

NO. 23614

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

RICHARD KELA, Appellant-Appellant, v.  
HAWAIIAN HOMES COMMISSION, Appellee-Appellee

APPEAL FROM THE THIRD CIRCUIT COURT  
(CIV. NO. 97-542)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Appellant Richard Kela (Kela) appeals from the June 27, 2000, Judgment of the Circuit Court of the Third Circuit<sup>1</sup> (the circuit court) following its January 10, 2000, Order Affirming Hawaiian Home Commission's (the Commission) Findings of Facts, Conclusions of Law, Decision and Order (Decision and Order) finding in favor of the Commission's decision to terminate Kela's lease for failure to pay the construction loan on his leasehold. Kela appears to contend that the circuit court: (1) lacked jurisdiction, (2) conspired to fraudulently deprive him of his "Constitution rights and of his due process," and (3) discriminated against him. We disagree with Kela's contentions and affirm the circuit court's Judgment affirming the Commission's Decision and Order.

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<sup>1</sup>The Honorable Greg K. Nakamura presided.

## I. BACKGROUND

On June 19, 1978, the Department of Hawaiian Home Lands (DHHL) awarded Kela Residential Lot Lease No. 4850 (lease) pursuant to section 207(a) (1976) of the Hawaiian Homes Commission Act, 1920, as amended (the Act). On April 19, 1985, Kela entered into a Contract of Loan No. 13501 (loan) with DHHL in the amount of \$45,000.00 for construction of a home upon his leasehold. The loan was repayable within thirty years of the first monthly payment date, with interest of 8-3/4% per annum, due in monthly installments of \$354.02 on or before the 19th day of each month.

Following repeated notices to Kela that his loan was in arrears, DHHL sent Kela by certified mail on April 16, 1996, a Notice of Hearing, informing him that he was in direct violation of the terms of the loan and that a Contested Case Hearing (hearing) had been scheduled for June 6, 1996, before a Commission hearings officer to give Kela an opportunity to show cause why his lease should not be canceled.

Following the June 6, 1996 hearing, Hearings Officer H. K. Bruss Keppeler (hearing officer) issued his Findings of Fact, Conclusions of Law and Recommended Order on July 10, 1996 (Recommended Order). Based on evidence presented at the June 6, 1996 hearing, the hearing officer found that Kela had failed to take action to correct the delinquency on the loan; as of May 20,

1996, Kela had been delinquent for thirty-three months; and on May 20, 1996, the amount of the delinquency was \$11,362.66, including interest due and payable. Kela had also failed to maintain fire insurance on the improvements (which were security for the loan) and to pay real property taxes. Such failure was a violation of § 215(2) (1976)<sup>2</sup> of the Act. The Recommended Order gave Kela an opportunity to prevent forfeiture and cancellation of the lease, provided that he met specific conditions. Kela was to:

- a. faithfully attend[] credit counseling sessions arranged for him by DHHL and, thereafter, for a period of one year (1) year:
- b. regularly pay[] the amount of Three Hundred and Fifty-Four and 02/100 Dollars (\$354.02) per month on or before the due date established therefor, commencing on June 19, 1996, and
- c. secure[] and maintain[] fire insurance coverage (in an amount required by DHHL) for the improvements upon the subject lot, and

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<sup>2</sup> **§215. Conditions of loans.** Except as otherwise provided in section 213(i), each contract of loan with the lessee or any successor or successors to his interest in the tract or with any agricultural or mercantile cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

. . . .

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semiannual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year for loans made directly from the Hawaiian home loan-fund, or at the rate of two and one-half per cent or higher as established by law for other loans, payable periodically or upon demand by the department, as the department may determine.

d. if not exempt therefrom, timely pay[] the real property taxes levied on said lot and the improvements thereon and make[] arrangements to pay the amount of said taxes presently in arrears[.]

On October 10, 1996, DHHL sent Kela a Notice of Proposed Adverse Decision indicating that DHHL intended to adopt the findings in the Recommended Order and that on October 22, 1996, DHHL proposed to take final action. DHHL notified Kela that under Hawai'i Administrative Rules (HAR) § 10-5-41(d), he had the right to file exceptions and present arguments. No exceptions were filed. On October 22, 1996, Kela attended the hearing<sup>3</sup> before the Commission where the Recommended Order was adopted. The Commission based its decision on the testimony of witnesses (Kela, his wife Barbara Kela, and a Mortgage Loan Specialist with DHHL) and documents presented at the hearing.

On October 3, 1997, the Commission issued its Findings of Fact, Conclusions of Law, Decision and Order (Order). Again, the Order provided an opportunity for Kela to meet specific conditions, cure his delinquency, and have the forfeiture and cancellation of his lease declared null and void. Kela did not file for reconsideration and failed to meet the specific conditions as set forth in the Order.

On October 31, 1997, Kela filed a notice of appeal to the circuit court. On June 15, 1999, the Commission again

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<sup>3</sup>The hearing was held pursuant to § 216 of the Act and HAR Title 10, Chapter 5, Subchapter 3.

instituted a settlement offer where Kela's delinquency would be cured provided he meet specific conditions. Following a failure to settle, the circuit court held a hearing on September 17, 1999.

On January 10, 2000, the circuit court affirmed the Commission's Order and found Kela failed to demonstrate that

the decision violated statutory or constitutional provisions; is made in excess of statutory authority or the jurisdiction of the Hawaiian Homes Commission; is made upon unlawful procedure; is affected by other error of law; is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or is arbitrary, capricious, or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.

The Notice of Entry of Judgment was filed on January 20, 2000.

Kela filed his Notice of Appeal on February 17, 2000.

On June 1, 2000, the appeal was dismissed by the Hawai'i Supreme Court for lack of appellate jurisdiction because the January 10, 2000, order affirming the Commission's Order had not been reduced to a separate judgment as required by Hawai'i Rules of Civil Procedure (HRCP) Rules 58 and 72(k). The Hawai'i Supreme Court further stated that the January 20, 2000, "Notice of Entry of Judgment" was not a judgment on the January 10, 2000, order and therefore the appeal was premature. Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994).

On June 2, 2000, pursuant to Rules of the Circuit Courts Rule 23, the Commission sought to secure Kela's signature on a judgment in order to comply with HRCP Rules 58 and 72(k). Kela did not sign the judgment and alternatively filed a Motion

In Opposition and Reply to Kumu B. Vasconcellos, Deputy Attorney General's Amended Judgment (Motion). The Motion was set for hearing on June 30, 2000. On June 27, 2000, after reviewing the pleadings and files and considering the claims and the decision rendered as reflected in the January 10, 2000, order, the circuit court entered judgment in favor of the Commission and against Kela on all claims pursuant to HRCF Rule 58 and Rules of the Circuit Courts Rule 23.

On July 26, 2000, Kela filed a Notice of Appeal.

## II. STANDARD OF REVIEW

### A. Agency Decisions

Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) [(1993)] to the agency's decision. This court's review is further qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.

Korean Buddhist Dae Won Sa Temple Hawai'i v. Sullivan, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998) (brackets in original) (quoting Bragg v. State Farm Mutual Auto Ins., 81 Hawai'i 302, 304, 916 P.2d 1203, 1205 (1996)). Hawai'i Revised Statutes § 91-14(g) (1993) provides:

#### §91-14 Judicial review of contested cases.

. . . .

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or

modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." Korean Buddhist Dae Wong Sa Temple Hawaii at 229, 953 P.2d at 1327.

"An agency's findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." Poe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 195, 953 P.2d 569, 573 (1998); HRS § 91-14(g) (5).

### III. DISCUSSION

Kela, a Hawaiian Homes Commission lessee, appeals from a judgment entered by the circuit court in favor of the

Commission canceling his interest and lease in Department of Hawaiian Home Lands Keaukaha Lot No. 123-A due to non-payment of his loan. Kela seems to argue that the circuit court affirmed the Commission's decision in violation of HRS § 91-14(g)(1) (in violation of constitutional or statutory provisions) following a notice Kela filed with the Commission on September 27, 1993, in which Kela objected to Paragraph 10 in his lease as violating article XII, sections 1, 2, and 3 of the Hawai'i Constitution and the Act.<sup>4</sup>

Article XII, sections 1, 2, and 3 of the Hawai'i Constitution provide:

**ARTICLE XII**

**HAWAIIAN AFFAIRS**

**HAWAIIAN HOMES COMMISSION ACT**

**Section 1.** Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature; provided that if and to the extent that the United States shall so require, such law

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<sup>4</sup>Kela complains about paragraph 10 of his lease, but neither paragraph 10 nor the lease are part of the record on appeal. Kela attached the following to his "Notice of Appeal to Circuit":

§10-1-1 Purpose. These rules are adopted under Chapter 91, HRS, and implement the Hawaiian Home Commission Act of 1920, as amended. They are adopted in accordance with section 222 of the Hawaiian Homes Commission Act of 1920, as amended, for:

- (1) Efficient execution of functions vested in the department by the act;
- (2) To provide for management of lands and funds entrusted to the department; and
- (3) To further rehabilitation of the Hawaiian race as stated in article XI, section 2 of the constitution of the State of Hawai'i.



shall be subject to amendment or repeal only with the consent of the United States and in no other manner; provided further that if the United States shall have been provided or shall provide that particular provisions or types of provisions of such Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the native Hawaiian rehabilitation fund, section 213 of the Hawaiian Homes Commission Act, 1920, for the purposes enumerated in that section. Thirty percent of the state receipts derived from the leasing of lands cultivated as sugarcane lands on the effective date of this section shall continue to be so transferred to the native Hawaiian rehabilitation fund whenever such lands are sold, developed, leased, utilized, transferred, set aside or otherwise disposed of for purposes other than the cultivation of sugarcane. There shall be no ceiling established for the aggregate amount transferred into the native Hawaiian rehabilitation fund.

#### **ACCEPTANCE OF COMPACT**

**Section 2.** The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

#### **COMPACT ADOPTION; PROCEDURES AFTER ADOPTION**

**Section 3.** As a compact with the United States relating to the management and disposition of the Hawaiian

home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the constitution of this State, as provided in section 7, subsection (b), of the Admission Act, subject to amendment or repeal only with the consent of the United States, and in no other manner; provided that (1) sections 202, 213, 219, 220, 222, 224 and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212 and other provisions relating to the powers and duties of officers other than those charged with the administration of such Act, may be amended in the constitution, or in the manner required for state legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for state legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of such Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for state legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands," as defined by such Act, shall be used only in carrying out the provisions of such Act.

Kela fails to show how an objection to the lease relieves him of his loan obligation.

Section 202 of the Act establishes the DHHL, creates a nine-member Commission, and charges the Commission with administration of the Act in accordance with HRS § 26-17. The Commission is authorized under §§ 207, 213, 214, and 215 of the Act to provide leases to qualified Native Hawaiians and make loans to qualified lessees.

Section 216(b) and (d) (1993) of the Act provides as follows:

**§216. Insurance by borrowers; acceleration of loans; lien and enforcement thereof.**

. . . .

(b) Whenever the department has reason to believe that the borrower has violated any condition enumerated in paragraph (2), (4), (5), or (6) of section 215 of this Act, the department shall give due notice and afford opportunity for a hearing to the borrower or the successor or successors to his interest, as the case demands. If upon such hearing the department finds that the borrower has violated the condition, the department may declare all principal and interest of the loan immediately due and payable notwithstanding any provision in the contract of loan to the contrary.

. . . .

(d) The department may, subject to this Act and procedures established by rule, enforce any lien by declaring the borrower's interest in the property subject to the lien to be forfeited, any lease held by the borrower canceled, and shall thereupon order such leasehold premises vacated and the property subject to the lien surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such lease shall thereupon revert in the department, and the department may take possession of the premises covered therein and the improvements and growing crops or improvements and aquaculture stock thereon; provided that the department shall pay to the borrower any difference which may be due him after the appraisal provided for in section 209 has been made.

Section 217 (1993) of the Act provides as follows:

**§217. Ejectment, when: loan to new lessee for improvements.** In case the lessee or borrower or the successor to his interest in the tract, as the case may be, fails to comply with any order issued by the department under the provisions of section 210 or 216 of this title, the department may (1) bring action of ejectment or other appropriate proceedings, or (2) invoke the aid of the circuit court of the State for the judicial circuit in which the tract designated in the department's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the department. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the department as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the department, of all improvements made in respect to such tract by the original lessee or any successor to his interest therein shall constitute a loan by the department to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except

paragraph (1), and 216 to the same extent as loans made by the department from the Hawaiian loan fund. [Brackets deleted.]

The record in this case contains substantial evidence, including DHHL Delinquent Loans Collection Assistant Madalyn Kaeo's testimony and documentary evidence, that Kela failed to take action to correct a thirty-three month delinquency (as of May 20, 1996) of \$11,362.66, including interest due and payable, on the loan; to maintain fire insurance on the property; and to pay real property taxes. Substantial evidence established that once Kela became delinquent under his lease, he had multiple opportunities to cure his delinquency and have the forfeiture and cancellation of lease declared null and void.

In addition to instituting multiple favorable settlement offers, DHHL notified Kela that under HAR § 10-5-41(d), he had the right to present exceptions and arguments prior to the October 22, 1996, hearing before a Commission hearings officer.

Further, the circuit court acted within its subject matter jurisdiction over appeals brought from agency decisions. HRS § 91-14 (1993); see Life of the Land v. Land Use Comm'n, 58 Haw. 292, 294, 568 P.2d 1189, 1192 (1977).

**IV. CONCLUSION**

Based on the foregoing, we affirm the June 27, 2000, Judgment of the Circuit Court of the Third Circuit.

DATED: Honolulu, Hawai'i, January 29, 2002.

On the briefs:

Richard Kela,  
appellant pro se.

Chief Judge

Kumu B. Vasconcellos,  
Bryan C. Yee,  
George K.K. Kaeo, Jr.,  
Deputy Attorneys General,  
for appellee.

Associate Judge

Associate Judge