise, the multitude of agency disqualification rules that fail to directly address bias or prejudice would absurdly allow for participation by biased or prejudiced adjudicators.[26] Accordingly, Liberty is incorrect in arguing that HAR § 11-185-32 is inadequate because it does not directly address bias or prejudice.

Finally, although Liberty argued in the circuit court that the Reconsideration Committee members were not hearings officers and that HAR § 11-185-32 was therefore inapplicable, it has abandoned this argument on appeal. Indeed, Liberty now asserts that both rules "must be given effect." Accordingly, Liberty has waived any argument that HAR § 11-185-32 is inapplicable to the Reconsideration Committee members. Hawaiʻi

[25] In Ross, the applicable statute expressly provided for disqualification where a judge had a "personal bias or prejudice[.]" 89 Hawaiʻi at 376, 974 P.2d at 16. However, this court looked beyond the statute to due process to determine, not actual bias or prejudice, but "whether circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the judge's impartiality." Id. at 377, 974 P.2d at 17 (internal quotation marks, ellipses, and brackets omitted). Because of the statutory disqualification requirement, this court was not required to determine whether a judge's actual bias or prejudice would also implicate due process. However, it would be incongruous to conclude that an appearance of impropriety or partiality violates due process, but actual impropriety or partiality does not.

[26] See, e.g., HAR §§ 3-90-3 (1987) (conflicts of interest for State Foundation of Culture and the Arts), 6-23-45 (2009) (disqualification in contested case proceedings before Department of Budget and Finance), 6-61-28 (1992) (disqualification in hearings before the Public Utilities Commission), 11-62-58 (2004) (conflicts of interest in review of wastewater management permits), 11-175-4(c) (1988) (conflicts of interest for State Council on Mental Health and Substance Abuse), 11-271-104 (1994) (disqualification in contested case proceedings relating to hazardous waste management), 13-167-61 (1988) (disqualification in contested case proceedings before Commission on Water Resource Management), 13-197-20 (1989) (disqualification in contested case proceedings before Hawaiʻi Historic Places Review Board), 13-300-62 (1996) (disqualification in administrative appeals relating to burial sites and human remains).

Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued may be deemed waived."). Although this issue was not addressed in the parties' appellate briefing, the dissent nevertheless concludes that HAR § 11-185-32 is inapplicable because the Reconsideration Committee members are not hearings officers. Dissenting opinion at 18-19. We respectfully disagree.

Before the Reconsideration Committee and on appeal, SHPDA has consistently argued that HAR § 11-185-32 governs the disqualification of Reconsideration Committee members. As SHPDA explained in the circuit court, the SHPDA rules preceded the DOH rules by many years. SHPDA stated,

> So for years, the two chapters, 11-185 and 11-186 specifically in the certificate of need matters governed. Perhaps Rule No. 11-185-32 is not as comprehensive or as eloquent as it could be if revised today, but it is a clear disqualification of hearing officer rule. And in this instance in the reconsideration committee situation it is the reconsideration committee who is the hearing officer of the reconsideration.
>
> . . . . And these rules were promulgated with the understanding that the public hearing that would follow the grant of a reconsideration would be heard by the reconsideration committee.

(Emphasis added).

SHPDA's interpretation of its own rules is entitled to deference unless it is clearly erroneous or inconsistent with the underlying legislative purpose. See Kaleikini, 128 Hawaiʻi at 67, 283 P.3d at 74.

HAR § 11-185-32 must be construed in pari materia with HRS § 323D-47 and the other rules governing SHPDA and the CON process. HRS § 1-16 (1993) ("Laws in pari materia, or upon the

same subject matter, shall be construed with reference to each other."). HRS § 323D-47 and HAR § 11-186-82(d) make clear that, where there is good cause for reconsideration, the Reconsideration Committee must hold a public hearing and then issue a decision on behalf of SHPDA.[27] It is beyond dispute that the hearing conducted by the Reconsideration Committee in the instant case constituted a public hearing. See HAR § 11-185-30 ("At any public hearing held by the agency, any person shall have the right to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing."). The Reconsideration Committee members presided at this hearing, ruling on evidentiary objections and motions, and issuing the Reconsideration Decision. Accordingly, it was not clearly erroneous for SHPDA to conclude that the Reconsideration Committee members are hearings officers whose disqualification is governed by HAR § 11-185-32.

Moreover, although HAR § 11-185-31 indicates that a separate hearings officer may be appointed for the purpose of ensuring the "orderly and just conduct of the hearing," nothing in HAR § 11-185-31 indicates that the Reconsideration Committee members are thereby excluded from the disqualification provisions of HAR § 11-185-32. In other words, the fact that SHPDA

[27] HAR § 11-186-82(d) states that "the committee shall schedule a public hearing for reconsideration of the decision" and "[t]he committee shall file a decision on the reconsideration within forty-five days after the conclusion of the hearing." (Emphasis added). Here, the Reconsideration Decision was filed by all five Reconsideration Committee members.

designated Andrew Tseu as a hearings officer to assist the Reconsideration Committee in conducting the hearing did not render HAR § 11-185-32 inapplicable to the Reconsideration Committee members.

Lastly, the dissent argues that, prior to the adoption of the DOH rules, SHPDA's rules "did not explicitly provide disqualification rules for reconsideration committee members," and, therefore, the DOH rule should apply. Dissenting opinion at 23. However, this argument is unpersuasive. Under the dissent's analysis, no disqualification rules would have governed the Reconsideration Committee members from the establishment of the Reconsideration Committee procedure in 1987 until the promulgation of the DOH rule in 2005. Thus, according to the dissent, during that almost 20-year period, SHPDA had conflict of interest rules governing non-binding advisory committee members and hearings officers who preside over non-substantive matters, but neglected to provide any disqualification rules governing the persons responsible for the agency's final action on a CON application. We decline to adopt an interpretation of the rules that would lead to such a result. See Sierra Club v. Dep't of Transp., 120 Hawaiʻi 181, 227, 202 P.3d 1226, 1272 (2009) ("[I]t 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)).

In sum, HAR § 11-185-32 applies in the instant case. Because Liberty has not raised any arguments to suggest that Trygstad should have been disqualified pursuant to HAR § 11-185-32, its arguments are without merit.

IV. Conclusion

Although we do not adopt the circuit court's reasoning, we affirm its December 13, 2011 final judgment, which affirmed the Reconsideration Committee's February 17, 2011 Reconsideration Decision.

Daniel P. Collins for petitioner

Ellen Godbey Carson for respondent Rainbow Dialysis, LLC

Ann V. Andreas for respondent State of Hawaii

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna