RECEIVED
OFC OF THE OMBUDSMAN
STATE OF HAWAII

2005 FEB -9 A 7:54

DEPARTMENT OF HEALTH

Repeal of State of Hawaii Public Health Regulations "Rules of Practice and Procedure" and Adoption of Chapter 11-1, Hawaii Administrative Rules

FEB 0 1 2005

SUMMARY

1. State of Hawaii Public Health Regulations "Rules of Practice and Procedure" is repealed.

2. Chapter 11-1, Hawaii Administrative Rules, entitled "Rules of Practice & Procedure," is adopted to read as follows:

DEPARTMENT OF HEALTH

State of Hawaii Public Health Regulations "Rules of Practice and Procedure", REPEALED

[FEB 14 2005]

HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

SUBTITLE 1 GENERAL DEPARTMENTAL PROVISIONS

CHAPTER 1

RULES OF PRACTICE AND PROCEDURE

Subchapter 1 General Provisions

§11-1-1 Statement of scope and purpose
§11-1-2 Seal of the Department of Health
§11-1-3 Definitions
§11-1-4 The department; office hours; filings; communications
§11-1-5 Public records
§11-1-6 Public notices for variances and permits
§11-1-7 Computation of time
§11-1-8 Extension of time
§11-1-9 Severability
§11-1-10 Videoconferences
§§11-1-11 to 11-1-20 (Reserved)

Subchapter 2 General Procedures for Contested Cases

§11-1-21 General
§11-1-22 Hearings; scheduling; requests and complaints; notice
§11-1-23 Docket
§11-1-24 Hearings officer; duties and powers
§11-1-25 Disqualification
§11-1-26 Substitute hearings officer

2630

§11-1-27 Communications with hearings officer and final decision maker
§11-1-28 Filing of documents
§11-1-29 Amendment of documents and dismissal
§11-1-30 Retention of documents by the department
§11-1-31 Public access; documents and hearings.
§11-1-32 Representation and appearances before the department
§11-1-33 Substitution of parties
§11-1-34 Consolidation and severance
§11-1-35 Intervention
§11-1-36 Prehearing conferences
§11-1-37 Motions
§11-1-38 Evidence
§11-1-39 Subpoenas of witnesses
§11-1-40 Continuance of contested case hearing
§11-1-41 Defaults, dismissals, and summary decisions.
§11-1-42 Proposed and final decisions; exceptions and argument
§11-1-43 Transcripts; fees; corrections
§§1-1-44 to 11-1-50 (Reserved)

Subchapter 3 Rulemaking

§11-1-51 Petitions for adoption, amendment or repeal of rules
§11-1-52 Notices of proposed rulemaking
§11-1-53 Conduct of hearings
§11-1-54 [deleted: Emergency rulemaking]
§§1-1-54 to 11-1-60 (Reserved)

Subchapter 4 Declaratory Orders

§11-1-61 Petitions for declaratory orders
§§11-1-62 to 11-1-70 (Reserved)

SUBCHAPTER 1

GENERAL PROVISIONS

§11-1-1 Statement of scope and purpose. (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.

(b) These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding authorized by law to be brought before the department or any attached entity. Whenever this chapter or the specific rules of any program or attached entity are silent on a matter, the director or hearings officer may refer to the Hawaii Rules of Civil procedure for guidance.

(c) To the extent necessary, these rules shall be interpreted to preserve the authority of the department and State to administer programs under federal law for which the department has primary enforcement authority, authority to administer a program, or is delegated administration of a federally created program, provided that the department or State meets minimum federal requirements.

[Eff FEB 14 2005] (Auth: HRS §321-9, §91-2) (Imp: HRS §91-2, §321-9, chapters 333F {Dev. Dis.}, 340E {drinking water}, 340F {public water system operator certif.}, 342B {air pollution}, 342D {water pollution}, 342J {hazardous waste}, 342L {used oil}, 342P {asbestos}, 346 {DHS welfare/MEDICAID})

§11-1-2. Seal of the department of health. a) The official seal of the department of health shall be circular in shape, two and one-fourth inches in diameter. At the curve on the top portion there shall be the words "DEPARTMENT OF HEALTH" and at the curve on the bottom portion there shall be the words "STATE OF HAWAII." At the curve on each side portion shall be a star. In the center of the seal shall be the Caduceus, a winged rod entwined with two serpents, which has long been recognized as a universal symbol of medicine. The Caduceus shall be encircled by an indentation, which shall separate it from the words "DEPARTMENT OF HEALTH" and "STATE OF HAWAII." For illustrative purposes, a black and white drawing of the official seal is attached at the end of this section as Exhibit "A," titled "Seal of the Department of Health," and dated November 1, 1988, and made a part of this section.

(b) The official seal of the department of health shall be embossed near the signature of the director of health to verify commissions of appointment of deputy directors and notaries public, certificates, and other formal official documents on which the official seal has been customarily used or is appropriate to be used, as the director of health may determine on a case-by-case basis.

(c) The seal of the department of health may also be reproduced, in either an enlarged or a reduced size, on official stationery, reports, certificates, equipment, supplies, uniform insignia, and other objects and items to be used or produced by the department of health, but the reproduction and use of the seal shall always be subject to the exclusive control of the director of health.

[Eff FEB 14 2005] (Auth: HRS §§321-9, 91-2) (Imp: HRS §§321-9, 91-2)

§11-1-3 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Agency" means a state or county board, office, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

``Attached entity'' means an administrative office, agency, board, or commission placed or established within or administratively attached to the department.

"Complainant" means the person or entity upon whose complaint action by the department is instituted.

"Complaint" refers to a notice of violation, finding of violation, order or such other document by which the department, a person, or agency starts action against any person or entity.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after opportunity for a hearing.

"Day" means calendar day unless otherwise specified.

"Declaratory order" means a determination by the director as to the applicability of any rule or order of the department or of a statute, which the department is required to administer or enforce.

"Department" means the department of health, State of Hawaii, including attached entities.

``Director'' means the director of health.

``Final decision maker'' means the individual or entity with the authority to render and issue a final decision and order, and final findings of fact and conclusions of law in a contested case.

"Hearings officer" means the individual or entity designated to conduct hearings by the director.

``Party'' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as party, in an agency proceeding.

"Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

"Petition" refers to a document used to request a declaratory ruling or rulemaking.

"Petitioner" means a person or agency making or on whose behalf a petition is made for a declaratory ruling as to the applicability of any statutory provision or of any department rule or order, or for rulemaking, including the adoption, amendment, or repeal of any department rule.

"Respondent" means the party in a contested case against whom the complaint is filed, any party against whom relief is being sought, or any party who contests or controverts a proceeding initiated by another party.

"Rulemaking" means any formal action for the adoption, amendment, or repeal of any rule of the department. [Eff FEB 14 2005] (Auth: HRS §§91-2, §321-9) (Imp: HRS §91-1, 91-2)

§11-1-4 The department; office; hours; filings; communications. (a) Office. The principal office of the department is in Honolulu, Hawaii.

(b) Office hours. The offices of the department shall be open from 7:45 a.m. to 4:30 p.m., Monday through Friday, except on state holidays, unless otherwise provided by statute or executive order.

(c) Filing of documents. All documents and written communications required by this chapter or other law to be filed with the department shall be mailed to:

Director of Health,
Department of Health,
State of Hawaii,
P. O. Box 3378,
Honolulu, Hawaii 96801,

or by hand delivery to:

Director of Health,
Department of Health,
State of Hawaii,
1250 Punchbowl Street, Third Floor,

Honolulu, Hawaii 96813,

unless otherwise specified by the department.

(d) Filing shall meet the time limits prescribed by statute, rule, or order of the director or the department, unless otherwise specified by the department. The date when the department actually receives a document is the date of filing.

(e) The department may authorize facsimile filing for specific purposes and specify the means and filing date. If authorized and if the means and filing date are not otherwise specified, facsimile filing:

(1) Is effective if:

(i) The entire document, including any attachment or exhibit, is transmitted to and received at the proper facsimile phone number without error, and

(ii) The entire document includes a cover sheet which states the specific individual, branch, or division to whom the transmission is addressed, the individual who sent it, the number of pages of the document, and any applicable docket number; and

(2) Is complete upon receipt of the entire document at the proper facsimile number before 4:30 p.m. on a normal state workday. When any part of the document is received after 4:30 p.m., then filing occurs on the next normal state workday.

(f) The department may authorize electronic filing, and specify the means and filing date. If authorized and if the means and effective date are not otherwise specified, electronic filing:

(1) Is effective if:

(i) The entire document, including any attachment, is transmitted to and received at the electronic mail address without error, and

(ii) The entire document states the name of the specific individual, branch,

or division to whom the transmission is addressed, the individual from whom it is sent, the number of pages of the document in its original format, and any applicable docket number;

(2) Is complete upon receipt of the entire document at the proper electronic mail address before 4:30 p.m. on a normal state workday. When the receipt concludes after 4:30 p.m., then filing occurs on the next normal state workday; and

(3) Is in a format that the department can easily read.

(g) Senders of facsimiles and electronic mail to the department assume the entire risk of problems with the transmission or receipt of their documents, including equipment and system problems, power interruptions, difficulties in conversion between different word processing programs, and differences between department clocks and senders' clocks.

(h) The department may at any time refuse to accept facsimile or electronic filing, despite prior authorization, to prevent actual or suspected damage or loss to equipment or phone, electronic, or other systems.

(i) In addition to statutorily required means of notice, the department may send official notices and other communications by mail, facsimile transmission, electronic mail transmission, or Internet website posting, and such notices and communications by the department shall be complete upon mailing, transmission, or posting.

(j) The department shall provide opportunities for effective communications with persons with disabilities consistent with existing state and federal legal requirements.

(k) The department shall provide opportunities for effective communications with non-English speaking persons consistent with existing state and federal legal requirements.

(l) The department shall maintain, as needed, a

durable record of any facsimile, electronic, Internet website notice or other communication between the department and the public. The department shall preserve, as needed, audio and video recordings taken of public department proceedings, or a transcript of such recordings.
[Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§80-1, 91-2)

§11-1-5 Public records. Records of the department shall be available for inspection during established business hours, pursuant to chapter 92F, HRS, rules adopted under that chapter, and any other applicable laws. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-2, ch. 92F, ch. 323C, §325-101, §334-5)

§11-1-6 Public notices for variances or permits. (a) For variances or permits for which costs and public notice procedures are not already provided for in title 11, HAR, or statutes, the department may require an applicant for a permit, variance, or similar action to pay all costs related to the processing of the application. Costs may include processing fees, hearing costs, and costs related to publishing the required public notices.

(b) When a public notice in a newspaper is required, and the director has determined that the applicant shall pay all costs related to publishing the notice, the applicant shall make payment directly to the newspaper publishing the notice.

(c) The public notice shall appear in a newspaper of statewide general circulation or a newspaper of county general circulation published in the county in which the project or activity is proposed, at the department's direction.

(d) In addition to newspaper publication, the public notice may be published electronically. The department may require an applicant to submit an

electronic version of the public notice in a format suitable for the department to publish in an electronic manner.

(e) The public notice shall include at least the following:

(1) The name, address, and phone number of the agency issuing the public notice;

(2) The name and address of the applicant;

(3) A brief description of the applicant's project or activity and its location(s);

(4) A brief description of the procedures for the formulation of final determinations, including the specified comment period and other means by which interested persons may comment upon those determinations; and

(5) The address and phone number of the state agency premises where interested persons may obtain further information and may inspect a copy of the application and related materials.

(f) The public notice shall be reviewed and approved by the department before publication and must appear in the newspaper in the approved form.

(g) The applicant shall obtain an affidavit from the newspaper specifying the date the notice appeared in the newspaper and make a copy of the affidavit available to the department.

(h) The department should make information regarding the proposed project or activity available for inspection in the county where the applicant's project or activity is being proposed. The department need not make all records relating to the proposal or project available for inspection in that county. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9, 321-11.5) (Imp: HRS §§91-2, 321-9, 321-11.5)

§11-1-7 Computation of time. In computing any period of time prescribed or allowed by these rules or by order of the department, the day from which the period runs is excluded and the last day is included.

The period shall be extended, if necessary, to ensure that the last day falls on a normal State workday. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-2, 321-9)

§11-1-8 Extension of time. Whenever a person or agency has a right or is required to take action within the period prescribed or allowed by these rules, by notice given under the rules, or by an order, the department, or hearings officer in a contested case, may:

(1) Before the expiration of the prescribed period, with or without notice, extend such period; or

(2) Upon motion, permit the act to be done after the expiration of a specified period when the failure to act is reasonably shown to be excusable. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-9, 321-9)

§11-1-9 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-2)

§11-1-10 Videoconferences. (a) The department may conduct meetings and hearings by videoconference.

(b) Public meetings held by videoconference by attached entities are subject to section 92-3.5, HRS.

(c) Before the videoconference of a contested case hearing, the hearings officer shall arrange a

procedure for the videoconference, including the exchange and presentation of exhibits. [Eff FEB 14 2005] (Auth: HRS §§91-2, 92-3.5, 321-9) (Imp: HRS §§91-2, 91-9, 92-3.5, 321-9)

§§11-1-11 to 11-1-20 (Reserved)

SUBCHAPTER 2

GENERAL PROCEDURES FOR CONTESTED CASES

§11-1-21 General. (a) Procedures to be followed by the department shall, unless specifically prescribed in this chapter or by chapter 91, HRS, or other statutory provisions, be such as in the opinion of the department will best serve the purposes of such hearings. Cases shall be conducted fairly and impartially.

(b) Any procedure in a contested case may be agreed to, modified, or waived by stipulation of the parties, and informal disposition may be made of all or part of any contested case by stipulation, settlement, consent order, or default.

(c) The department may voluntarily withdraw or dismiss a case it brings, and any other party may voluntarily withdraw or dismiss a case upon order of the department and upon such terms and conditions that the department deems proper. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-9, 321-9)

§11-1-22 Hearings; scheduling; requests and complaints; notice. (a) The department may schedule a contested case hearing on its own initiative or may schedule one when required by law based upon a complaint.

(b) A complaint may set or request a hearing and shall contain concise statements of:

(1) The legal authority under which the proceeding, hearing, or action is to be held or made;
(2) The disagreement, denial, grievance, or other matter that is being contested by the complainant;
(3) The facts and issues raised; and
(4) The relief requested.

The department may prepare and require the use of forms that may be substituted for any complaint.

(c) No hearing on a contested case shall be held until due notice is given to all parties as provided in sections 91-9 and 91-9.5, HRS.

(d) Within the time specified in the complaint, a respondent may request a contested case hearing and shall notify the department of such request in writing. FEB 14 2005

[Eff] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-2, 91-9, 91-9.5)

§11-1-23 Docket. The department shall maintain a docket of all contested cases, and each case shall be assigned a number. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: HRS §91-2, 91-9)

§11-1-24 Hearings officer; duties and powers. (a) The director or attached entity may act as the hearings officer and personally conduct the hearing of a contested case or may appoint a representative to be the hearings officer. The hearings officer shall conduct the hearing and any related pre-hearing and post-hearing activities as may be required or appropriate.

The director or attached entity shall be the final decision maker unless the director or attached entity delegates that responsibility.

(b) In any contested case, the hearings officer may:

(1) Give notice of a prehearing conference or the hearing and any continuation of a conference or the hearing;
(2) Require that a complaint be answered or be made more definite;
(3) Impose time limits on any phase or aspect of the proceedings;
(4) Issue subpoenas for people, documents, and things as authorized by law;
(5) For good cause shown, upon motion or the hearings officer's own initiative, order a party to produce non-privileged evidence, and may draw inferences against the party if the evidence is not produced without good cause being shown;
(6) Administer oaths;
(7) Examine witnesses and inspect sites;
(8) Certify official documents and acts;
(9) Rule on motions, requests, and offers of proof;
(10) Admit, receive, and exclude evidence;
(11) Regulate the course and conduct of the hearing and related proceedings, including:
    (i) Allowing or directing the use of telephone or videoconference meetings, hearings, and testimony;
    (ii) Regulating the manner of any examination of a witness to prevent harassment or intimidation and ordering the removal of disruptive individuals;
    (iii) Specifying the time, place, and method of filing documents;
(12) Enter such orders and rulings against any party who fails to comply with these rules or any other order of the hearings officer, including without limit orders under section 11-1-36(c); and
(13) Perform such other functions and duties, and issue such orders necessary for the proper conduct of the hearing and the resolution of the case.

(c) Any provision of this chapter may be suspended or waived by the department or by the

hearings officer before whom the matter is heard, to prevent undue hardship in any particular instance.

(d) The hearings officer may engage the services of a stenographer, or someone similarly skilled, to take a verbatim record of the evidence presented at any hearing. If a stenographer or other person of similar skill is not engaged, the hearings officer shall have the hearing recorded by audiotape, videotape, or comparable means.

(e) Except as provided for under subsection (b)(5), the hearings officer shall not order or approve civil style discovery against non-parties; and unless stipulated to by all parties, the hearings officer shall not order or approve civil style discovery between parties. Civil style discovery refers to procedures initiated by parties under judicial rules of civil procedure, specifically including but not limited to, depositions on oral or written questions, written interrogatories, requests for production of documents or things, requests to enter land or other property, physical and mental examinations, and requests for admissions.

[Eff FEB 14 2005] (Auth: HRS §§91-2, 92-16, 321-9) (Imp: HRS §§91-9, 91-10, 91-11, 91-12, 92-16)

§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, Hawaii Revised Statutes, 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.

(b) A hearings officer, director, or member of an attached entity shall withdraw from further participation in the proceedings upon discovery of a disqualifying conflict of interest or bias if the factual circumstances are undisputed. If the allegation of a disqualifying conflict of interest or bias is not clearly substantiated, the allegedly disqualified individual need not voluntarily withdraw, and the party seeking the disqualification may file a motion to disqualify.

(c) A motion to disqualify shall be filed promptly after discovery of the alleged disqualifying facts. The motion shall be filed first with the challenged hearings officer, director, or attached entity, which shall rule on the motion.

(d) If a hearings officer appointed by the director or attached entity is disqualified, the director or attached entity shall appoint another representative to serve as the hearings officer. If the director or attached entity is disqualified, the director or attached entity shall appoint another representative to serve as the hearings officer, final decision maker, or both. [Eff FEB 14 2005] (Auth: HRS §91-2) (Imp: HRS §§84-14, 91-9)

§11-1-26 Substitute hearings officers. If a hearings officer is absent from a scheduled hearing, is incapacitated from performance of duty, or for other good cause, the director or attached entity may appoint another representative to serve as a substitute hearings officer without abatement of the

proceedings. [Eff FEB 14 2005] (Auth: HRS §91-2) (Imp: HRS §91-9)

§11-1-27 Ex parte communications with hearings officer and final decision maker. (a) No person shall have ex parte communications with the hearings officer or final decision maker regarding any substantive or disputed factual or legal matter to be heard or decided with the intent, or the appearance of the intent, to influence the decision of the hearings officer or final decision maker, unless all of the parties to the proceedings are given notice of communication and an opportunity to also communicate with the hearings officer or final decision maker.

(b) If a communication is made privately with the hearings officer or final decision maker in violation of subsection (a), the hearings officer or final decision maker shall disclose the communication to all parties on the record and afford all parties an opportunity to respond to, refute, or otherwise comment on the ex parte communication.

[Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-9, 91-13)

§11-1-28 Filing of documents. (a) All pleadings, submittals, complaints, petitions, applications, charges, reports, maps, exceptions, briefs, memorandums, and other papers required to be filed in any contested case shall be filed as required in section 11-1-4(c), unless otherwise specified, and shall comply with the time limit, if any, set forth in any statute, rule, or order for that filing. The date on which the papers are actually received by the department is the date of filing, unless otherwise provided under subsection (g).

(b) Complaints, notices of violation and orders, and similar documents may be issued by branches of the department in enforcement cases without first filing

under subsection (a), but the original document shall be transmitted to the hearings officer after a hearing is requested and the hearings officer is appointed.

(c) All papers filed with the department shall be written in black ink, typewritten, photocopied, or printed, shall be plainly legible, and shall be on strong durable paper, no larger than 8-1/2" x 11" in size, except that tables, maps, charts and other documents may be larger, but shall be folded, if possible, to the size of the documents to which they are attached.

(d) All papers must be signed in indelible ink by the party or the party's fully authorized agent or attorney. The signature constitutes a certification that the person has read the document; that to the best of person's knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that the document is not interposed for improper purpose, such as harassment, unnecessary delay, or increase in cost.

(e) Unless otherwise specifically provided by a particular rule or order of the department, an original and one copy of all papers shall be filed. Properly authenticated copies of documents may be received in evidence and attached to papers filed with the department.

(f) The initial document filed by any party in any proceeding shall state on the document's first page the name, mailing address, phone number, and facsimile number of the individual or individuals who may be served with any documents filed in the proceeding. All documents filed afterwards shall contain a certification by the party filing the document that a copy was served on the opposing party. The certification shall contain the name and address of the person served; the method of service (i.e., personal service, U.S. mail, postage prepaid, courier, etc.) the date service was or will be made, and the certification shall be signed by the party making the service. If an attorney represents a party, the document shall be served upon the party's attorney at the attorney's business address.

(g) In a specific case under a hearings officer's jurisdiction, the hearings officer may authorize

facsimile or electronic filing and service of documents and may specify the means and effective filing dates. The hearings officer shall require that any facsimile or electronic documents be sufficiently legible and authentic and have a signature equivalent, and the hearings officer may require the contemporaneous or later submission of the original signed paper versions. The hearings officer shall provide that a durable paper record of any facsimile and electronic communications be maintained as needed.

(h) The hearings officer may direct, or upon request, permit ex officio filing of documents at department of health branch and district offices. Any such documents filed ex officio shall be promptly transmitted to the hearings officer by the branch or district office where the original was filed. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9 (Imp: HRS §91-2, 91-9)

§11-1-29 Amendment of documents and dismissal.

(a) If any document initiating, or filed in, a contested case is not in substantial conformity with the applicable rules of the department as to the contents of the document, or is otherwise insufficient, the department, on its own motion or on motion of any party, may reject or dismiss the document or require its amendment.

(b) If amended under subsection (a) or otherwise, a document shall be effective as of the date of the original filing. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-2, 91-9)

§11-1-30 Retention of documents by the department. (a) All documents filed with or presented to the department may be retained in the files of the department. Documents, which are part of a contested case record, shall be retained at least until the time for any appeal has expired. However,

the department or a hearings officer may permit the withdrawal of original documents upon submission of properly authenticated copies as replacements.

(b) The hearings officer or department shall maintain a durable paper record of any facsimile or electronic communication, which is part of the contested case record. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-9)

§11-1-31 Public access; documents and hearings.

(a) Documents filed with the department in a contested case shall be available for public inspection under section 11-1-5.

(b) Hearings shall be open to the public unless otherwise provided by law. Prehearing and post hearing conferences shall be closed to the public. Hearings may be closed to the public for the time necessary to address information and documents that are confidential pursuant to law.

(c) Confidential treatment may be requested where authorized by statute or rule. For good cause shown, the hearings officer may grant such a request. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-9)

§11-1-32 Representation and appearances before the department. (a) An individual may appear in the individual's own behalf; a general partner of a partnership may represent the partnership; a bona fide officer, trustee, or managerial level employee of a corporation, trust, or association may represent the corporation, trust or association; the manager of a manager-managed limited liability company and a member of a member-managed limited liability company may represent the limited liability company; and an officer or employee of an agency of the state or a political subdivision of the state may represent that agency in any hearing before the department. A legal

guardian may appear on behalf of a ward, within the scope of the guardian's duties, and a parent may appear on behalf of his or her minor child, unless the parent's rights have been terminated by court order.

(b) In any hearing under these rules, a party may be represented by a lawyer or lawyers qualified to practice before the Supreme Court of Hawaii or an attorney who is allowed to appear pro hac vice. Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or District of Columbia who is not a resident of or regularly employed in the State of Hawai'i may be permitted to associate himself or herself with a member or members of the Hawai'i bar in the presentation of the specific contested case at the discretion of the hearings officer or final decision maker.

(c) A party shall not be represented in any hearing except as stated in subsections (a) and (b).

(d) An individual's personal appearance or signature on a document filed with the department constitutes a representation that the individual is authorized and qualified to represent the particular party on whose behalf the individual claims or appears to act. The department may at any time require any individual acting in a representative capacity to prove the individual's authority and qualification to act in that capacity.

(e) No past officer, employee, or lawyer of the department shall in any manner represent or appear on behalf of any person regarding any matter or proceeding which was pending before the department when the individual was associated with the department, unless the individual first obtains the director's written consent. To obtain that consent, the individual shall submit a sworn statement showing that the individual did not personally consider or gain particular knowledge of the facts of the matter or proceeding during the individual's association with the department.

(f) No individual appearing before the department in any proceeding or matter shall knowingly

accept assistance from another individual regarding that proceeding or matter, if the second individual would be precluded by this section from appearing before the department in such proceeding or matter. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: HRS §§91-9)

§11-1-33 Substitution of parties. Upon motion and for good cause shown, the hearings officer may order substitution of parties, except that when an individual party dies or a government officer is replaced, substitution may be ordered without the filing of a motion. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-9)

§11-1-34 Consolidation and severance. (a) The hearings officer, upon the officer's own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings that involve substantially the same parties, or issues that are the same or closely related, if the hearings officer finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of the business of the department and to the ends of justice and will not unduly delay or harm the proceedings.

(b) The hearings officer, upon the officer's own initiative or upon motion, for good cause, may order any proceedings severed with respect to any or all parties or issues. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: §91-9)

§11-1-35 Intervention. (a) Any person or agency not a party to the contested case hearing may seek to become a party by filing a motion for leave to intervene. The motion shall state the grounds upon

which the person or agency claims to have an interest in the proceeding. The person or agency shall file the motion at least ten days before the hearing and shall serve the motion upon the hearings officer and all parties or their attorneys. Motions for intervention will be granted to persons or agencies properly seeking and entitled as of right to be admitted as a party; otherwise, at the discretion of the hearings officer, they may be denied. As a general policy, such motions shall be denied unless the person or agency shows that it has an interest in a question of law or fact involved in the contested matter and the disposition of the contested case may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) The hearings officer may permit intervention to such an extent and upon such terms as the hearings officer may deem proper and shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: HRS §91-9)

§11-1-36 Prehearing conferences. (a) The hearings officer may order and hold prehearing conferences with the parties to formulate or simplify issues, obtain stipulations of facts, arrange the exchange of proposed exhibits or written testimony, set schedules, exchange names of witnesses, limit the number of witnesses, and determine such other matters as may expedite the orderly conduct and disposition of the case as permitted by law.

(b) The hearings officer may request memoranda setting forth the issues, facts, and legal arguments upon which the parties intend to rely, and the hearings officer may fix the conditions and time for the filing of memoranda and the number of pages. Exhibits may be reproduced in an appendix to a

memorandum. A memorandum of more than twenty pages, exclusive of exhibits, shall contain a table of contents and table of authorities.

(c) If a party fails to abide by any prehearing or other order of the hearings officer or final decision maker, the hearings officer or final decision maker may enter an order refusing the disobeying party from supporting or opposing claims or defenses, or prohibiting the disobeying party from calling witnesses and/or introducing designated matters into evidence. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-9)

§11-1-37 Motions. (a) All motions, other than those made during a hearing, shall be made in writing to the hearings officer, shall state the relief sought, and shall be accompanied by an affidavit, declaration, or memorandum setting forth the grounds upon which they are based. The hearings officer shall determine whether a motion shall be heard or decided upon written submissions, and may set the time for hearing and opposing memorandum, if any.

(b) Unless otherwise specified by the hearings officer, the moving party shall serve a copy of all motions on the hearings officer and all other parties not less than ten working days before any hearing

(c) Unless otherwise specified by the hearings officer, a memorandum in opposition or a counter affidavit or declaration may be filed and served on all parties not later than three working days before any hearing. The original and proof of service shall be filed with the presiding hearings officer. No party may file any papers less than three days before the date set for the hearing unless otherwise permitted or ordered by the hearings officer.

(d) No reply or supplemental memoranda shall be filed unless specifically allowed by the hearings officer.

(e) When service is made by mail, two calendar days shall be added to the periods required in

subsections (b) and (c). [Eff FEB 14 2005] (Auth: §91-2, 321-9) (Imp: §91-9)

§11-1-38 Evidence. (a) The hearings officer shall follow section 91-10, Hawaii Revised Statutes, with respect to evidence submitted or objected to in contested case hearings.

(b) The hearings officer shall rule on the admissibility of all evidence.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval or at the direction of the hearings officer, a witness may submit written testimony into the record on direct examination. Before any prepared testimony is read or submitted, unless excused by the hearings officer, the witness shall deliver copies thereof to the hearings officer and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. The hearings officer may order that copies of the prepared testimony be served upon all parties and the hearings officer a set number of days before the hearing to permit proper cross examination of the witnesses on matters contained in the prepared testimony. The hearings officer may order the submission of written direct examination if the officer deems that substantial savings in time will result, or for other good cause.

(f) If relevant and material information is offered in evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other information in the document would burden the record, at the discretion of the hearings officer, the

relevant and material information may be read into the record, or copies of the redacted document received as an exhibit. Other parties shall be afforded opportunity at the time to examine the document, and to offer in evidence other portions believed material and relevant.

(g) If testimony in a proceeding other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the hearings officer.

(h) The hearings officer may disregard or strike direct testimony if opposing parties do not have an opportunity for cross-examination.

(i) At the hearing, the hearings officer may require the production of further evidence upon any issue. Upon agreement of the parties, the hearings officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time. [Eff FEB 14 2005] (Auth: §§91-2, 92-16, 321-9) (Imp: §§91-9, 91-10, 92-16)

§11-1-39 Subpoenas of witnesses. (a) Witnesses may be subpoenaed to give oral testimony, produce documents and things, or both.

(b) Subpoenas may be issued by the hearings officer. No subpoena shall be issued unless the party requesting the subpoena provides the name and address of the witness; identifies the document, record or thing sought, if any; and tenders the proper, required witness and mileage fees. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued.

(c) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii, and such fees and mileage shall be paid by the party at whose request the witness appears, except that State and county agencies are exempt from paying witness fees and

mileage. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-10, 92-16, 607-12, 607-24, HRCP 45(c))

§11-1-40 Continuance of contested case hearing. The contested case hearing shall be held at the time and place set in the notice of hearing. The hearings officer may continue the hearing based on a stipulation, motion, or the hearings officer's own initiative, and at the hearing may continue the hearing from day to day or adjourn the hearing to a later day or to a different place without notice other than an announcement at the hearing. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: HRS §91-9)

§11-1-41 Defaults, dismissals, and summary decisions. (a) For good cause shown or upon failure of a party to appear after proper notice, a hearings officer may find a party in default, or dismiss a complaint, whether or not a party requests such relief.

(b) If a party fails to request a hearing within the time specified in the departmental order or by statute, a party shall be in automatic default and subject to the order without the need for a finding or any other action by a hearings officer.

(c) Upon motion or the hearings officer's own initiative and proposal, and after the parties have an opportunity to present their arguments, a hearings officer may render a summary decision and order where no genuine issue of material fact exists and a party is entitled to a decision as a matter of law.

(d) A default, dismissal, or summary decision may apply to only some parties or may resolve only some issues, and the hearings officer shall specify which parties or what legal issues and facts remain for hearing.

(e) If a default other than an automatic default under subsection (b), dismissal, or summary decision resolves all issues, then the hearings officer shall issue or propose appropriate decisions and orders, and for summary decisions, findings of fact and conclusions of law. [Eff FEB 14 2005] (Auth: HRS §91-2, 321-9) (Imp: HRS §91-9)

§11-1-42 Proposed and final decisions; exceptions and argument. (a) A hearings officer, other than the director or attached entity, shall:

(1) Render and serve on the parties or their attorneys a certified copy of the hearings officer's proposed decision and order, findings of fact, and conclusions of law (collectively, "proposal") within thirty days after the end of the hearing or the parties' submission of the parties' proposals, whichever is later. The director or attached entity may extend this time if the hearings officer shows good cause in writing; and

(2) Set a time limit for any party adversely affected by the hearings officer's proposal to file and serve specific exceptions to the proposal, designation of parts of the record to consider, and a request for argument before the director or attached entity who will make the final decision. The hearings officer shall consider the time necessary for any transcription of the record when setting time limits.

(b) Exceptions or objections to the proposal shall be in writing and shall state, with particularity, the specific finding, conclusion, decision or order being challenged and the reasons why the proposal, or any portion thereof, is erroneous or not warranted based upon the evidence presented at the hearing or the law and shall identify the parts of the record which support the exception or objection.

(c) When the hearings officer is not the final decision maker, the final decision maker:

(1) Shall consider any exceptions that a party files,

(2) Shall consider the whole hearing record or those parts that the parties designate,

(3) Shall hear any argument that has been requested, and

(4) Should issue a final decision, order, findings of fact, and conclusions of law within thirty days after the hearings officer files the officer's proposal or the parties file exceptions and present argument, whichever is later.

(d) When the hearings officer is also the final decision maker, the final decision maker should issue final decisions, orders, findings of fact, and conclusions of law within thirty days after the end of the hearing or the parties' filing of proposed findings, conclusions, decision, and order, whichever is later.

(e) All final decisions, orders, findings of fact, conclusions of law, opinions, or rulings issued at the conclusion of a contested case shall be served upon the parties in the hearing by mailing a certified copy within a reasonable time to each party or to the party's attorney of record.

[Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-2, 91-12)

§11-11-43 Transcripts; fees; corrections. (a) When a stenographic or other record is taken, any party may request a certified transcript of the hearing. The party making the request shall be responsible for the fees for the transcript, unless the party is initiating an appeal to circuit court, in which case the department shall provide for a copy of the transcript of the hearing to be transmitted to the court for the appeal.

(b) Motions to correct the transcript shall be made within five days after receipt of the transcript, and motions shall be acted upon by the hearings officer within ten days.
[Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-9)

§§11-1-44 to 11-1-50 (Reserved)

SUBCHAPTER 3

RULEMAKING

§11-1-51 Petitions for adoption, amendment or repeal of rules. (a) Any interested agency or person who is not representing the department, may petition the department to adopt, amend, or repeal any rule that is designed to implement, interpret, or prescribe law, policy, procedure, or practice requirements of the department.

(b) The petition shall be filed in writing and shall include:

(1) The petitioner's name, mailing address, and telephone number;
(2) The petitioner's signature or the signature of the petitioner's authorized representative or attorney;
(3) A statement of the nature of the petitioner's interest;
(4) The text of the proposed rule or amendment or a designation of the rule sought to be repealed;
(5) A statement of the reason or reasons in support of the proposed rule, amendment, or repeal; and
(6) Any other information relevant to the petition.

(c) The department may require the petitioner to serve other persons or governmental agencies known or believed to be interested in the proposed rulemaking.

2630

(d) The department may dismiss any petition that fails to comply with the requirements of this section.

(e) Within thirty calendar days after the petition is filed, the department shall either deny the petition, giving the reasons for the denial, or initiate the rulemaking procedure. In either event, the department shall send notification of the department's action to the petitioner as allowed by section 11-1-4.

(f) Nothing in this chapter prevents the department, on its own motion, from acting on any matter disclosed in any petition. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-6)

§11-1-52 Notices of proposed rulemaking.

(a) When the department proposes to adopt, amend, or repeal an administrative rule, the department shall assign a docket number for each proposed rulemaking under this subchapter.

(b) Notice of proposed rulemaking shall be published as required by statute.

[Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: §91-3, 92-41)

§11-1-53 Conduct of hearings. (a) Each rulemaking hearing shall be presided over by a hearings officer. The hearing shall be conducted so as to afford to any interested person or agency a reasonable opportunity to be heard on matters specified in the notice of hearing and so as to obtain a clear and orderly record. The hearings officer may direct the order of statements, set time limits on statements, and take all action necessary for the orderly conduct of the hearing.

(b) At the commencement of the hearing, the presiding hearings officer shall read the notice of hearing, or distribute copies of the notice and

summarize it, and then outline briefly the procedure to be followed.

(c) All interested persons or agencies shall be given reasonable opportunity to speak with respect to the matters specified in the notice of hearing. Every individual shall, before presenting his or her statement, state his or her name, address, and whom the individual represents at the hearing, and shall give such other information regarding the individual's appearance as the hearings officer may request. The hearings officer shall confine the statements to the matters specified in the notice of the hearing. Every individual may be questioned by the hearings officer, but shall not be questioned by anyone else unless the hearings officer expressly permits it.

(d) In addition to or in place of oral statements at a hearing, persons and agencies may also file with the department within five calendar days following the close of the hearing, or within such other time permitted by the hearings officer, written comments or recommendations regarding the proposed rulemaking.

(e) The hearings officer may determine if statements given at a rulemaking hearing will be recorded by stenography, audiotape, videotape, or other means. All supporting written statements and data received at the hearing and which are deemed by the hearings officer to be authentic and relevant, shall be made a part of the record.

(f) A rulemaking hearing shall be held at the time and place announced in the notice of hearing. The hearing may be continued by the hearings officer from day to day or adjourned to a later date or to a different place without notice other than the announcement of the continuance or adjournment during or at the end of the hearing held at the scheduled time and place. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §§91-2, 91-3)

§§11-1-54 through 11-1-60 (Reserved)

SUBCHAPTER 4

DECLARATORY ORDERS

§11-1-61 Petitions for declaratory orders. (a) Any interested person or agency may petition for a declaratory order as to the applicability of any statutory provision administered by the department or of any rule or order of the department.

(b) The petition shall be filed in writing and shall include:

(1) The petitioner's name, mailing address, and telephone number;

(2) The petitioner's signature or the signature of the petitioner's authorized representative or attorney;

(3) A designation of the specific statutory provision, rule, or order in question, together with a clear and concise statement of the controversy or uncertainty involved;

(4) A full disclosure of the petitioner's interest in the subject matter, including the reason or grounds for submission of the petition;

(5) A detailed statement of the facts;

(6) A statement of the petitioner's position or contention; and

(7) A memorandum containing a discussion of reasons and legal authorities in support of the petitioner's position or contention.

The department may summarily dismiss any petition that fails to comply with the requirements of this section, or may require the petitioner to file additional data in support of the petition, or may offer a reasonable opportunity to correct any deficiencies in the petition.

(c) There is no right to a hearing on a petition for a declaratory order. At its discretion, the department may hold a hearing of any type it chooses before it rules on the petition.

(d) The department may, for good cause, refuse to

issue a declaratory order. Good cause includes, but is not limited to, a finding by the department that:

(1) The question is speculative or purely hypothetical and does not involve an existing situation or one that can reasonably be expected to occur in the near future;

(2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action in a court of law based on the same factual and legal circumstances presented in the petition;

(3) The statutory provision cited in the petition is not administered by the department or the rule or order cited in the petition is not a rule or order of the department; or

(4) The factual and legal circumstances presented in the petition are involved in pending administrative contested case proceedings or judicial proceedings that may result in a decision on the applicability of the statutory provision or rule or order cited in the petition.

(e) Within a reasonable time after the petition is filed, the department shall file a written ruling on the petition stating the department's reasons for:

(1) Denying the petition;

(2) Granting the petition; or

(3) Granting part and denying part of the petition;

and issue a declaratory order if the petition is granted in whole or in part.

The department shall send the ruling and any order to the petitioner as allowed by section 11-1-4. [Eff FEB 14 2005] (Auth: HRS §§91-2, 321-9) (Imp: HRS §91-8)

§§11-1-62 to 11-1-70 (Reserved)"

6.30

DEPARTMENT OF HEALTH

Chapter 1, State of Hawaii Rules of Practice and Procedure, on the Summary Page dated FEB 01 2005 following public hearing held through video-conferencing on January 3, 2005, after public notice was given in the Honolulu Star Bulletin, Sunday, December 5, ~~2005~~ 2004.

These rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

CHIYOME LEIMAALA FUKINO, M.D.
Director of Health

APPROVED AS TO FORM:

BENJAMIN T. ROBERTS
Deputy Attorney General

LINDA LINGLE
Governor
State of Hawaii

Date: FEB 02 2005

'05 FEB -3 A9:41

LIEUTENANT GOVERNOR
STATE OF HAWAII

2630