Office of the Ombudsman
State of Hawaii
Fiscal Year 2009-2010
Report Number 41

As a service to the public provided by the legislature, the Office of the Ombudsman receives and investigates complaints from the public about injustice or maladministration by executive agencies of the State and county governments.

The Ombudsman is a nonpartisan officer of the legislature. The Ombudsman is empowered to obtain necessary information for investigations, to recommend corrective action to agencies, and to criticize agency actions; but the Ombudsman may not compel or reverse administrative decisions.

The Ombudsman is charged with: (1) accepting and investigating complaints made by the public about any action or inaction by any officer or employee of an executive agency of the State and county governments; and (2) improving administrative processes and procedures by recommending appropriate solutions for valid individual complaints and by suggesting appropriate amendments to rules, regulations, or statutes.

By law, the Ombudsman cannot investigate actions of the governor, the lieutenant governor and their personal staffs; the legislature, its committees and its staff; the judiciary and its staff; the mayors and councils of the various counties; an entity of the federal government; a multistate governmental entity; and public employee grievances, if a collective bargaining agreement provides an exclusive method for resolving such grievances.

Kekuanaoa Building, 4th Floor
465 South King Street
Honolulu, HI 96813

Phone:	**808-587-0770**
Fax:	**808-587-0773**
TTY:	**808-587-0774**

Neighbor island residents may call our toll-free numbers.

Hawaii	**974-4000**
Maui	**984-2400**
Kauai	**274-3141**
Molokai, Lanai	**1-800-468-4644**

Telephone extension is 7-0770
Fax extension is 7-0773
TTY extension is 7-0774

email: **complaints@ombudsman.hawaii.gov**
website: **www.ombudsman.hawaii.gov**

State of Hawaii

Report of the Ombudsman

For the Period July 1, 2009 - June 30, 2010
Report No. 41

Presented to the Legislature
pursuant to Section 96-16 of
the Hawaii Revised Statutes

December 2010

Mr. President, Mr. Speaker, and Members of the
Hawaii State Legislature of 2011:

In accordance with Section 96-16, Hawaii Revised Statutes, I am pleased to submit the report of the Office of the Ombudsman for fiscal year 2009-2010. This is the forty-first annual report since the establishment of the office in 1969.

The Office of the Ombudsman remains committed to its role as a link between the people and their government. We continue our efforts to ensure the fair and impartial delivery of government services and hope that our efforts enhance the public's trust and confidence in Hawaii government.

I would like to take this opportunity to thank the State Legislature for its continued support. I would also like to express my appreciation to the Governor, the Mayors of the various counties, and the State and County department heads and employees for their ongoing cooperation and assistance in our efforts to resolve citizen complaints.

Finally, I would like to personally thank First Assistant David Tomatani and the other staff members of the office for their continued commitment and dedication to the mission and purpose of our office.

Respectfully submitted,

ROBIN K. MATSUNAGA
Ombudsman

December 2010

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Chapter I

THE YEAR IN BRIEF

Total Inquiries Received

During fiscal year 2009-2010, the office received a total of 4,978 inquiries. Of these inquiries, 3,509, or 70.5 percent, may be classified as complaints within the jurisdiction of the office. The remaining inquiries consisted of 587 non-jurisdictional complaints and 882 requests for information.

The 4,978 inquiries received represent a 9.2 percent increase from the 4,560 inquiries received the previous fiscal year. There was an increase in all categories of inquiries.

A comparison of inquiries received in fiscal year 2008-2009 and fiscal year 2009-2010 is presented in the following table.

TWO-YEAR COMPARISON

Years	Total Inquiries	Information Requests	Non-Jurisdictional Complaints	Jurisdictional Complaints		
				Total Jurisdictional	Prison Complaints	General Complaints
2009-2010	4,978	882	587	3,509	1,869	1,640
2008-2009	4,560	852	537	3,171	1,640	1,531
Numerical Change	418	30	50	338	229	109
Percentage Change	9.2%	3.5%	9.3%	10.7%	14.0%	7.1%

Staff Notes

Administrative Services Officer Linda Teruya retired on September 1, 2009, after serving 16 years with our office. Her dedication and loyalty will truly be missed as she enjoys the golden years of retirement. Congratulations and best wishes to Ms. Teruya!

Carol Nitta came on board as Ms. Teruya's replacement effective September 1, 2009. Ms. Nitta transferred from the Legislative Reference Bureau after serving 24 years as a secretary with the Bureau.

The United States Ombudsman Association's 30th Annual Conference was held in Estes Park, Colorado, from September 28 to October 2, 2009. Ombudsmen from around the world meet annually to share their knowledge, experiences, and learn new ways to carry out their mission and goals of fair and equitable treatment. The conference theme was "Navigating the Rocky Divide: Ombudsmen at the Summit." Attendees were Ombudsman Robin Matsunaga and analysts Herbert Almeida and Rene Dela Cruz. Mr. Almeida delivered the keynote address at the conference, sharing insight gained during his 24 years of work with our office.

Analyst Lynn Oshiro retired on December 31, 2009 after 19 years with our office. Ms. Oshiro was employed with the State of Hawaii for 32 years. We wish her the best as a full-time retiree.

Joining our staff on April 1, 2010 as an analyst was Marcie McWayne. Ms. McWayne transferred from the Department of the Attorney General. She earned a Bachelor of Arts degree in Political Science and Sociology from the University of Hawaii and her Juris Doctor from Thomas M. Cooley Law School in Lansing, MI. She was admitted to the Hawaii State Bar in 2009.

Analyst Mark Au resigned on May 19, 2010 to accept a position as a Senior Investigator with the University of Hawaii's affirmative action office. Mr. Au was employed with our office for over 9 years. We wish Mr. Au the best as he pursues his new career.

At the end of the year, our office staff consisted of Ombudsman Robin Matsunaga; First Assistant David Tomatani; analysts Herbert Almeida, Rene Dela Cruz, Alfred Itamura, Yvonne Jinbo, Gansin Li, Dawn Matsuoka, and Marcie McWayne; Administrative Services Officer Carol Nitta; and support staff Sheila Alderman, Edna de la Cruz, Debbie Goya, and Sue Oshima.

Outreach Efforts

We began the fiscal year by participating in the second annual Senior Health and Awareness Fair on July 10, 2009 at the Hawaii Okinawa Center. Participants from our office were Ombudsman Robin Matsunaga and support staff Edna de la Cruz. This event was sponsored by the Hawaii United Okinawa Association and was open to the public free of charge.

During September 25-27, 2009, our staff participated in the 25th Annual Hawaii Seniors' Fair – The Good Life Expo at the Neal Blaisdell Center. Over 1,000 attendees visited our booth during the three-day event and were able to learn about the function of our office and the services we provide.

State legislators representing the Aiea and Pearl City communities hosted a Senior Fair at Pearlridge Shopping Center on October 17, 2009. Ombudsman Matsunaga and Administrative Services Officer Carol Nitta explained the function of our office to approximately 300 shoppers who stopped at our table.

The first Wahiawa Community Health Fair was held on November 7, 2009. This fair was sponsored by the Wahiawa Hongwanji Mission for the community and surrounding areas. Analysts Rene Dela Cruz and Yvonne Jinbo were able to provide attendees with a better understanding of the services our office provides.

On May 14 and 15, 2010, the Hawaii United Okinawa Association sponsored the third annual Senior Health and Awareness Fair, this time a two-day event, at the Hawaii Okinawa Center. Participants from our office were Ombudsman Matsunaga, analyst Marcie McWayne, and support staff Edna de la Cruz and Sue Oshima.

Chapter II

STATISTICAL TABLES

For all tables, the percentages may not add up to a total of 100% due to rounding.

TABLE 1
NUMBERS AND TYPES OF INQUIRIES
Fiscal Year 2009-2010

Month	Total Inquiries	Jurisdictional Complaints	Non-Jurisdictional Complaints	Information Requests
July	481	328	60	93
August	456	330	58	68
September	399	273	47	79
October	392	267	46	79
November	345	250	39	56
December	362	249	50	63
January	433	304	54	75
February	378	261	57	60
March	529	385	45	99
April	414	275	66	73
May	388	286	28	74
June	401	301	37	63
TOTAL	4,978	3,509	587	882
% of Total Inquiries	--	70.5%	11.8%	17.7%

TABLE 2
MEANS BY WHICH INQUIRIES ARE RECEIVED
Fiscal Year 2009-2010

Month	Telephone	Mail	Email	Fax	Visit	Own Motion
July	436	34	5	0	4	2
August	405	32	14	1	4	0
September	359	28	4	1	6	1
October	350	24	15	0	3	0
November	310	24	8	0	2	1
December	325	22	14	0	1	0
January	382	25	18	0	6	2
February	342	19	15	1	0	1
March	474	25	17	2	11	0
April	325	58	17	12	2	0
May	322	38	23	1	3	1
June	348	35	14	1	2	1
TOTAL	4,378	364	164	19	44	9
% of Total Inquiries (4,978)	87.9%	7.3%	3.3%	0.4%	0.9%	0.2%

TABLE 3
DISTRIBUTION OF POPULATION AND INQUIRERS BY RESIDENCE
Fiscal Year 2009-2010

Residence	Population*	Percent of Total Population	Total Inquiries	Percent of Total Inquiries
City & County of Honolulu	907,574	70.1%	3,494	70.2%
County of Hawaii	177,835	13.7%	539	10.8%
County of Maui	145,240	11.2%	478	9.6%
County of Kauai	64,529	5.0%	111	2.2%
Out-of-State	--	--	356	7.2%
TOTAL	1,295,178	--	4,978	--

*Source: The State of Hawaii Data Book 2009, A Statistical Abstract. Hawaii State Department of Business, Economic Development, and Tourism, Table 1.06, "*Resident Population, by County: 1990 to 2009.*"

TABLE 4
DISTRIBUTION OF TYPES OF INQUIRIES
BY RESIDENCE OF INQUIRERS
Fiscal Year 2009-2010

	TYPES OF INQUIRIES					
	Jurisdictional Complaints		Non-Jurisdictional Complaints		Information Requests	
Residence	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
C&C of Honolulu	2,457	70.0%	352	60.0%	685	77.7%
County of Hawaii	366	10.4%	84	14.3%	89	10.1%
County of Maui	365	10.4%	61	10.4%	52	5.9%
County of Kauai	75	2.1%	15	2.6%	21	2.4%
Out-of-State	246	7.0%	75	12.8%	35	4.0%
TOTAL	3,509	--	587	--	882	--

TABLE 5
MEANS OF RECEIPT OF INQUIRIES
BY RESIDENCE
Fiscal Year 2009-2010

Residence	Total Inquiries	Means of Receipt					
		Telephone	Mail	Email	Fax	Visit	Own Motion
C&C of Honolulu	3,494	3,179	141	104	17	44	9
% of C&C of Honolulu	--	91.0%	4.0%	3.0%	0.5%	1.3%	0.3%
County of Hawaii	539	503	13	23	0	0	0
% of County of Hawaii	--	93.3%	2.4%	4.3%	0.0%	0.0%	0.0%
County of Maui	478	442	26	9	1	0	0
% of County of Maui	--	92.5%	5.4%	1.9%	0.2%	0.0%	0.0%
County of Kauai	111	102	3	6	0	0	0
% of County of Kauai	--	91.9%	2.7%	5.4%	0.0%	0.0%	0.0%
Out-of-State	356	152	181	22	1	0	0
% of Out-of-State	--	42.7%	50.8%	6.2%	0.3%	0.0%	0.0%
TOTAL	4,978	4,378	364	164	19	44	9
% of TOTAL	--	87.9%	7.3%	3.3%	0.4%	0.9%	0.2%

TABLE 6
DISTRIBUTION AND DISPOSITION OF JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2009-2010

Agency	Juris-dictional Complaints	Percent of Total	Completed Investigations		Discon-tinued	Declined	Assisted	Pending
			Substan-tiated	Not Substan-tiated				
State Departments								
Accounting & General Services	21	0.6%	3	12	2	3	0	1
Agriculture	10	0.3%	3	4	0	3	0	0
Attorney General	118	3.4%	10	18	12	19	55	4
Budget & Finance	195	5.6%	30	55	26	26	45	13
Business, Economic Devel. & Tourism	8	0.2%	1	5	1	1	0	0
Commerce & Consumer Affairs	47	1.3%	2	22	5	12	2	4
Defense	4	0.1%	0	2	0	2	0	0
Education	104	3.0%	25	37	12	24	1	5
Hawaiian Home Lands	5	0.1%	1	2	0	2	0	0
Health	133	3.8%	13	40	21	43	2	14
Human Resources Development	5	0.1%	2	2	0	1	0	0
Human Services	398	11.3%	83	175	39	65	14	22
Labor & Industrial Relations	147	4.2%	14	67	14	34	8	10
Land & Natural Resources	54	1.5%	7	26	7	4	1	9
Office of Hawaiian Affairs	3	0.1%	0	0	1	2	0	0
Public Safety	1,953	55.7%	234	768	84	781	46	40
Taxation	33	0.9%	1	12	4	10	6	0
Transportation	42	1.2%	5	15	5	9	2	6
University of Hawaii	24	0.7%	1	8	7	5	0	3
Other Executive Agencies	11	0.3%	0	4	0	6	0	1
Counties								
City & County of Honolulu	143	4.1%	17	44	21	44	2	15
County of Hawaii	28	0.8%	0	10	5	8	3	2
County of Maui	18	0.5%	1	5	3	8	0	1
County of Kauai	5	0.1%	0	3	0	2	0	0
TOTAL	3,509	--	453	1,336	269	1,114	187	150
% of Total Jurisdictional Complaints	--	--	12.9%	38.1%	7.7%	31.7%	5.3%	4.3%

TABLE 7
DISTRIBUTION AND DISPOSITION OF SUBSTANTIATED JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2009-2010

Agency	Substantiated Complaints	Complaints Rectified	Not Rectified/ No Action Necessary
State Departments			
Accounting & General Services	3	0	3
Agriculture	3	3	0
Attorney General	10	10	0
Budget & Finance	30	30	0
Business, Economic Devel. & Tourism	1	1	0
Commerce & Consumer Affairs	2	2	0
Defense	0	0	0
Education	25	23	2
Hawaiian Home Lands	1	1	0
Health	13	12	1
Human Resources Development	2	2	0
Human Services	83	77	6
Labor & Industrial Relations	14	14	0
Land & Natural Resources	7	7	0
Office of Hawaiian Affairs	0	0	0
Public Safety	234	226	8
Taxation	1	1	0
Transportation	5	5	0
University of Hawaii	1	1	0
Other Executive Agencies	0	0	0
Counties			
City & County of Honolulu	17	15	2
County of Hawaii	0	0	0
County of Maui	1	1	0
County of Kauai	0	0	0
TOTAL	453	431	22
% of Total Substantiated Jurisdictional Complaints	--	95.1%	4.9%
% of Total Completed Investigations (1,789)	25.3%	24.1%	1.2%

TABLE 8
DISTRIBUTION OF INFORMATION REQUESTS
Fiscal Year 2009-2010

Agency	Information Requests	Percent of Total
State Departments Accounting & General Services	22	2.5%
Agriculture	5	0.6%
Attorney General	33	3.7%
Budget & Finance	33	3.7%
Business, Economic Devel. & Tourism	9	1.0%
Commerce & Consumer Affairs	99	11.2%
Defense	1	0.1%
Education	9	1.0%
Hawaiian Home Lands	3	0.3%
Health	77	8.7%
Human Resources Development	1	0.1%
Human Services	46	5.2%
Labor & Industrial Relations	29	3.3%
Land & Natural Resources	19	2.2%
Office of Hawaiian Affairs	0	0.0%
Public Safety	48	5.4%
Taxation	7	0.8%
Transportation	8	0.9%
University of Hawaii	3	0.3%
Other Executive Agencies	21	2.4%
Counties City & County of Honolulu	73	8.3%
County of Hawaii	4	0.5%
County of Maui	6	0.7%
County of Kauai	0	0.0%
Miscellaneous	326	37.0%
TOTAL	882	--

TABLE 9
DISTRIBUTION OF NON-JURISDICTIONAL COMPLAINTS
Fiscal Year 2009-2010

Jurisdictional Exclusions	Number of Complaints	Percent of Total
Collective Bargaining	30	5.1%
County Councils	4	0.7%
Federal Government	18	3.1%
Governor	6	1.0%
Judiciary	80	13.6%
Legislature	3	0.5%
Lieutenant Governor	0	0.0%
Mayors	0	0.0%
Multi-State Governmental Entity	0	0.0%
Private Transactions	445	75.8%
Miscellaneous	1	0.2%
TOTAL	587	--

TABLE 10
INQUIRIES CARRIED OVER TO FISCAL YEAR 2009-2010 AND THEIR DISPOSITIONS, AND INQUIRIES CARRIED OVER TO FISCAL YEAR 2010-2011

Types of Inquiries	Inquiries Carried Over to FY 09-10	Inquiries Carried Over to FY 09-10 and Closed During FY 09-10	Balance of Inquiries Carried Over to FY 09-10	Inquiries Received in FY 09-10 and Pending	Total Inquiries Carried Over to FY 10-11
Non-Jurisdictional Complaints	4	4	0	1	1
Information Requests	2	2	0	1	1
Jurisdictional Complaints	170	169	1	150	151
		Disposition of Closed Complaints: Substantiated 34 Not Substan. 113 Discontinued 22 169			
TOTAL	176	175	1	152	153

Chapter III

SELECTED CASE SUMMARIES

The following are summaries of selected cases investigated by the office. Each case summary is listed under the State government department or the county government involved in the complaint or inquiry. Although some cases involved more than one department or involved both the State and the county, each summary is placed under what we believe to be the most appropriate agency.

LIST OF SUMMARIES

Page

DEPARTMENT OF BUDGET AND FINANCE

(08-03814) Lack of notice regarding exclusion from dental coverage. A State employee complained that his dental insurance from the Hawaii Employer-Union Health Benefits Trust Fund (EUTF) did not cover the realignment of his dentures that was completed by his dentist in April 2008 because a one-year waiting period had not elapsed. The EUTF provides health care benefit plans to State and County employees and retirees.

The complainant previously had dual dental insurance through the EUTF and his spouse's dental plan through her private employer. However, in 2007 the EUTF informed employees that effective July 1, 2007 it would discontinue dual dental insurance, so employees enrolled in the EUTF dual dental plan would have the option of enrolling in the more expensive regular EUTF dental plan during the open enrollment period from April to May 2007. The complainant chose not to enroll in the regular EUTF dental plan and elected to be covered under only his spouse's dental plan beginning July 1, 2007. Thus, when his spouse terminated employment on September 1, 2007, her health plans were cancelled and the complainant was left without any dental insurance.

Pursuant to the EUTF rules, when the complainant lost the dental insurance he had under his spouse's plan, he became eligible to enroll in the EUTF dental plan. He applied for the EUTF regular dental plan on September 11, 2007 and was enrolled retroactively to September 1, 2007.

After his dentist completed the realignment of his dentures in April 2008, the complainant learned that there was a one-year waiting period before the dental work would be covered by his EUTF dental plan. He complained that the EUTF did not inform him of the one-year waiting period before he enrolled in the EUTF plan.

We inquired with the EUTF staff and learned that for certain services, including denture realignment, there was a one-year waiting period beginning from the date of enrollment before such services would be covered. Because the complainant's coverage began on September 1, 2007, his denture realignment in April 2008 was completed during the 12-month waiting period and therefore was not covered.

We reviewed the EUTF "Reference Guide For Active Employees" (Guide) for 2005, 2006, and 2007. The Guide contained information about the EUTF health care insurance plans, including dental plans, in which employees could enroll. The Guide was made available prior to the annual open enrollment period so that employees may make informed choices regarding their health care insurance plans. We found that the 2005 Guide contained information that certain services, including denture realignment,

would be covered only "after 12 months of continuous enrollment." The 2006 Guide stated that the benefits remained the same as in 2005 and "[f]or a full description of your dental benefits and how to access them, refer to the EUTF website, www.eutf.hawaii.gov." The 2007 Guide contained some changes to benefits but there was no mention of the one-year waiting period for certain types of dental work.

We contacted an EUTF administrator and recommended that the EUTF review the completeness of the information it provided or made available to its members in the 2006 and 2007 Guides, in comparison to the 2005 Guide. The administrator agreed to publish additional information in future releases. A few months later, we inquired with the EUTF and found that notification of the 12-month waiting period for certain dental services was included in the Guide that had been printed for dissemination to employees for the next open enrollment period, and the information was posted on the department's website as well.

DEPARTMENT OF EDUCATION

(09-01366) Notice of wage overpayment. A Department of Education (DOE) employee whose salary was being garnished to repay a private debt complained that the calculation of the court-ordered garnishment was incorrect.

We reviewed Chapter 653, Hawaii Revised Statutes (HRS), titled "Garnishment of Government Beneficiaries." The statute included a State employee in its definition of a "government beneficiary" and established the amount to be garnished from the employee's monthly salary in Section 653-11, HRS, as follows:

> Five per cent of the first $100 per month, ten per cent of the next $100 per month, and twenty per cent of all sums in excess of $200 per month, or an equivalent portion of the above amount per week.

We applied the above formula to the complainant's monthly salary and found that the DOE calculation of her court-ordered garnishment was correct. We so informed the complainant.

The complainant then informed us that after auditing her pay, the DOE also found that it authorized her paid sick leave even though she had exhausted her sick leave credits. As a result of the error, she received a salary overpayment and the DOE was about to apply a second garnishment to her forthcoming paychecks to recover the overpayment. Since her salary

was already being garnished for the private debt, she felt she could not afford additional withholdings for the salary overpayment.

We contacted the Office of Fiscal Services (OFS) and a fiscal specialist informed us that the complainant was orally told of the amount of the salary overpayment and how it occurred, and that she had agreed with the amount to be deducted from her paycheck. The DOE also orally informed the complainant of her option to request a contested case hearing pursuant to Chapter 91, HRS, titled "Administrative Procedure."

The complainant acknowledged that she was orally informed of her salary overpayment and the amount to be withheld from her paycheck and that she was aware that she could have requested a hearing but chose not to do so. However, she reported that since the salary garnishment for her private debt had now ended, the DOE's recovery of her salary overpayment had since become affordable. Thus, we discontinued the investigation of the appropriateness of the second garnishment to recover her salary overpayment.

After reviewing Chapter 78, HRS, titled "Public Service," which provided for the recovery of salary overpayment to State employees, we followed up further with the OFS regarding its procedure for notifying complainants of their indebtedness due to salary overpayment.

At the time of the complaint, Section 78-12, HRS, stated in part:

> Salary withheld for indebtedness to the government.
>
> . . . .
>
> (e) If the indebtedness has occurred as a result of salary or wage overpayment, the disbursing officer shall determine the amount of indebtedness and notify the employee in writing of the indebtedness. If the employee contests the disbursing officer's determination of indebtedness, the employee may request a hearing pursuant to chapter 91. (Emphasis added.)

We pointed out to the DOE fiscal specialist that the statute required the DOE to provide employees with notice of withholding in writing. The specialist acknowledged the statutory requirement but questioned whether the law required written notice be provided for each paycheck from which a salary withholding is made to recover a salary or wage overpayment. We informed the specialist that our interpretation of the statute was that the DOE was not required to send a notice for every paycheck and that a notice is

required only at the outset when recovery of the overpayment commences, but advised him to consult the department's legal counsel if he was uncertain.

The fiscal specialist met with his staff and subsequently reported to us that for the most part, the DOE staff had been providing written notices to all employees who were indebted to the department because of a wage or salary overpayment. The specialist informed us the staff was reminded that the statute required written notice be provided to every employee whose indebtedness occurred as a result of salary or wage overpayment.

(10-00680) Difficulty in dropping off and picking up disabled students. The driver of a commercial van that provided transportation services to disabled students at a public intermediate school complained that because of traffic congestion it was very difficult to maneuver through the school parking lot to reach the space reserved for the parking of vehicles transporting disabled persons. The complainant reported that her van was blocked by vehicles driven by parents who were dropping off or picking up their children. According to the complainant, she asked the school office staff for assistance but was told that nothing could be done to remedy the situation.

We spoke with the school principal, who informed us that traffic congestion was a difficult problem for the school to resolve. She said that parents would be angry if they were not allowed to drop off and pick up their children in the parking lot, and school staff was not available to direct traffic at the times that students were being dropped off or picked up. We asked the principal if there was another location where the van could park to drop off and pick up disabled students, as the complainant informed us that during the previous year she was able to drop off and pick up the students along a street behind the school. The principal thought that arrangement was feasible and at our request she agreed to discuss the matter with the head of the transportation company.

Subsequently, the principal informed us that she and the transportation company owner agreed that it was not a good idea for the van to drop off and pick up students along the street due to safety concerns. Therefore, they agreed that the van would continue to use the disabled persons parking space in the school parking lot, but a security staff member would be assigned to prevent other cars from blocking the van's movement to and from that parking space. In addition, the principal would have signs posted and the parking lot curbsides would be painted a darker shade of red so that drivers would be alerted not to park in that area.

When we contacted the complainant, she informed us that she had noticed the change and reported that it was "great."

(10-00735) Charter school student not allowed to participate in soccer at public high school. In 2006 when it passed Senate Bill No. 2719, which was codified as Chapter 302B, Hawaii Revised Statutes (HRS), titled "Public Charter Schools," the State Legislature stated that the charter school system is an important complement to the Department of Education (DOE) school system, one that empowers local school boards and their charter schools by allowing more autonomy and flexibility and placing greater responsibility at the school level. The charter school system is made up of the board of education, the charter school administration, the charter school review panel, and individual charter schools.

A student at a charter high school on the island of Hawaii wanted to participate in soccer, a sport that was not available at his school. The student's father sought approval from the DOE to allow his son to participate in soccer at a public high school. The coach and athletic director of the high school for whom the student wished to play were supportive, but the complex area superintendent denied the request. The student's father complained to our office about the superintendent's denial.

The complainant argued that the DOE was required to allow his son to play soccer at the high school because a law provided charter school students the opportunity to play a sport for a public school if the sport was not offered at the charter school. He cited Section 302B-16, HRS, which stated:

> **Sports.** The department shall provide students at charter schools with the same opportunity to participate in athletics provided to students at other public schools. If a student at a charter school wishes to participate in a sport for which there is no program at the charter school, the department shall allow that student to participate in a comparable program of any public school in the complex in which the charter school is located.

We inquired with the complex area superintendent about the reason she denied the request to allow the student to participate in soccer at the public high school in question. She informed us that the law allowed a student to participate at any public school in the complex in which the charter school is located. According to the DOE, a complex consists of a non-charter public high school and all of the intermediate/middle and elementary schools that are feeder schools for that high school. Additionally, a charter high school belongs to a non-charter public high school's complex. In this case, the complainant's son attended a charter school that was not in the complex of the public high school at which he wished to play soccer.

Additionally, we learned that the complainant's son's charter high school belonged to the complex of a public high school that did not

participate in soccer. The public high school's students were not afforded the opportunity to play soccer for a high school in another complex.

We noted that Section 302B-16, HRS, required the DOE to provide students at charter schools with the same opportunity to participate in athletics that is provided to students at other public schools. Since a student at a non-charter public high school would not be allowed to play in a sport for a public high school in another complex simply because his school did not offer that sport, we believed that if the DOE were to allow a charter school student to participate in a sport for a high school of another complex, that charter school student would receive a benefit that was not afforded to students at non-charter public high schools.

We informed the complainant that we found the denial by the complex area superintendent of his son's request to play soccer at the public high school outside of the charter school's complex to be in accordance with the statute.

(10-01773) Delay in payment for unused vacation leave after resignation from State employment. A former employee of the Department of Education (DOE), who had resigned in January 2009, complained in November 2009 that he had not received payment for his accrued vacation leave that was unused at the time of his resignation. Pursuant to law, the complainant was entitled to payment for his unused vacation leave. The DOE did not dispute his entitlement to vacation pay but informed him that it gave greater priority to processing vacation pay for employees who retired than for employees who resigned.

We contacted the DOE Office of Fiscal Services and learned that the department was backlogged in its processing of vacation pay for both employees who retired and employees who resigned. In order to ensure that accrued vacation payments were accurate, the DOE audited each individual's vacation leave records before processing payment, and a backlog had developed over the years. The DOE hired a private contractor to assist in processing the payments to clear the backlog.

The DOE informed us that vacation payments for retirees were being processed before vacation payments for employees who resigned, regardless of when the employment ended. Priority was given to retiree vacation payments because by law, any State or County agency was subject to a monthly fee if it failed to comply with the State Employees' Retirement System requests for information regarding lump sum vacation payments within 90 days of an employee's retirement.

We noted that under this prioritization, however, the backlog in processing vacation payments for retirees would lead to significant delays

in processing vacation payments for employees who had resigned. We questioned the fairness of the practice, as an employee who resigned long before an employee who retired would conceivably receive his or her vacation pay much later than the retired employee. The DOE agreed to review its practice.

Subsequently, the DOE advised us that it would process vacation pay chronologically, on a "first in, first out" basis, regardless of whether the employee had retired or resigned. Furthermore, the DOE reported that its private contractor had made significant progress in reducing the backlog of vacation payments and it was anticipated that the backlog would be eliminated by the end of December 2010.

DEPARTMENT OF HEALTH

(10-02335) Delay in payment for services rendered. The director of a company that was contracted by the Department of Health (DOH) to provide therapeutic and assessment services to children and families complained to our office on December 21, 2009 that the department had not made payment on 22 invoices that the company submitted. Most of the invoices were less than 30 days past due, but several ranged from 37 to 98 days past due. The unpaid invoices totaled over $800,000.

The complainant acknowledged that the company may have contributed to the delay because it changed its business status from a corporation to a Limited Liability Company (LLC) during the contract period. The change required the contract to be amended and the amendment was completed in early November 2009. The complainant felt, however, that any delay after the contract amendment should not be attributed to the company.

According to law, except in certain specified circumstances, the department was required to make payment no later than 30 calendar days following the receipt of an invoice for the performance of services. Section 103-10, Hawaii Revised Statutes (HRS), stated in part:

> **Payment for goods and services**. (a) Any person who renders a proper statement for goods delivered or services performed, pursuant to contract, to any agency of the State or any county, shall be paid no later than thirty calendar days following receipt of the statement or satisfactory delivery of the goods or performance of the services. In the event circumstances prevent the paying agency from complying with this section, the person shall be entitled to interest from the paying agency on the principal amount remaining unpaid

> at a rate equal to the prime rate for each calendar quarter plus two per cent, commencing on the thirtieth day following receipt of the statement or satisfactory delivery of the goods or performance of the services, whichever is later, and ending on the date of the check. As used in this subsection, "prime rate" means the prime rate as posted in the Wall Street Journal on the first business day of the month preceding the calendar quarter.

We contacted the various DOH agencies to which the company submitted invoices for payment. The agencies attributed the delay in payment to the company's change of status from a corporation to an LLC. However, none of the circumstances in which the department was not required to make payment within 30 days was applicable.

We found that some of the unpaid invoices were submitted before the contract was amended to reflect the change to an LLC and the delay in these cases might be partially attributed to the need to amend the contract. However, a majority of the unpaid invoices were submitted about the time the contract was amended or thereafter. In these cases, the need to amend the contract did not appear to be a factor.

We monitored the department's action in the case until all of the submitted invoices were paid. The last invoice was paid the first week of February 2010. The DOH paid interest to the LLC in accordance with Section 103-10, HRS.

(10-02946) Underpaid for accumulated vacation leave. A woman who was laid off from her half-time civil service position at the Department of Health (DOH) due to budget cuts complained that she was paid only one-half of what she was owed for her accumulated unused vacation leave. She was paid $1,649.34 but because her hourly rate of pay was $13.86 and she had accumulated 238 hours of unused vacation leave, she expected to receive twice the amount that she was paid. The DOH accounting office informed her, however, that the payout amount was correct because it was based on the rate of pay of a half-time position.

We spoke with the accounting office staff member who calculated the complainant's vacation pay. The staff member confirmed that the complainant's hourly rate of pay was $13.86. In calculating the complainant's vacation pay, the accounting office used an hourly rate of $6.93 (one-half of $13.86) because the complainant was a half-time employee. The staff member also confirmed that the complainant had a total of 238 hours of unused vacation leave and maintained that the complainant was correctly paid $1,649.34 ($6.93 multiplied by 238).

We disagreed with the accounting office that $6.93 was the correct hourly rate to calculate the complainant's vacation pay. The complainant's hourly pay was $13.86 and we believed it was improper to halve that hourly rate to calculate her vacation pay because she was a half-time employee.

We contacted the Department of Accounting and General Services (DAGS) payroll section, which processes payroll for State employees. The DAGS payroll section agreed that the hourly rate of pay used to calculate vacation pay should be the same hourly rate to which the employee was entitled, regardless of whether the position was half-time or full-time. Therefore, the complainant's vacation pay should be calculated on the basis of $13.86 as her hourly rate of pay.

We thereafter informed the DOH business office manager that we believed the accounting office was erroneously calculating the complainant's vacation pay. We learned that the DAGS also contacted the DOH about the manner in which the department was calculating vacation pay. The manager subsequently reviewed the calculations and reported that corrections were made using $13.86 as the rate of pay. She informed us that the complainant would thus receive an additional check for $1,649.34.

We asked the manager if she knew of other half-time DOH employees whose unused vacation pay may have been calculated in the same manner as in the complainant's case. The manager stated that there was one other employee in a similar situation and she informed us that they were already working to correct the vacation pay in that case.

We notified the complainant that she would be receiving another check for $1,649.34. She was grateful for our assistance.

DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT

(10-02368) Delay in workers' compensation payment resulted in administrative penalty paid by State. An employee of the Department of Public Safety (PSD) complained that he had not received payment of a workers' compensation award for a work-related injury. The employee also claimed that due to the delay, he was entitled by law to an additional payment of a penalty of 20% of the award.

The State of Hawaii is a self-insured employer and the Department of Human Resources Development (DHRD) handles the workers' compensation cases of most of the State's executive departments.

In our investigation, we learned that the applicable law was Section 386-92, Hawaii Revised Statutes (HRS), which stated in part:

> **Default in payments of compensation, penalty.** If any compensation payable under the terms of a final decision or judgment is not paid by a self-insured employer or an insurance carrier within thirty-one days after it becomes due, as provided by the final decision or judgment, . . . there shall be added to the unpaid compensation an amount equal to twenty per cent thereof payable at the same time as, but in addition to, the compensation, unless the non-payment is excused by the director after a showing by the employer or insurance carrier that the payment of the compensation could not be made on the date prescribed therefor owing to the conditions over which the employer or carrier had no control.

The Department of Labor and Industrial Relations (DLIR) held a hearing to determine whether the injury arose out of and in the course of the complainant's employment. At the hearing, the DHRD representative accepted liability for the injury and in a decision dated November 13, 2009, the DLIR ordered the State to pay the complainant.

The complainant contacted our office on December 23, 2009 because he had not been paid. We noted that it had been 40 days since the DLIR ordered the State to pay the complainant, which exceeded the 31-day period within which the complainant should have been paid.

We contacted the DHRD and learned that a staff member failed to process the payment to the complainant. A DHRD supervisor had discovered the staff member's error and had forwarded the necessary paperwork to the PSD to process payment to the complainant. Although the DHRD had caught and corrected its error, we recommended that it review Section 386-92, HRS, to determine whether the complainant was entitled to receive the penalty payment.

After completing its review, the DHRD determined that the penalty payment was warranted and ordered payment to the complainant of an amount equal to 20% of the workers' compensation award.

The complainant was informed of the remedial action and was grateful for our assistance.

DEPARTMENT OF HUMAN SERVICES

(10-00683) Refusal to sign a waiver to allow tenant to receive a rebate on purchase of an energy efficient appliance. A tenant at a Hawaii Public Housing Authority (HPHA) apartment building applied for a $75 rebate from the Hawaiian Electric Company (HECO) on his purchase of an energy efficient "Energy Star" air conditioner for his apartment. According to the HECO rebate program, in order to obtain the rebate a tenant who purchases an Energy Star appliance must obtain a signed waiver from the landlord of any claim to the rebate. The tenant asked his HPHA building manager to sign the waiver, but she refused and informed the tenant that he was not entitled to the rebate because the HPHA was the HECO account holder. The tenant then wrote to the HPHA administration to complain that the manager refused to sign the waiver. After several months without a response from the HPHA, he contacted our office.

In our investigation of the complaint, we reviewed the HECO Energy Star rebate application form. We confirmed that in a landlord-tenant situation where the tenant purchases the Energy Star appliance, the tenant may receive the rebate from the HECO only if the landlord certifies that the tenant has permission to install the appliance and the landlord waives any claim to the rebate.

We also reviewed the complainant's rental agreement and the HPHA Project Rules, and we spoke with the HPHA building manager. The manager informed us that the HPHA does not allow tenants to utilize air conditioners unless it is deemed medically necessary because the air conditioners will generate additional electricity costs for the HPHA, which pays the electricity costs for many of its tenants. She further informed us that she did not examine the complainant's rebate application form but told him she would not sign the waiver because the HPHA, not the complainant, paid the electricity bill. The manager noted that she also refused to sign the rebate application of another tenant for the same reason.

We wrote to the HPHA Executive Director (Director) about the case. We noted that the complainant admitted that he did not obtain the HPHA's permission to install the appliance before he purchased it and asked the manager to sign the waiver. We informed the Director that we were not requesting a review of the complainant's case, but were requesting his reconsideration of the HPHA's position with regard to the HECO rebates to tenants when the purchased appliance has been deemed to be medically necessary for the tenant and the HPHA has granted permission to purchase the appliance.

We pointed out that when a physician or health care provider has certified that a tenant has a disability or impairment that requires an

accommodation, the HPHA allows the tenants to apply for the accommodation. It was our understanding that if the accommodation involves the purchase of an appliance that has been approved and deemed to be medically necessary, such as an air conditioner, the HPHA would authorize the tenant to purchase the appliance. Since the HPHA may incur increased electricity costs for any approved appliance that is purchased and installed, the purchase of an Energy Star appliance would reduce the HPHA's costs and also contribute toward energy conservation. Thus, in order to encourage approved tenants to select an Energy Star appliance at the time of purchase, we suggested that the HPHA waive its claim to the rebate and allow these tenants to receive the rebate.

After due consideration, the Director agreed with our suggestion and issued a memorandum to all building managers, instructing them to waive the HPHA's claim to the HECO rebate for any approved tenant who purchases a qualifying Energy Star appliance. The Director explained in his memorandum that the HPHA wished to encourage tenants to purchase an energy-saving appliance when the purchase is necessary and approved by the HPHA.

The complainant was pleased with the action taken by the Director.

(10-01621) Unable to meet a deadline that fell on "Furlough Friday." Due to State budget cuts necessitated by the poor economy, in the fall of 2009 agencies of the executive branch of the Hawaii State government, including the Department of Human Services (DHS), began placing employees on unpaid furlough on two Fridays of each month. Many offices were closed to the public on these days.

A woman on a neighbor island who received food stamps complained that she was unable to submit required paperwork to her DHS caseworker because the office was closed on the deadline to submit the paperwork. The deadline was October 23, 2009, the first Furlough Friday to be implemented.

We contacted the complainant's caseworker on Monday, October 26, 2009, and learned that the deadline for the complainant to submit her paperwork was determined prior to the establishment of the DHS Furlough Friday schedule. The caseworker further informed us that clients were normally given ten calendar days to submit the required paperwork. If the tenth day fell on a weekend or holiday, it was the practice of the DHS to extend the deadline to the next workday following the weekend or holiday. Similarly, if a deadline fell on a Furlough Friday, the deadline would be extended to the following Monday, which would be the next workday after the Furlough Friday.

In the complainant's case, because October 23, 2009 was a Furlough Friday and the DHS office was closed, the deadline for the complainant to submit her paperwork was extended to Monday, October 26, 2009. The caseworker informed us that she received the required paperwork from the complainant on October 26, 2009 and she was deemed to have met the deadline.

Additionally, we learned that all of the welfare offices had secure boxes into which paperwork could be placed after hours by applicants and recipients. Documents placed in these boxes would be considered to be received on the following workday.

(10-01729) Reduction in financial assistance. A woman with a disability complained that the Department of Human Services (DHS) reduced her monthly financial assistance benefits under the State-funded General Assistance (GA) program from $401 to $251 effective November 2009. The complainant believed that because of her disability, her benefits should not have been reduced. Her caseworker informed her, however, that benefits were reduced for every GA recipient.

In our investigation, the complainant's caseworker informed us that the amount of assistance to GA recipients was reduced because the appropriated funding for the remainder of the State fiscal year was determined to be insufficient to meet the projected increase in the number of GA recipients. Therefore, the DHS reduced the amount of assistance to every GA recipient in order to provide assistance to the increased number of projected GA recipients until the end of the fiscal year on June 30, 2010. All GA recipients were sent advance written notice of the reduction in their financial assistance.

We reviewed Chapter 346, Hawaii Revised Statutes (HRS), titled "Department of Human Services." Section 346-53, HRS, stated in part:

> Determination of amount of assistance. . . .
>
> . . . .
>
> (b) The director shall determine the allowance for general assistance to households without minor dependents based upon the total amount appropriated for general assistance to households without minor dependents, among other relevant factors.

We found no statutory provision that prohibited a reduction of the allowance and therefore concluded that the decision by the DHS to reduce the amount of assistance provided to GA recipients was authorized by law.

Furthermore, the complainant was mistaken in her belief that her benefits should not have been decreased because of her disability. To be eligible for benefits under the GA program, an individual must be certified as disabled by the DHS medical board. Therefore, all GA recipients were certified as disabled and there was no basis to treat the complainant differently from other GA recipients.

We also investigated whether the calculation by the caseworker in determining the amount of assistance to the complainant was correct.

We reviewed Hawaii Administrative Rules (HAR) Title 17, Chapter 676, titled "Income," and Chapter 680, titled "Eligibility and Benefit Determination." Section 17-676-54, HAR, stated in part:

> Determining monthly net income for financial assistance. (a) Monthly net earned income for households whose total gross income does not exceed one hundred eighty-five per cent of the family's standard of need shall be determined by the following process:
>
> (1) From the monthly gross earned income of each applicant or recipient, deduct a standard deduction of twenty per cent;
>
> (2) After the twenty per cent standard deduction, deduct a flat rate of two hundred dollars from the remainder;
>
> (3) After the two hundred dollar flat rate deduction, a thirty-six per cent earned income disregard shall be deducted from the remainder; . . .

Section 17-680-12, HAR, stated in part:

> Benefit determination. (a) The monthly financial assistance payment for individuals, who are prospectively determined eligible, shall be determined by subtracting the monthly net income from the monthly standard of assistance regardless of the date of application.

The reduction of GA assistance was implemented by reducing the amount of the standard of assistance for a household of one person from $450 to $300. The complainant had $344 monthly gross income, from which the 20% standard deduction ($68) was subtracted, resulting in a balance of $276. The flat rate of $200 was then subtracted, resulting in a balance of $76. Thereafter, the 36% earned income disregard, which amounted to $27, was subtracted

resulting in a remainder of $49. The remaining balance of $49 was the complainant's net income, which was subtracted from the reduced standard of assistance of $300, resulting in a financial assistance payment of $251 to the complainant. We found that the caseworker calculated the complainant's benefit amount in accordance with the rules.

We explained to the complainant that the department was authorized to reduce the benefits paid to all GA recipients and had correctly calculated the amount of her benefits.

(10-01970) Notices for food stamps sent to wrong address. A woman complained that the Department of Human Services (DHS) terminated food stamps benefits for her and her son because she failed to complete and return an eligibility redetermination form and did not appear for her scheduled interview. The complainant learned that she did not receive the form and notice of interview because they were sent to her former residence address, not her mailing address. The complainant informed us that her current mailing address remained the same for about two years, but that her residence address had changed more than once during the same time period. When the complainant was told about the termination of her food stamps benefits, she reapplied for food stamps and was scheduled for an interview with her worker. However, she was distressed about the delay in her receipt of food stamps for over a month.

We reviewed Title 17, Chapter 648, Hawaii Administrative Rules (HAR), titled "Eligibility Redeterminations." Section 17-648-12, HAR, stated in part:

> Eligibility redetermination. (a) The department shall act on applications for redeterminations as follows:
>
> . . . .
>
> (2) An eligible household shall be provided an opportunity to participate by its normal issuance cycle in the month following the end of its current certification period.
>
> . . . .
>
> (b) The department shall provide each household with notification of the end of its certification and the need to be recertified as follows:
>
> . . . .

(3) The department shall include with the notice of expiration a scheduled appointment for an interview and an application or eligibility redetermination form.

We spoke with a DHS supervisor about the case. The supervisor informed us that the department mailed the complainant a notice which advised her that the certification of her eligibility for food stamps benefits was about to end and that recertification of her eligibility would need to be completed for her benefits to continue. The department also mailed her a notice of her scheduled interview appointment.

We asked the supervisor to track the changes that were made to the complainant's mailing and residence addresses. She informed us that the complainant's current mailing address had been entered in the computer, but was subsequently deleted when the complainant reported a change in her residence address. The supervisor was unable to explain why the complainant's mailing address was deleted when there was no change to that address. As a result of the deletion, the only address for the complainant that remained in the department's records was an outdated residence address. The notices were inadvertently sent there, and thus the complainant never received them.

On the day of the complainant's reapplication interview, the supervisor informed us that the complainant's food stamps benefits were recertified. Due to the department's error in sending the notices to the wrong address, the complainant was deemed eligible for food stamps benefits retroactively and she and her son would not lose any benefits.

We informed the complainant of the decision and she was appreciative of our assistance.

(10-02237) Inappropriate behavior of State driver. A man complained about a confrontation he had with the driver of a State truck. The complainant admitted that he cut in front of the truck to get to a freeway off ramp, but reported that the employee then followed the complainant as he exited the freeway and confronted the complainant when they stopped at an intersection. The employee got out of his truck, walked up to the complainant who was sitting in his vehicle, and threatened the complainant with bodily harm and called him a derogatory name. The complainant called the police but the employee left the scene before the police arrived. When he left, the employee made a U-turn and headed in the direction from which he came.

Based on information provided by the complainant, we were able to identify the agency to which the State truck was assigned. We spoke with

the supervisor of the employee about the complaint. The supervisor informed us that the police interviewed the employee but were not taking further action against the employee.

According to the supervisor, the employee claimed that he did not go out of his way to follow the complainant. The employee admitted, however, that he got out of the truck to confront the complainant because the complainant had been waving his hands in a provocative manner after he cut in front of the employee's truck.

In speaking with the supervisor, we emphasized the importance of reminding his staff that they are public employees and are held to a high standard of conduct when sharing the road with the general public. The supervisor informed us that the employee was reprimanded for his actions and that the employee understood the gravity of his actions.

We reported to the complainant that we spoke with the driver's supervisor and believe that the action taken was reasonable. The complainant was satisfied with the outcome of our investigation.

(10-03024) Unpaid funeral bill. In February 2010 a woman complained that the State did not pay a mortuary for funeral services that it provided for her father shortly after his death in May 2008. The complainant's father was receiving assistance from the Med-QUEST Division (Med-QUEST), Department of Human Services (DHS), at the time of his death.

We reviewed Title 17, Chapter 1745, Hawaii Administrative Rules (HAR), titled "Funeral Payments Program." Section 17-1745-12, HAR, stated in part:

> Services covered by the funeral payments program. Payments provided by the funeral payments program shall be available only within the State. Payment for services shall include:
>
> (1) Mortuary services . . . .
>
> . . . .
>
> (2) Burial services . . . .

Section 17-1745-14, HAR, stated in part:

Choice of services.

(b) The family or any interested party shall agree to pay all costs beyond the maximum payment allowed by law if they choose to upgrade the mortuary or burial services provided by the funeral payment's program.

Section 17-1745-20, HAR, stated in part:

Amount and method of payment. (a) Payment may be made as needed up to $400 for mortuary and $400 for burial services.

The complainant discovered through a collection agency that the State did not pay the mortuary's bill, which exceeded $1,000. The complainant paid the collection agency for the entire bill and planned to ask the mortuary to reimburse her the $800 allowed under the rules after the State paid the mortuary. The complainant had contacted the Med-QUEST office for assistance but the issue had not been resolved.

We contacted a Med-QUEST unit supervisor regarding the complaint. The supervisor informed us of the procedure by which a mortuary would be paid for its services. She said Med-QUEST would send a purchase order to the mortuary, the mortuary would then send a bill to the DHS fiscal office, and the DHS fiscal office would then pay the mortuary.

In the complainant's case, the unit supervisor discovered that Med-QUEST approved a purchase order in August 2008. However, the purchase order was left in the case file and was never sent to the mortuary. When the error was discovered, Med-QUEST and the DHS fiscal office expedited the process. Med-QUEST submitted another purchase order to the mortuary on February 16, 2010; the mortuary submitted an $800 bill on February 19, 2010; and the fiscal office sent a check to the mortuary on February 24, 2010.

We informed the complainant that Med-QUEST paid the mortuary for her father's mortuary and burial services.

DEPARTMENT OF LAND AND NATURAL RESOURCES

(10-02276) No action taken to shut off a drinking fountain at Kokee State Park. A man complained in December 2009 that the Department of Land and Natural Resources (DLNR) did not shut off a drinking fountain in Kokee State Park even though a posted sign informed the

public that some drinking water samples were found to have lead levels above the Environmental Protection Agency (EPA) action level. The complainant stated that he inquired with various offices within the DLNR and the Department of Health (DOH), but no action was taken.

In our investigation, we spoke to the DLNR State Parks Division staff and the DOH Safe Drinking Water Branch staff. We learned that lead levels in Kokee State Park water samples tested in 2007 had exceeded the EPA action levels, and Federal law required that the information in the posted signs be provided to the public. Subsequently, tests of lead and copper levels in 2008 and 2009 produced results that were below EPA action levels and thus the water was safe to drink by the time the complainant contacted our office. We reviewed documented test results and correspondence between the DOH Safe Drinking Water Branch and the DLNR State Parks Division staff that corroborated the information that was reported to us by the DLNR and DOH.

We inquired with the DOH Safe Drinking Water Branch as to whether the posted signs at the Kokee State Park should be taken down. We were assured that the water was safe to drink and the signs could be removed. Water samples would continue to be monitored, with the next set of tests scheduled for the summer of 2010.

We contacted the Kokee State Park maintenance supervisor about the removal of the posted sign near the drinking fountain in question. We were informed that the sign had already been removed.

We notified the complainant that the monitoring of the water system over the required period of time confirmed that the water was safe to drink and the warning sign had been removed.

DEPARTMENT OF PUBLIC SAFETY

(09-04393) Cash missing from property of inmate. A former inmate complained that when he was released from prison more than a year earlier, $477.39 was missing from his property.

According to the complainant, he was in a drug treatment facility when he was arrested on a warrant. A deputy sheriff drove him from the drug treatment facility to a correctional facility for intake processing. At the correctional facility, the complainant surrendered a paycheck and $477.39 in cash to a deputy sheriff, who sealed the cash in a small envelope, which he then sealed in a larger envelope together with the paycheck. The envelope and other property were placed in a plastic bag and sealed by the deputy

sheriff. Later that day the complainant was transferred to another facility, where a deputy sheriff handed the complainant's property bag to an adult corrections officer (ACO).

After a month, the complainant became eligible to return to the drug treatment facility. A staff member from the drug treatment facility picked up the complainant at the correctional facility and the complainant was given his property bag. When he opened the bag, the complainant found that the envelope that contained the cash was opened and the cash was gone.

The complainant filed a tort claim for $477.39 with the Risk Management Office (RMO) of the Department of Accounting and General Services. With his claim the complainant submitted a statement by the staff member of the drug treatment facility who had picked him up at the correctional facility and was with him when he opened his property bag at the time of his release. The staff member's statement corroborated the complainant's claim that the cash was not in the property bag he received.

We received a copy of the RMO file on the complainant's tort claim. In its response, the correctional facility denied being responsible for the missing cash. The RMO had made no decision on the claim because the sheriff's office had not responded to requests for information regarding the claim. The property receipt which was issued by the deputy sheriff and which was provided to the correctional facility verified that $477.39 had been confiscated from the complainant.

We questioned the staff member who was in charge of the correctional facility's property room about its handling of the complainant's property. The staff member stated that the property room staff did not open the complainant's property bag and the tape that the sheriff's office used to seal the bag was intact. The drug treatment facility staff member also confirmed in his statement that the bag was sealed with tape when the complainant received it.

We brought the matter to the attention of an administrator in the Law Enforcement Division, which has jurisdiction over the deputy sheriffs. After reviewing the complaint, the administrator found it was likely that a theft was committed by Department of Public Safety (PSD) staff, but he was unable to determine the responsible party. The administrator informed us that a meeting with the police was scheduled and he planned to request that the PSD Internal Affairs office conduct a criminal investigation.

The administrator recommended that the RMO approve the settlement of the complainant's tort claim and the RMO offered to pay the complainant $477.39. The complainant accepted the RMO offer and was pleased with the outcome.

(10-00127) Privileged correspondence. An inmate at a correctional facility on the mainland that is contracted by the Department of Public Safety (PSD) to hold Hawaii inmates complained that he received a letter from the PSD Mainland Branch (MB) in an envelope that was already opened when he received it. When the complainant informed the MB about it, the MB informed him that it sends its correspondence to inmates in an unsealed envelope to allow for review by the facility mail censors in accordance with the facility's policy. The MB informed the complainant that correspondence from the MB and other State agencies is considered privileged mail, not legal mail, and that only legal mail from attorneys and the courts is not opened before the inmate receives it.

We inquired with the MB and received the same response as had the complainant. The MB informed us that privileged mail may be opened and read by the facility mail censors. Since the MB considered its correspondence with inmates to be privileged mail, the MB left their envelopes unsealed to facilitate the mail censors' review.

At our request, the MB provided us a copy of the mainland facility's policy governing privileged correspondence. We found that the policy provisions regarding privileged correspondence were very similar to the PSD policy provisions and state that incoming privileged mail is to be opened only in the presence of the inmate and only examined for physical contraband.

Since the MB considered its correspondence to inmates to be privileged, we advised the MB that according to the policy, its mail to all inmates should be sent in sealed envelopes. After due consideration, the MB acknowledged its misinterpretation of the policy and informed us that it would henceforth seal the envelopes when corresponding with inmates. The MB also asked the contracted mainland facilities to remind their staff to only open privileged mail in the presence of the inmate and to only examine privileged mail for contraband.

We informed the complainant of the outcome of our investigation.

(10-00132) Duplicate misconduct charges. An inmate complained that following a shakedown of his cell, he was charged and found guilty of misconduct. During the shakedown, a white powdery substance was discovered in the complainant's shampoo bottle. A test was conducted, and the substance was determined to be cocaine.

The complainant was charged with violating the following sections of Department of Public Safety (PSD) Policy No. COR 13.03, titled "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations":

4.0 MISCONDUCT RULE VIOLATIONS AND SANCTIONS

. . . .

.2 Greatest Misconduct Violations (6).

a. . . . .

6 (19) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

. . . .

.3 High Misconduct Violations (7).

a. . . . .

7 (9) Possession of introduction, manufacturing or use of any narcotic paraphernalia, drugs, intoxicants or alcoholic beverages not prescribed for the individual by the medical staff, which includes any form of being intoxicated.

. . . .

7 (17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

. . . .

.4 Moderate Misconduct Violations (8)

a. . . . .

8 (10) Possession of anything not authorized for retention or receipt by the inmate/detainee and not issued to the inmate/detainee through regular institutional channels.

The facility adjustment committee (Committee) found the complainant not guilty of violating Section 4.3a.7(17), but guilty of the three other charges.

After reviewing the staff reports, we concluded there was sufficient evidence that the complainant was in possession of cocaine and therefore guilty of possession of a narcotic drug. However, it appeared to us that the facility was "stacking" the charges against the complainant for the same conduct by also finding the complainant guilty of a criminal act classified as a Class A felony and possession of anything not authorized for his retention or receipt. Furthermore, pursuant to Section 710-1022, Hawaii Revised Statutes, the possession of a drug by an inmate constituted the offense of promoting prison contraband in the first degree, which is a Class B felony, not a Class A felony, so Section 4.2a.6(19) was an erroneous charge.

After our attempts to resolve our concerns with the Committee chairperson were unsuccessful, we spoke with the facility deputy warden. The deputy warden supported the Committee findings and informed us that the inmate needs to be punished because possession of drugs is a serious matter. The deputy warden commented that our office was unconcerned about the security and safety of inmates and staff of the facility. We disagreed and informed the deputy warden that security and safety are factors of concern in our investigations. It was our position, however, that disciplinary actions against inmates should be carried out in a fair and reasonable manner.

We brought our concerns to the PSD Institutions Division Administrator (IDA) and requested his review. After reviewing the reports, the IDA agreed that charges were duplicative and stacked against the complainant. The IDA decided to sustain the guilty finding for Section 4.3a.7(9), but to expunge the guilty findings for Sections 4.2a.6(19) and 4.4a.8(10). The IDA informed us that the facility records would be corrected to reflect the expungement of both charges.

We agreed with the IDA's decision and informed the complainant of the results of our investigation.

(10-00218) Special diets not honored upon transfer to another facility. During the past year, we received complaints from inmates that their religious or medical diets were being interrupted when they were transferred from one correctional facility to another.

We had investigated similar complaints in 2007. It appeared the problem in 2007 was that the food service units at the facilities to which the inmates were transferred were not informed in a timely manner of the inmates' special diets or did not have sufficient time to review the appropriateness of the special diets following the transfer of the inmates.

To address the problem, the Department of Public Safety (PSD) food service manager issued a memorandum instructing all facility food service managers to honor special diets of newly transferred inmates for four days upon request from the inmate's housing unit. In order to continue the special diets beyond the initial four days, the religious services or medical staff would need to review the religious and medical diets, respectively, and submit formal requests to the food service units. Thereafter, in a discussion with a PSD deputy director, we were informed that the period would be extended from four days to seven days.

In our investigation of the more recent complaints, we again brought the matter to the attention of the PSD deputy director with whom we had spoken in 2007. The deputy director recalled that the facilities to which the inmates were transferred were to honor the special diets from the inmates' previous facilities for seven days, rather than four days, to allow religious services and medical staff additional time to review inmates' special diets and submit requests to the food service units. However, he found that the memorandum issued by the PSD food service manager in 2007 had not been amended to increase the initial period from four to seven days.

Therefore, on instruction from the deputy director, the PSD food service manager issued a memorandum extending to seven days the time during which inmates' special diets would be honored at the facilities to which they were transferred. In order for the special diets to continue beyond the initial seven days, the religious services or medical staff would need to review the religious and medical diets, respectively, and submit formal requests to the food service units for religious and medical diets, respectively.

We were concerned that facility staff other than food services staff may not be informed of the procedure and we shared our concern with the PSD deputy director. The deputy director then instructed that the memorandum issued by the PSD food service manager be reissued not only to all food service managers, but also to all facility wardens, unit managers, case managers, and other facility staff to ensure that all staff were informed of the procedure. We are continuing to monitor the situation through our receipt of inmate complaints.

(10-00512) Delay in issuance of medical marijuana certificate. When the State Legislature passed legislation in 2000 to legalize the use of marijuana for medical purposes, it stated its finding that modern medical research had discovered a beneficial use of marijuana in treating or alleviating pain or other symptoms associated with certain debilitating illnesses. There was sufficient medical and anecdotal evidence to support the proposition that these diseases and conditions may respond favorably to medically controlled use of marijuana. The purpose of legalizing marijuana for medical purposes was to ensure that seriously ill patients were not

penalized for the use of marijuana when their treating physicians provided professional opinions that the benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patients.

In August 2009 a man complained that the Narcotics Enforcement Division (NED), Department of Public Safety (PSD), did not issue him a registry identification certificate that he needed to use marijuana for medical reasons. The complainant reported that his physician had submitted the required certification forms in June 2009, by which his physician certified that he was medically qualified to use marijuana.

We reviewed Chapter 329, Part IX, Hawaii Revised Statutes (HRS), titled "Medical Use of Marijuana." The conditions for the medical use of marijuana were specified in Section 329-122, HRS, as follows:

> **Medical use of marijuana; conditions of use.**
> (a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient shall be permitted only if:
>
> (1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition;
>
> (2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; . . .

Section 329-123, HRS, also mandated the following registration requirements for the use of medical marijuana:

> **Registration requirements. . . .**
>
> (b) Qualifying patients shall register with the department of public safety. Such registration shall be effective until the expiration of the certificate issued by the physician. . . .The department shall then issue to the qualifying patient a registration certificate, . . .

We also reviewed Title 23, Chapter 202, Hawaii Administrative Rules (HAR), titled "Medical Use of Marijuana." Section 23-202-6, HAR, stated in part:

Time and method of registration. . . .

(b) No person shall engage in the use of marijuana for medical purposes, until the completed written certification/registry identification forms and registration fees are submitted to the Department by the qualifying patient's physician. Upon receipt of the written certification/registry identification forms and registration fees, the department shall issue a receipt, which shall serve as a temporary registration certificate. The temporary registration certificate shall be valid for nor [*sic*] more than 60 days from the date of issuance or until the department issues or denies the registry identification certificate. . . . (Emphasis added.)

. . . .

(d) Failure to obtain a certificate from the department will prohibit the applicant from engaging in any activity utilizing the medical use of marijuana as designated in Section 329-122, Hawaii Revised Statutes.

Furthermore, Section 23-202-8(e), HAR, stated that the PSD shall verify the information on all certification/registry identification forms (hereinafter certification forms) and written documentation.

We inquired with the NED as to why the complainant had not been issued the receipt that would serve as his temporary registration certificate, as required by Section 23-202-6(b), HAR. We were told that the NED had never issued a temporary registration certificate to any qualified patient because it took the same amount of time to verify the certification forms and issue the registry identification certificate as it took to issue the receipt. Therefore, the NED's practice was to verify the certification forms and then issue or deny a registry identification certificate. However, the NED acknowledged that due to recent staff shortages, it may take up to 45 days for the NED to verify the certification forms and send the qualifying patient his or her registry identification certificate.

We were concerned that while an application was pending, an applicant who was certified by his physician as qualified to use marijuana for medical purposes was not legally authorized to use

marijuana because he did not possess either a temporary registration certificate or a registry identification certificate issued by the NED.

We asked the PSD director to review the NED's practice. We noted that Section 329-122, HRS, conditioned the medical use of marijuana during the initial 60-day period only on written certification by the qualifying patient's physician and the submittal of the certification forms and registration fees, and not on the NED's verification of the certification forms and other written documentation. We interpreted the phrase "upon receipt" in Section 23-202-6(b), HAR, to require that "at the time" that the NED receives the certification forms and registration fees, it must send the applicant either a receipt (that serves as a temporary registration certificate) or a registry identification certificate. We recommended that upon receipt of the certification forms and registration fees, the NED issue temporary registration certificates for any applicants to whom an identification certificate could not be issued because verification of the submitted information could not be immediately completed.

In January 2010 the PSD director reported that the NED would follow the existing rules and issue temporary registration certificates upon receipt of the certification forms and registration fees. He also informed us that the department would seek amendments to the HAR to change the medical marijuana registration process.

We continued to monitor the situation until the NED implemented procedures that upon receipt of certification forms would allow it to issue receipts that would serve as temporary registration certificates. We were informed that by March 2010, the NED had issued all qualified patients with pending registrations a temporary registration certificate.

The complainant had received a registry identification certificate in October 2009, four months after his physician had submitted the necessary certification forms. We informed him that the NED would issue him at least a temporary registration certificate upon receipt of his certification forms in the future. He was appreciative of the action taken.

(10-00542) Substance abuse treatment schedule. A probationer who was serving a one-year jail term as a condition of probation complained that he was being released from a correctional facility to attend substance abuse treatment only one day a week, rather than four days a week as scheduled by his probation officer. The complainant attempted to contact his probation officer but was unsuccessful.

The complainant alleged that according to a letter from his probation officer to the facility dated July 10, 2009, he was to be released for treatment on Tuesdays, Wednesdays, and Thursdays from 4 p.m. to 9:30 p.m. Subsequently, the probation officer sent a letter to the facility dated July 20, 2009, stating that he was to be released for treatment on Mondays from 9 a.m. to 12 noon. The complainant believed that the correctional facility was missing the July 10, 2009 letter, as he was being released for treatment only on Mondays from 9 a.m. to 12 noon, pursuant to the letter of July 20, 2009.

We contacted staff at the correctional facility's records office and were informed that the facility had both the July 10, 2009 and July 20, 2009 letters from the probation officer. However, the facility believed that the second letter superseded the first, so the complainant was being released for substance abuse treatment only on Mondays.

We recommended that the correctional facility records staff contact the complainant's probation officer to verify the days on which the complainant was to attend substance abuse treatment. After speaking with the probation officer, the records staff informed us that the complainant was supposed to be released for treatment on Mondays from 9 a.m. to 12 noon and on Tuesdays, Wednesdays, and Thursdays from 4 p.m. to 9:30 p.m. Thereafter, the probation officer sent the facility an amended letter dated August 6, 2009 verifying the complainant's substance abuse treatment schedule.

We informed the complainant that he would henceforth be allowed to attend substance abuse treatment four days a week.

(10-00574) Restriction in amount of property to be transferred. One of the measures taken by the Department of Public Safety (PSD) to deal with a reduction of funding due to the State's poor financial condition was to close a neighbor island correctional facility. Nearly sixty inmates at the facility were to be transferred to other correctional facilities within the State. Twelve of the inmates complained to our office that they were being restricted in the amount of property they were allowed to take with them to their destination facility. The facility informed inmates by memorandum that they could take only a small bag that contained their medication, soap, toothbrush, toothpaste, shampoo, hair conditioner, and the clothing that they would be wearing on the day of their transfer. The inmates were concerned about their other belongings, including legal papers and religious materials.

We reviewed PSD Policy No. COR.493.17.02, titled "Personal Property of Inmates," which stated in part:

4.0 PROCEDURES

. . . .

.4 Transfer to Another Correctional Facility

When offenders are transferred to another correctional facility, the personal property they were allowed to retain shall be transferred with them. . . .

The receiving facility may limit the type and amount of personal property the offender is allowed to retain while in their custody.

There was no provision which allowed the sending facility to limit the items that the inmates could take with them upon transfer to another facility.

We contacted the correctional facility's housing officer, who had drafted the memorandum restricting the property that inmates would be allowed to take with them upon transfer. He informed us that he was merely following orders from the PSD administration.

We thereafter contacted a PSD administrator who informed us that although the inmates were to be transported on a chartered flight, the airplane was owned by the military which placed limits on the amount of property that could be brought on board due to space limitations. Although limits were necessary, the administrator agreed that the memorandum issued by the facility was too restrictive.

The PSD administrator conferred with the facility's chief of security. Based on his consultation with the administrator, the chief of security issued a new memorandum which allowed inmates to carry hygiene items, medications, medical appliances, legal materials and class work, personal clothing, and certain items bought from the inmate store that could be put in a bag that would fit under a passenger's seat on the airplane. The inmates were also encouraged to send out any remaining property to family or friends.

We informed each complainant of the additional items that he would be allowed to take on the flight.

(10-00920) Inmate found guilty of erroneous and duplicate misconduct charges. An inmate at a correctional facility complained that he was found guilty of several misconduct charges stemming from an

incident that occurred while he was in a work furlough program. He alleged that the facility had engaged in "stacking" of charges whereby he was found guilty of duplicative charges.

The investigation report by the correctional facility staff indicated that the complainant and several other inmates were on a Hawaii Correctional Industries (HCI) community service project, not on work furlough. The inmates were working at a camp site under the supervision of an HCI employee. A vehicle drove onto the camp site and one of the inmates received a plate of food from the driver and was observed having lunch with the driver. Subsequently, another vehicle drove onto the camp site and several of the inmates were observed interacting with the occupants, and two of the inmates were observed smoking. A witness identified the complainant as the inmate who greeted and had lunch with the first driver, as well as one of the inmates who engaged in smoking.

Under the facility policy that listed prohibited acts, the complainant was found guilty by the facility adjustment committee (Committee) of the following charges:

High Misconduct Violations

4.3a(15) Any deviation from the following: date of validity, time expiration, destination, and purpose/intent of any furlough pass.

4.3a(17) Any other criminal act which the Hawaii Penal Code classifies as a Class B felony.

Moderate Misconduct Violations

4.4a(10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.

4.4a(11) Refusing to obey an order of any staff member, which may include violations in the low moderate category.

4.4a(16) Being in an unauthorized area.

4.4a(19) Unauthorized contacts with the public or other inmates.

Low Moderate Misconduct Violations

4.5a(8) Violating a condition of any community release or furlough program.

After reviewing the investigation report and discussing the matter with the Committee chairperson, we were of the opinion that the guilty finding with regard to Sections 4.4a(10), 4.4a(16), 4.4a(19), and 4.5a(8) were supported by the evidence and were reasonable. However, we did not believe the evidence supported a guilty finding with regard to Sections 4.3a(15), 4.3a(17), and 4.4a(11).

Section 4.3a(15). We noted that Department of Public Safety (PSD) Policy No. COR.14.15, titled "Furloughs," defined a furlough as "an authorized leave of absence from the institution without an escort." In this case, all of the inmates were escorted by and were under the supervision of an HCI employee. Since the complainant was not on furlough, the guilty finding with regard to Section 4.3a(15) for deviating from the date, time, destination, or purpose of any furlough was erroneous.

Section 4.3a(17). We were advised by the Committee chairperson that the inmate was found guilty of violating Section 4.3a(17) because he was smoking, and possession of tobacco was a Class B felony under the Hawaii Revised Statutes (HRS). We were provided a copy of a memorandum from the PSD director stating that effective February 1, 2009 inmates were prohibited from possessing and using any tobacco product. We reviewed the Hawaii Penal Code and found that Section 710-1022, HRS, established the Class B felony offense of promoting prison contraband in the first degree and stated:

> (1) A person commits the offense of promoting prison contraband in the first degree if:
>
> . . . .
>
> (b) Being a person confined in a correctional or detention facility, the person intentionally makes, obtains, or possesses a dangerous instrument or drug. (Emphasis added.)

A cigarette did not meet the definition of a dangerous instrument or drug under the law. As a result, the complainant's smoking of a cigarette did not constitute a violation of Section 710-1022, HRS.

Section 4.4a(11). We were advised that the complainant was found guilty of violating Section 4.4a(11) for refusing to obey an order because his violation of other sections of the rules in this incident constituted a violation of

his HCI community service workline agreement. We reviewed the agreement and determined that the complainant's other rule violations did constitute a violation of the agreement and thus the guilty finding with regard to Section 4.5a(8) was reasonable. However, having found the complainant guilty of violating Section 4.5a(8) based on those other rule violations, it was duplicative to also find the complainant guilty of violating Section 4.4a(11) based on the same rule violations. In addition, we noted that no direct order was ever given by the HCI supervisor to the complainant during this incident and we therefore found no other basis to find the complainant guilty of refusing to obey an order.

We presented the facility warden with our findings and recommended that he overturn the guilty finding with regard to Sections 4.3a(15), 4.3a(17), and 4.4a(11). The warden declined to carry out our recommendation.

We thereafter presented the case to the PSD Institutions Division Administrator (IDA) and asked that he review the matter. Upon review, the administrator concurred with our assessment of the case and concluded that the Committee finding with regard to the three charges was improper. As a result, the administrator ordered that the guilty finding with regard to Sections 4.3a(15), 4.3a(17), and 4.4a(11) be expunged from the complainant's file.

We notified the complainant of our findings and the action taken by the IDA.

(10-00980) Erroneous information given to inmate regarding disposition of detainers. An Interstate Agreement on Detainers (Agreement) was enacted into Federal law (Public Law 91-538, December 9, 1970) for the disposition of charges in a State against a person who is being held in custody in another State. The Federal government and 48 States were parties to the Agreement. Hawaii entered into the Agreement, which was enacted into law in Chapter 834, Hawaii Revised Statutes (HRS), titled "Agreement on Detainers."

A Hawaii inmate held in a private facility on the mainland on contract with the Department of Public Safety (PSD) wanted to dispose of outstanding warrants in Oklahoma, which was a party to the Agreement. He complained that the PSD was not processing his request for final disposition of the warrants, as required by Chapter 834, HRS.

The mainland correctional facility staff advised the complainant to write directly to Oklahoma. The complainant wrote to Oklahoma but did not receive a response. The complainant also made requests to the warden of the mainland facility and to the PSD Mainland Branch (MB), and both maintained that the inmate should send his request to Oklahoma. The

complainant contended that under Chapter 834, HRS, the PSD was required to process his request by completing appropriate forms and sending them to Oklahoma.

We reviewed Chapter 834, HRS, which adopted the provisions of the Agreement. Pursuant to Chapter 834, HRS, and the Agreement, an inmate who is serving a sentence of imprisonment in Hawaii with a pending criminal charge in another jurisdiction may request a final disposition of the pending charge. After the inmate provides proper notification to Hawaii prison officials of his request for final disposition, the prison officials are required to prepare a certificate of custody with information about the inmate's sentence and parole. The inmate's request and the prison officials' certificate should then be forwarded to the jurisdiction in which the charges are pending, and that jurisdiction then has 180 days to bring the inmate to trial. The Agreement set forth in Chapter 834, HRS, stated in part:

Article III

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, the prisoner shall be brought to trial within one hundred eighty (180) days after the prisoner shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of the prisoner's imprisonment and the prisoner's request for a final disposition to be made of the indictment, information or complaint; . . . <u>The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner</u>.
>
> (b) <u>The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the superintendent, administrator of corrections or other official having custody of the prisoner, who shall promptly forward it together with the</u>

> certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested. (Emphasis added.)

We contacted the MB and the PSD classification office. Both offices informed us that the complainant was required to first write to Oklahoma before the PSD would send Oklahoma a certificate of custody to initiate the disposition of his pending warrants.

We informed both offices that upon receipt of an inmate's request for final disposition of charges pending in another State, Chapter 834, HRS, and the Agreement required the PSD to complete a certificate of custody and forward it along with the inmate's request to the State in which charges were pending. Upon further review, both offices agreed that the complainant only needed to provide the written request for final disposition to the MB, after which the MB would forward the request and certificate of custody to Oklahoma.

We requested that the MB also notify the private correctional facility of the requirements of the law and to institute procedures for other Hawaii inmates who may want to dispose of pending charges in other jurisdictions. The MB complied with our request by sending the private facility procedural information and forms to implement the process in accordance with Chapter 834, HRS, and the Agreement. The private facility made the information and forms available to inmates through the facility's law library.

We informed the complainant of the results of our investigation and advised him to initiate the process by submitting the written notice and request for final disposition to the MB.

(10-01091) Increase in prices of store items without prior notice. The Department of Public Safety (PSD), through its Hawaii Correctional Industries (HCI) program, operates stores through which inmates may purchase various items, such as snacks, hygiene products, radios, and clothing, using their own money from their individual accounts. An inmate at a correctional facility complained that he placed an order for items that should have cost $65, but he was charged $85 when he received the items. He complained that prices were raised, without prior notice, above the prices that were listed on the order form at the time he placed his order.

We reviewed PSD Policy No. COR.02.01, titled "Inmate Store." The policy did not address the issue of providing inmates with prior notice of price increases. We also reviewed the store order form and found it stated that prices and availability of items were subject to change without notice.

However, we believed that as a matter of fairness, an inmate should be charged the price of an item that is listed on the order form at the time the inmate placed the order.

We contacted the HCI administrator, who informed us that the last comprehensive price increase was in July 2007. Therefore, with approval from the PSD administration, prices were increased in July 2009, but the store order forms with the new prices were not printed until the end of that month. The HCI administrator understood our concern about providing inmates with prior notice of price increases and initially planned to give inmates a month's prior notice. However, after checking with HCI's suppliers, he stated that none of the suppliers were willing to commit to holding prices unchanged for a month, in order for the HCI to be able to give inmates prior notice of price increases. According to the administrator, the HCI would thus not be able to give inmates prior notice of price increases.

We discussed our concern with a PSD deputy director, who informed us that he understood the need for inmates to have the current prices when placing their store orders and that he would follow up with the HCI administrator. After further discussion with our office, the PSD and the HCI issued a memo to all facilities stating that following any approved price increases, the HCI would hand deliver a notice of new prices and the effective date of the change to the facilities for posting within the inmate housing units. The memo made the facilities responsible for posting the price increase notices and distributing updated store order forms to the modules, and the HCI was made responsible for follow up with the facility to confirm that those actions were taken. The memo provided that the HCI would begin to charge inmates the new prices five business days after the effective date listed on the notice and the distribution of updated store order forms.

We notified the complainant, who was happy to learn that inmates would receive prior notice of price increases in the future.

(10-01169) Reimbursement for holiday photos. A correctional facility offered a Holiday Picture Taking Program through which inmates could elect to have their photos taken for the purpose of sending a photo to family members and friends during the 2008 holiday season. Inmates were allowed to purchase up to five photos, at $2 per photo.

An inmate at the facility complained in September 2009 that the facility refused to refund $10 that was deducted from his account in November 2008 for five photos. He requested the refund because they failed to take his photo in time for mailing during the 2008 holiday season.

The facility offered to take his photo in Spring 2009, but by then the complainant no longer wanted to have his photo taken as the holiday season had passed.

We reviewed the 2008 Holiday Picture Taking Program notice and the form that the inmates signed to participate in the program. The notice stated that the photos would be taken in December and the sign-up form for the complainant's housing unit notified inmates that the photos for that unit would be taken from December 8-12, 2008. The form stated that there would be no refunds even if the inmate was released or transferred.

We questioned the facility staff member who was responsible for the program. The staff member informed us that during the photo sessions, the complainant's name was not on the roster at the housing unit where he had signed up for the photos. The staff member erroneously assumed that the complainant had been released and did not inquire of his whereabouts. In fact, the complainant had not been released but had been transferred to another housing unit within the facility. When the staff member learned in Spring 2009 that the complainant's photo had not been taken, he offered to take the photo of the complainant at that time or during the 2009 Holiday Picture Taking Program free of charge. However, the complainant declined the offer.

In our opinion, it was not fair for the facility to deny the complainant a refund, despite the "no refund" notice, as it was through no fault of his own that his photo was not taken in December 2008. It was reasonable for the complainant to believe when he signed up for the program that he would receive the photos in time for him to send the photos to family members and friends during the 2008 holiday season.

Thus, we contacted the supervisor of the staff member with whom we had spoken about the program, as well as staff at the facility business office. We were told that the complainant would get a refund only if he had already been released from prison. We were also informed that all of the money that was collected for the 2008 Holiday Picture Taking Program had already been spent to purchase photographic ink and paper and therefore the facility could not provide the complainant with a $10 refund.

We did not find this explanation to be satisfactory and thereafter spoke with the facility's deputy warden about our concerns. After reviewing the matter further, the deputy warden agreed to have the facility refund the $10 to the complainant.

We informed the complainant about the refund. Although $10 may appear to be a small amount to people outside of prison, it was a considerable amount to the complainant, who was grateful for our assistance.

(10-01173) Duplicate and inappropriate misconduct charges. While conducting a security check at a correctional facility, a sergeant observed four inmates who appeared to be smoking a cigarette. One of the inmates was charged and found guilty of a high severity misconduct and complained to our office that he was previously found guilty of only a moderate severity misconduct for the same offense.

We were aware that neither the facility nor the Department of Public Safety (PSD) had a rule that specifically prohibited smoking, but the use and possession of tobacco products had long been banned at PSD facilities by administrative order. We learned that in this case, the adjustment committee (Committee) found the complainant guilty of violating the following three sections of the facility's policy regarding "Acts Prohibited for Inmates and Penalties for Such Actions":

> 4.3 High Misconduct Violations
>
> a. . . . .
>
> 16. Any lesser and reasonable (sic) included offense of paragraphs (1) to (15).
>
> . . . .
>
> 4.4 Moderate Misconduct Violations
>
> a. . . . .
>
> 10. Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.
>
> . . . .
>
> 25. Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

When we reviewed the staff reports, it appeared that the facility was "stacking" the charges, i.e., bringing multiple charges against the complainant for the same conduct. We concluded that the only charge for which the complainant should be found guilty was Section 4.4a(10) for having possessed a cigarette, an unauthorized item. We attempted to resolve our

concerns with the Committee chairperson and the unit manager but were unsuccessful, so we brought the matter to the attention of the warden.

The warden agreed with our assessment that charges were stacked against the inmate and expunged two of the three charges. However, the warden chose to find the complainant guilty of Section 4.3a(16), for having committed a lesser and reasonably included offense of paragraphs (1) to (15). The warden explained that he chose that charge because it was a high severity misconduct, rather than one of moderate severity, as he believed the inmate's conduct warranted the more severe disciplinary action.

We noted, however, that in order for Section 4.3a(16) to apply, the complainant's conduct must constitute a lesser included offense of one of the high severity offenses specified in (1) through (15) of Section 4.3a. The warden contended that Section 4.3a(9), which prohibited "[p]ossession, introduction, manufacture or use of any narcotic paraphernalia, drugs, intoxicants or alcoholic beverage not prescribed for the individual by the medical staff, which includes any form of being intoxicated" sufficiently matched the complainant's possession and smoking of a cigarette.

We disagreed with the warden because a cigarette is not narcotic paraphernalia, drug, intoxicant, or alcoholic beverage and, therefore, possession of a cigarette was not a lesser included offense of Section 4.3a(9). We maintained that the appropriate charge was that of possession of an unauthorized item. However, the warden maintained that the charge of a lesser included offense was proper because the possession of cigarettes posed a serious threat to the orderly running of the facility.

We then asked a PSD administrator to review the case. We noted that *Black's Law Dictionary, Ninth Edition* (2009), defined a "lesser included offense" as "[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime." Thus, the charge of possession of a cigarette might be a lesser charge included in a charge for smoking a cigarette, as the perpetrator would necessarily have possessed the cigarette in order to smoke it. In the complainant's case, however, we believed that the act of smoking a cigarette was not an element of possessing, introducing, or using narcotic paraphernalia, drugs, intoxicants, or alcoholic beverages.

Nevertheless, upon review the administrator agreed with the warden that the charge of possession of an unauthorized item did not adequately address the severity of the complainant's conduct. The administrator also agreed with the warden that the possession of a cigarette constituted a lesser included offense of Section 4.3a(9).

We disagreed with the administrator and sought a review of the case by the PSD director. We reiterated the argument that we made to the warden

and the administrator regarding the inappropriateness of the charge of a lesser included offense. We also expressed the opinion that when the facts of the case did not support a higher severity charge, it is inappropriate to find the inmate guilty of a misconduct of higher severity simply because staff members believed the inmate's conduct warranted discipline of a higher severity.

The PSD director responded that at the time of the complainant's misconduct, the only appropriate charge that conformed to the facts of the case was the moderate severity charge for possession of an unauthorized item. The director therefore expunged from the complainant's record the guilty finding for the high severity charge of Section 4.3a(9) for any lesser and reasonably included offense and imposed a guilty finding for the moderate severity charge of Section 4.4a(10) for possession of an unauthorized item.

During the course of our investigation, the PSD amended its rules to create a new charge prohibiting the possession, introduction, or use of tobacco or tobacco products and categorized the charge as a high severity misconduct. Henceforth, inmates who possess, introduce, or smoke a cigarette may be properly disciplined for high severity misconduct. We believe this is the proper way for the PSD to elevate the severity of this violation.

We reported the findings of our investigation to the complainant, who was grateful for our assistance and the corrective action taken by the director.

(10-01251) Duplicate and inapplicable misconduct charges.
An inmate complained that he was found guilty of five misconduct charges, three of which involved the possession of cigarettes, which inmates were not allowed to have. He claimed that although he was in the area in which the cigarettes were found, the cigarettes were not his.

In our investigation, we reviewed the staff investigation report and Department of Public Safety (PSD) Policy No. COR.13.03, titled "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations." We also discussed the misconduct charges with the facility and PSD administrative staff.

We confirmed that the complainant was found guilty by an adjustment committee (Committee) of five separate charges: (1) any criminal act that the Hawaii Penal Code classifies as a Class B felony; (2) possession of anything not authorized; (3) refusing to obey an order of any staff member; (4) being in an unauthorized area; and (5) any criminal act that the Hawaii Penal Code classifies as a Class C felony.

According to the staff investigation report, the complainant was with a facility supervisor who drove a truck to a work site. The supervisor ordered the complainant to remain near the truck while he visited the work site. While the supervisor was busy, an adult corrections officer (ACO) noticed the complainant hunched over a tree stump more than 50 feet from the truck. The ACO ordered the complainant back to the truck and later found some cigarettes in a bag hidden in the tree stump.

Based on the investigation report, we concluded that it was reasonable to have found the complainant guilty of refusing to obey an order because he failed to comply with the supervisor's order to remain near the truck. We also concluded that it was reasonable to have found the complainant guilty of being in an unauthorized area.

We believed it was unreasonable, however, to have found the complainant guilty of all three of the following charges: an act classified as a Class B felony; an act classified as a Class C felony; and possession of anything not authorized. We noted that the justification of the Committee for the guilty finding on all three charges was the complainant's possession of cigarettes.

We contacted the Committee chairperson, who informed us that the possession of cigarettes was a violation of Section 710-1022, Hawaii Revised Statutes (HRS), which established promoting prison contraband in the first degree as a Class B felony, and stated in part:

> **Promoting prison contraband in the first degree.** (1) A person commits the offense of promoting prison contraband in the first degree if:
>
> . . . .
>
> (b) Being a person confined in a correctional or detention facility, the person intentionally makes, obtains, or possesses a dangerous instrument or drug.
>
> (2) A "dangerous instrument" shall have the same meaning as defined in section 707-700; a dangerous instrument may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval. A "drug" shall include dangerous drugs, detrimental drugs, harmful drugs, intoxicating compounds, marijuana, and marijuana concentrates as listed in section 712-1240; a drug may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval and under medical supervision.

(3) Promoting prison contraband in the first degree is a class B felony.

Section 707-700, HRS, defined "dangerous instrument" as any firearm or other weapon, device, instrument, material, or substance, which in the manner it is used or intended to be used is known to be capable of producing death or serious bodily injury.

As the statutory definition of a dangerous instrument or drug did not include cigarettes, the possession of cigarettes by an inmate did not constitute a violation of Section 710-1022, HRS. Thus, the complainant should not have been found guilty of committing an act classified as a Class B felony.

We noted that Section 710-1023, HRS, established the offense of promoting prison contraband in the second degree as a Class C felony, and defined contraband as "any article or thing, other than a dangerous instrument or drug as defined in section 710-1022(2), that a person confined in a correctional or detention facility is prohibited from obtaining or possessing by statute, rule, or order." As inmates were prohibited from possessing cigarettes by order, there appeared to be a reasonable basis to find the complainant guilty of an act that was classified as a Class C felony.

Since the Class B felony misconduct charge was clearly inapplicable, we identified the issue to be whether the Class C felony misconduct charge or the charge of possession of anything unauthorized was more appropriate. We believed it would be duplicative to find the complainant guilty of both charges based on the same act of possessing cigarettes, and each charge was categorized as a moderate severity misconduct. We concluded that the charge for the possession of anything not authorized was more appropriate because it was the more specific charge prohibiting the complainant's possession of cigarettes.

We attempted to discuss our concerns and recommendations with the facility warden, who declined to respond to our inquiries and designated a staff member to answer our questions. The staff member reported that the possession and smoking of cigarettes by inmates was "getting out of hand" so the Class B felony misconduct charge was used to elevate the severity of the misconduct. We believed that it was improper to find an inmate guilty of an inapplicable charge simply to elevate the severity of a misconduct and asked the staff member to report our concerns and recommendations to the warden. The staff member subsequently informed us that the warden determined that the issue should be decided at the departmental level and would take no action.

Consequently, we addressed the issue with the PSD Institutions Division Administrator (IDA). The IDA subsequently informed us that he

agreed with our reasoning. The IDA expunged from the complainant's records the guilty findings with regard to the Class B felony misconduct and Class C felony misconduct charges, upholding the remaining three charges. We agreed with the action taken by the IDA.

We informed the complainant of the outcome of our investigation and he expressed his appreciation for the action taken by the IDA.

(10-01465) Improper escalation of severity of misconduct charge. An inmate complained that an adjustment committee (Committee) found him guilty of three misconduct charges stemming from his possession and smoking of cigarettes. Although it was once allowed, smoking has since been prohibited at all correctional facilities.

In our investigation, we obtained and reviewed the Committee decision and the staff investigation reports. According to the staff reports, an inmate informant reported that the complainant and another inmate were smoking in various areas of the facility and that the complainant assisted the other inmate in operating an unauthorized "store" through which they sold cigarettes to other inmates.

Based on the information received from the inmate informant, the Committee found the complainant guilty of one high severity charge and two moderate severity charges. The charges were categorized under Department of Public Safety (PSD) Policy No. COR.13.03, "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations," as follows:

> 4.3 High Misconduct Violations (7).
>
> . . . .
>
> 7 (17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.
>
> . . . .
>
> 4.4 Moderate Misconduct Violations (8).
>
> . . . .
>
> 8 (20) Giving money or anything of value to or accepting money or anything of value from an inmate/detainee, a member of the inmate's/detainee's family or friend.

8 (21) Smoking where prohibited.

We contacted the Committee chairperson, who declined to respond to our inquiry and asked that we speak with the warden. The warden then delegated a subordinate administrator to respond to our inquiries. The administrator informed us that the basis for the charge under Section 7(17) was the complainant's possession of cigarettes, which were considered to be prison contraband, which he also claimed constituted a Class B felony under the Hawaii Penal Code. According to the administrator, there was an increase in smoking of cigarettes by inmates, so Section 7(17) was used to elevate the severity of the misconduct to attempt to deter inmates from smoking.

In our opinion, however, the complainant should not have been found guilty of violating Section 7(17) for the following reasons:

The possession of cigarettes did not constitute a Class B felony under the Hawaii Penal Code. The Code establishes the promotion of prison contraband as a Class B felony in Section 710-1022, Hawaii Revised Statutes, which stated in part:

> Promoting prison contraband in the first degree. (1) A person commits the offense of promoting prison contraband in the first degree if:
>
> (a) The person intentionally conveys a dangerous instrument or drug to any person confined in a correctional or detention facility; or
>
> (b) Being a person confined in a correctional or detention facility, the person intentionally makes, obtains, or possesses a dangerous instrument or drug. (Emphasis added.)
>
> . . . .
>
> (3) Promoting prison contraband in the first degree is a class B felony.

The commission of the Class B felony offense for promoting prison contraband required that the contraband item be a dangerous instrument or drug. As a cigarette is not a dangerous instrument or drug, the complainant's possession of a cigarette did not constitute the Class B felony offense of promoting prison contraband. The possession of prison contraband other than a dangerous instrument or drug was classified as a Class C felony under the Hawaii Penal Code.

It is improper to elevate the severity of an inmate's misconduct by finding him guilty of a charge of higher severity unless the evidence supports the higher severity charge. As noted above, the evidence did not support the guilty finding with regard to the high severity charge of Section 7(17), and we concluded that it was improper to find the complainant guilty of violating Section 7(17) simply to increase the severity of the violation.

If the PSD deemed the possession of cigarettes to be a violation of higher severity than a moderate misconduct, the PSD could amend its misconduct policy to elevate the severity of the charge. We noted that the department had, in fact, amended PSD Policy No. COR.13.03 to create a new charge for the possession and use of tobacco products and to categorize the charge as a high severity misconduct. Henceforth, an inmate who possesses or smokes cigarettes may be found guilty of a high severity misconduct. Nevertheless, at the time of the complainant's violation, the smoking of cigarettes was categorized as a moderate severity misconduct.

We brought the matter to the attention of the PSD Institutions Division Administrator (IDA) and recommended that the guilty finding with regard to Section 7(17) be expunged from the complainant's record.

After reviewing the case, the IDA informed us that he agreed that Section 7(17) was misapplied and he ordered that the guilty finding be expunged from the complainant's file.

We informed the complainant of the results of our investigation.

(10-02349) Improper medical co-payment charges. In 1998, a law was enacted to allow the Department of Public Safety (PSD) to assess inmates' fees for nonemergency medical, dental, or mental health services or treatment, or for the treatment for intentional injury to themselves. As authorized by this law, the PSD adopted a policy by which an inmate may be charged a co-payment of $3 per visit for services requested by the inmate. Under the policy, certain treatments are exempt from the co-payment requirement.

An inmate complained that his account was debited the $3 fee for each of five visits to the facility medical unit for treatment of injuries he sustained when he was assaulted by another inmate. The complainant stated that the assault occurred while he was in handcuffs and seated in the library. The complainant denied any responsibility for the altercation and sought the reimbursement of the $15 in co-payment fees that was debited from his account.

As allowed by the PSD policy, the complainant filed a Step 1 grievance to contest the co-payment fees. In response to the grievance, the medical unit's clinical section administrator (CSA) stated that only two of the five visits to the medical unit were for treatment of injuries the complainant sustained in the assault. The CSA further stated that the co-payment fee is not waived for treatment of injuries sustained in a fight, so the $3 fee was properly assessed for each of the complainant's two visits to the medical unit. The complainant filed a Step 2 grievance and the PSD clinical section branch administrator upheld the Step 1 grievance decision, stating that assessment of the co-payment does not depend on who is at fault in an altercation.

We reviewed PSD Policy No. COR.10.1A.13, titled "Inmate Medical Co-Payment," which stated in part:

> **4.0 PROCEDURES**
>
> . . . .
>
> .3 There shall be a co-payment charge of three dollars ($3.00) per visit for identified medical and dental services requested by the inmate. There will be no charge for a return to clinic if ordered by the physician for an episode of care requested by the inmate. Subsequent visits related to the initial request shall include a co-payment if not initiated or scheduled by a health care provider.
>
> . . . .
>
> .10 The following services are exempt from the medical co-payment fee:
>
> a. Medical, mental health, and dental admission screenings, examinations, and diagnostic tests required by law, regulations, out-of-court settlements, the Department or the National Commission on Correctional Health Care standards for jails and prisons.
>
> . . . .

.12 . . . .

Inmates are required to pay the co-payment fee when treated for self-induced injury. This includes, but is not limited to:

a. Instigated fights with other inmates or staff, or deliberately punching, kicking, hitting, banging, etc., moveable or immovable objects; . . .

We discussed the complaint with the CSA, who maintained that the complainant was responsible for the co-payment for treatment of the injuries he sustained in the altercation.

We were of the opinion that it would be unfair to assess the co-payment fee if the complainant bore no responsibility in the altercation and had, in fact, been assaulted. Thus, we requested the staff reports on the alleged assault to determine whether the complainant engaged in a fight or was assaulted. Upon review of the staff reports that described the altercation, it was clear that the complainant was in handcuffs, did not engage in a fight, and was instead assaulted by the other inmate. The complainant was not charged with misconduct for fighting and the other inmate was charged with assault.

We informed the CSA of the description of the incident and the disciplinary action taken against the other inmate. The CSA informed us that the complainant was seen on the day of the assault by a nurse practitioner. The next day the complainant sought treatment for a headache and swollen left wrist and he was referred to the facility doctor, who placed the complainant's forearm in a splint. The CSA felt that the complainant was properly assessed $6 in co-payment fees for treatment he received on those two days. The CSA understood our position that it was unfair to assess the co-payment fees in this case, but he did not believe that he had the authority to exempt the complainant from paying the fees. The CSA suggested we speak with a higher authority.

Thereafter, we presented the case to the PSD health care administrator (HCA). We informed the HCA of the assault for which the complainant required medical treatment and provided him with copies of the staff reports that we reviewed.

Subsequently, after reviewing the complainant's case, the HCA agreed that the complainant should not be assessed any co-payment fees for treatment he received as a result of the assault. Therefore, the HCA arranged to have $6 credited back to the complainant's account.

We informed the appreciative complainant of the corrective action taken.

(10-03890) Inmate found guilty of violating a rule that was not yet in effect. An inmate complained that he was found guilty of misconduct for the possession of a cell phone, despite the fact that at the time of the incident there was no rule that specifically prohibited an inmate from possessing a cell phone. The complainant admitted that he used a cell phone on November 29, 2009 but contended that he should not have been found guilty because the rule that prohibited inmates from possessing cell phones did not take effect until February 4, 2010.

We reviewed the staff reports and findings of the adjustment committee (Committee). The records confirmed that the incident in which the complainant possessed a cell phone occurred on November 29, 2009. On February 19, 2010, he was found guilty by the Committee of possession of an unauthorized item, refusing to obey an order, and lying or providing false statements, but not guilty of threatening an adult corrections officer (ACO). Subsequently, the warden issued a memorandum by which he overturned the Committee findings and instructed that the complainant be charged with the possession of a cell phone rather than possession of an unauthorized item, and that the charge for threatening an ACO be reconsidered. The warden ordered a rehearing, which was held on March 18, 2010. After the rehearing, the Committee found the complainant guilty of possession of a cell phone, threatening an ACO, refusing to obey an order, and lying or providing false statements to a staff member.

Department of Public Safety (PSD) Policy No. COR.13.03, titled "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations," authorizes the warden to remand the case to the Committee for rehearing. Based on our review of the staff reports, we concluded that there was sufficient evidence to find the complainant guilty of threatening an ACO, refusing to obey an order, and lying or providing false statements.

We found, however, that the rule prohibiting the possession of a cell phone was not established until February 4, 2010 and that when the complainant had used the cell phone on November 29, 2009, there was no rule prohibiting its possession or use. Thus, we concluded that the complainant should not have been found guilty of possessing a cell phone, a violation of greatest severity. Instead, we concluded that the complainant should have been found guilty of the original charge of possession of an unauthorized item, a violation of moderate severity, as he knew that a cell phone was an unauthorized item.

We discussed our concerns with a PSD administrator and a deputy director and sought corrective action. Subsequently, we were informed that the Committee disposition would be amended to reflect that the complainant was guilty of "a lesser and reasonably included offense" with regard to one of 15 high severity prohibited acts, rather than possession of a cell phone. When we questioned which of the 15 prohibited acts the possession of a cell phone was a lesser and reasonably included part of, we were informed that it was a lesser and reasonably included part of the possession, introduction, manufacturing, or use of any narcotic paraphernalia, drugs, intoxicants, or alcoholic beverages.

As cell phones are not narcotic paraphernalia, drugs, intoxicants, or alcoholic beverages, we disagreed with the action taken by the administrator and deputy director. Thus, we presented our concerns to the PSD director for his review.

After reviewing the case, the director informed us that he found sufficient evidence to find the complainant guilty of threatening an ACO, refusing to obey an order, and lying or providing false statements, but that he disagreed with finding the inmate guilty of the charge for possession of a cell phone rather than the charge for possession of an unauthorized item because the cell phone charge was not in force at the time of the incident. The director also informed us that he found no relevancy or applicability in the complainant's case with regard to the charge of "a lesser and reasonably included offense." The director informed us that his determination would serve as the official decision in the complainant's misconduct and that all of the prior findings and determinations in this matter would be vacated.

DEPARTMENT OF TRANSPORTATION

(10-00569) Personal use of a State-owned vehicle. A man on the island of Hawaii complained that a State employee was driving a State truck in Hilo after normal work hours. The complainant believed that the employee's use of the vehicle at that hour was improper. He provided us with the license plate number and a description of the truck.

We reviewed the Department of Accounting and General Services (DAGS) motor pool listing of State vehicles by license numbers and learned that the truck was assigned to the Highways Division (Highways), Department of Transportation.

We spoke with a Highways supervisor about the complaint and learned that the truck was assigned to the employee who was observed driving it after hours. The employee normally reported to work at a base

yard in Hilo, but was temporarily assigned to work in Kona. As the commute between Hilo and Kona takes two to three hours each way, the employee drove to Kona on Monday morning and back to Hilo on Friday afternoon, staying at a hotel in Kona during the week. The employee was allowed to use the truck after his normal work hours to take care of his personal needs, for example, to buy provisions on his way back to his hotel from the work site. At the time the complainant made his observation, the employee had returned to Hilo to respond to a family emergency. Under the circumstances, the employee's use of the State truck at the time he was observed by the complainant did not seem unreasonable.

We were aware through our investigation of a previous complaint, however, that State employees were required to submit requests to the DAGS for permits authorizing the personal use of government vehicles. Section 105-1, Hawaii Revised Statutes (HRS), stated:

> **Government motor vehicles; certain uses prohibited.** Except as provided in section 105-2, it shall be unlawful for any person to use, operate, or drive any motor vehicle owned or controlled by the State, or by any county thereof, for personal pleasure or personal use (as distinguished from official or governmental service or use) including, without limitation to the generality of the foregoing, travel by or conveyance of any officer or employee of the State, or of any county thereof, directly or indirectly, from his place of service or from his work to or near his place of abode, or, directly or indirectly, from such place of abode to his place of service or to his work. (Emphasis added.)

The exceptions to the restriction on personal use of State vehicles were listed in Section 105-2, HRS, which stated in part:

> **Exceptions.** Section 105-1 shall not apply to:
>
> . . . .
>
> (4) Any officer or employee of the State who, upon written recommendation of the comptroller, is given written permission by the governor to use, operate, or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the State; . . . (Emphasis added.)

By Administrative Directive No. 08-02, dated October 30, 2008, the governor delegated the authority to approve personal use of State vehicles to the DAGS comptroller. The governor's directive stated in part:

> The purpose of this directive is to allow the State Comptroller of the Department of Accounting and General Services to administer section 4 of §105-2, Exceptions, Hawaii Revised Statutes.
>
> . . . .
>
> The authority and responsibility to approve departmental policies and designated employees personal use of government vehicles is delegated to the State Comptroller of the Department of Accounting and General Services or designee. In addition, the State Comptroller shall develop procedures for the application and approval for personal use of government vehicles. (Emphasis added.)

We asked the employee's supervisor whether the employee had permission from the DAGS comptroller to use the State truck for personal reasons. The supervisor was not aware that the comptroller's permission was required and it appeared that none of the Highways employees on the island of Hawaii had obtained permission for the personal use of State vehicles. We advised the supervisor to contact the DAGS for any necessary assistance and to complete the application process for employees for whom the personal use of State vehicles was necessary. Subsequently, we were informed that the DAGS' approval was obtained for all such employees.

We also brought the matter to the attention of the statewide Highways administration and asked it to verify that all division employees who required the personal use of a State vehicle had obtained the approval of the DAGS comptroller. Highways checked and reported that all subject employees had obtained the required DAGS' approval.

We notified the complainant of our findings.

(10-01015) Not paid for work performed. A woman who worked in a temporary position as an environmental health specialist at a State airport on Kauai complained that the Department of Transportation (DOT) refused to pay her for two-and-a-half days of work.

We inquired with the DOT Airports Division staff and learned that the complainant began work on May 18, 2009 and was originally hired to work for 89 days. Because of budget cutbacks due to the poor economy, there was a reduction in the number of days she was to work and the duration of her employment was amended so it did not exceed June 29, 2009. However, her supervisor worked on Oahu and did not inform her that her employment had ended until after she had worked a full day each on July 1 and July 2, as well as a half day on July 6, 2009.

An Airports Division employee on Kauai informed us that the complainant should have known that her contract expired on June 29, 2009 as the employer personnel action report that the complainant received had an NTE (not to exceed) date of June 29, 2009. A copy of this report, which was dated June 5, 2009, was given to the complainant.

Nevertheless, we felt that under the circumstances the complainant should be paid because she did perform the work for two-and-a-half days before she was informed by her supervisor that her employment had ended. After consulting the DOT personnel office on Oahu, the Kauai Airports Division agreed to pay her and the complainant's employment was extended to July 6, 2009 so that she could be paid.

We monitored the situation until the complainant received payment a month later.

(10-03442) Removal of accumulated debris from highway. In investigating a complaint, a site visit is sometimes helpful. Our office staff may not always be able to make a site visit, however, and we may rely on the government agency or complainant to assist us. The following is an example of a case in which we enabled an agency and a private citizen to assist each other in resolving a public safety concern.

A man emailed our office with a request that we forward information to the appropriate department. He stated that a maintenance crew recently cleaned the shoulder of a State highway that he regularly traveled. He was appreciative of the crew's work but asked if they could perform additional work and clear accumulated dirt and grass in front of a guard rail, behind which was a gutter that emptied into a gulch. He reported that when it rains heavily, the accumulated debris prevented the water from flowing into the gutter and instead diverted the water from the shoulder of the highway back onto the highway. He was concerned that the water being diverted onto the highway could cause a car to hydroplane and result in an accident.

We contacted the Highways Division (Highways), Department of Transportation, which had jurisdiction over the highway. A Highways engineer agreed that the accumulated debris should be removed and informed us that he would assign the task to a work crew. We asked to be informed when the debris was removed.

Subsequently, a Highways staff member contacted our office and informed us that he made a site visit but was unable to locate the accumulated debris. We called the complainant and he reported that the accumulated debris was still there. When we informed the Highways staff

member, he asked if we could have the complainant call him to provide the details as to the location of the debris. We spoke with the complainant, who agreed to call the staff member.

Thereafter, the Highways staff member informed us that the complainant was kind enough to meet with him and point out the location of the debris. The staff member reported that the complainant had a justified concern that the debris would cause rainwater to flow onto the highway, instead of off of it, and create a hazard. A work order was placed and the debris was removed shortly thereafter. The complainant was grateful for the work done, and we were appreciative of his sense of civic responsibility.

CITY & COUNTY OF HONOLULU

(10-00299) Required to pass road test to obtain a Hawaii driver's license. A woman complained that the driver's license office of the Department of Customer Services, City and County of Honolulu (C&C), refused to issue a Hawaii driver's license to her unless she passed a road test, even though she held a valid driver's license issued by the State of Nevada. The complainant presented her current Nevada driver's license to our office as proof that she was licensed in that State. According to the complainant, the C&C driver's license office reviewed her records in the National Driver Register (NDR) and informed her that because the NDR indicated she was "eligible but not licensed," she would need to pass all driver licensing requirements in Hawaii in order to obtain a Hawaii license.

We knew that the Hawaii law waived the driver's license road test for any person who is at least 18 years of age and who possesses a valid driver's license issued by another State. Such person could obtain a Hawaii driver's license by surrendering his or her out-of-state license to the C&C driver's license office.

We also knew that the NDR is a computerized database of information from State driver license offices throughout the nation which is used to track drivers who have had their licenses revoked or suspended, or who have been convicted of serious traffic violations, such as driving while impaired by alcohol or drugs. When a person applies for or renews a driver's license, the driver's license office that receives the application is able to review the applicant's driving record in any State that uses the NDR.

We reviewed Chapter 286, Hawaii Revised Statutes (HRS), titled "Highway Safety." Section 286-102, HRS, stated in part:

Licensing. . . .

. . . .

(d) Before issuing a driver's license, the examiner of drivers shall complete a check of the applicant's driving record to determine . . . whether the applicant has a driver's license from more than one state or jurisdiction. The record check shall include but is not limited to the following:

(1) A check of the applicant's driving record as maintained by the applicant's state of licensure;

. . . .

(3) A check with the National Driver Register; . . .

We inquired with the C&C driver's license office and were informed that the "eligible but not licensed" designation in the NDR meant that the complainant did not have a valid driver's license in Nevada, but was eligible to apply for a license as she did not have outstanding traffic violations and had a clean driving record.

The C&C driver's license office realized that the data in the NDR may not be current if Nevada was unable to input new information on a timely basis. Thus, the C&C office would accept verification faxed by the Nevada driver's license office that the complainant held a valid Nevada license. According to the complainant, however, the Nevada office had already denied her request to fax the verification to the C&C office, and the C&C office refused to contact the Nevada office to obtain the verification as well.

We contacted the C&C driver's licensing administrator and discussed his office's responsibility to check an applicant's driving record under Section 286-102, HRS. We noted that a complete check of the applicant's records was not limited to a review of the NDR, but also included "a check of the applicant's driving record as maintained by the applicant's state of licensure." Thus, we were of the opinion that a complete check of the complainant's records should include an inquiry with the Nevada driver's license office about the status of her license in that State. The administrator agreed and assigned an assistant administrator to contact the Nevada office about the complainant's license.

Subsequently, the Nevada driver's license office informed the C&C driver's license office that the complainant indeed held a valid Nevada license. The Nevada office reported that the "eligible but not licensed" designation in the complainant's NDR record was in reference to her Nevada motorcycle license, which had expired. As a result of the information

received from the Nevada office, the C&C office decided to allow the complainant to obtain a Hawaii license without having to pass the road test.

We informed the complainant of the outcome of our investigation. She was happy that her application for a Hawaii driver's license would be simplified.

(10-04345) Erroneous City and County park sign. A frequent user of a City and County of Honolulu (C&C) park complained that a sign posted in the park was erroneous. The complainant stated that the sign prohibited tents with walls, pursuant to an amendment to Chapter 10, Article 1, Revised Ordinances of Honolulu. The sign read:

NOTICE
EFFECTIVE IMMEDIATELY

TENTS WITH WALLS*
AND
SHOPPING CARTS*
ARE PROHIBITED
IN PUBLIC PARKS

VIOLATORS ARE SUBJECT TO
CRIMINAL PROSECUTION

Should you have any questions, please call the Department of Parks and Recreation, 233-7300, between 9:00 a.m. and 3:00 p.m. on weekdays.

***"Tent" means a collapsible structure consisting of sheets of canvas, fabric, or other material attached to or draped over a frame of poles or a supporting rope that has more than one wall.**
***"Wall" means an upright, vertical, or slated structure, partition, or divider serving to enclose, divide support, or protect.**
***"Shopping cart" means a metal or plastic handcart on three or more wheels provided by a wholesale or retail establishment such as a supermarket.**

CITY AND COUNTY OF HONOLULU
Department of Parks and Recreation
Auth.: ROH §§ 10-1.2, 10-1.6, as amended

The complainant believed that the sign was erroneous because the C&C did allow campers with permits to erect tents with walls in that particular park.

We contacted the C&C district parks manager who informed us that the sign was only temporary until a more permanent sign was manufactured by a sign company. He informed us that the temporary sign notified park users of the recently amended ordinance prohibiting the use of tents with walls in all City parks. The manager acknowledged that tents with walls were allowed in the particular park by persons with camping permits but stated that he did not believe the wording on the sign needed to be clarified. He referred us to the department's legal counsel.

When we contacted the department's legal counsel, she informed us that the ordinance was amended to eliminate canopies that were becoming unreasonably large and preventing others from enjoying the park. She had not seen the temporary sign that had been posted, however, so she agreed to review the wording on the sign with the department.

Subsequently, the legal counsel informed us that the temporary sign had been removed. Additionally, she contacted the sign manufacturer to revise the wording on the permanent sign to state that all tents were prohibited except by permit in City parks that allowed camping.

The complainant was satisfied with the change in the wording of the sign.

MAUI COUNTY

(10-01966) Delay in approval of building permit. A man applied for a building permit from the Department of Public Works (DPW) in order to replace the cabinets and drywall in his condominium unit which had been damaged by a flood. He complained that the Department of Water Supply (DWS) was withholding its approval of the building permit because another permit had already been issued to the condominium association to install a backflow inhibitor in the same condominium building. A letter the complainant received from the DWS stated that the DWS could not approve his permit until the backflow inhibitor project was completed.

Although the authority to grant final approval of the complainant's building permit rested with the DPW, the DWS was responsible for reviewing the permit application for compliance with any applicable laws under the

DWS's jurisdiction. The Maui County Building Code, Title 16, "Buildings and Construction," Chapter 16.26, "Building Code," stated in Section 106.4.1(a), with regard to permit issuance:

> The application, plans, specifications, computations and other data filed by an applicant for a permit shall be reviewed by the building official. The plans may be reviewed by other departments of this jurisdiction to verify compliance with any applicable laws under their jurisdiction. . . .

We contacted the DWS engineer who issued the letter to the complainant. He informed us that the condominium did not yet have a backflow inhibitor installed, as was required by the DWS rules in order to prevent contaminated water from accidentally entering the County water supply. The engineer said that even though the complainant's permit was unrelated to the backflow inhibitor project, approval for all permits in the building were being withheld as an incentive for the condominium association to complete the installation of the backflow inhibitor.

We contacted the DWS director and questioned why the approval of the complainant's building permit was being withheld when the complainant had no control over the backflow inhibitor project. The director agreed that the issuance of the complainant's permit should not be contingent upon the completion of the backflow inhibitor project and he promptly instructed the engineer to review the complainant's permit application.

Shortly thereafter, the DWS granted its approval of the complainant's building permit and the DPW followed with final approval of the permit.

We informed the complainant of the action taken and he was thankful that he would be able to proceed with the replacement of the cabinets and drywall in his unit.

Appendix

CUMULATIVE INDEX OF SELECTED CASE SUMMARIES

To view a cumulative index of all selected case summaries that appeared in our Annual Report Nos. 1 through 41, please visit our website at www.ombudsman.hawaii.gov and select the “Annual Reports” link from the homepage.

If you do not have access to our cumulative index via the Internet, you may contact our office to request a copy.