

**Electronically Filed
Intermediate Court of Appeals
CAAP-17-0000850
24-DEC-2018
10:15 AM**

NO. CAAP-17-0000850

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KŌKUA COUNCIL FOR SENIOR CITIZENS, AN UNINCORPORATED ASSOCIATION,
Plaintiff-Appellant, v. DIRECTOR OF THE DEPARTMENT OF HEALTH,
STATE OF HAWAII, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 16-1-1421)

MEMORANDUM OPINION

(By: Fujise, Presiding Judge, Reifurth and Chan, JJ.)

Plaintiff-Appellant Kōkua Council for Senior Citizens (Kōkua Council), appeals from the Circuit Court of the First Circuit's (Circuit Court) (A) "Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment Filed December 23, 2016," filed on April 5, 2017 (April 5, 2017 Order), and (B) Final Judgment, entered on November 9, 2017 (Final Judgment):¹

On appeal, Kōkua Council contends that the Circuit Court misinterpreted Hawaii Revised Statutes (HRS) § 92F-15 (2012)² and Hawaii Rules of Civil Procedure (HRCPP) Rule 81.1³ in

¹ The Honorable Karen T. Nakasone entered the former and the Honorable Keith K. Hiraoka entered the latter.

² Section 92F-15, HRS, principally provides that "[a] person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure." HRS § 92F-15(a) (2012).

³ Rule 81.1 of the HRCPP declares that

[t]he writ of mandamus is abolished in the circuit courts, except when directed to a court of inferior

concluding that it lacked jurisdiction and erroneously dismissed Kōkua Council's claim for relief in the nature of mandamus associated with Kōkua Council's request under HRS chapter 92F to access inspection reports on Adult Residential Care Homes and Expanded Adult Residential Care Homes (collectively, ARCH) from Defendant-Appellee Director of the Department of Health, State of Hawai'i (the Director or DOH).

I.

On December 13, 2015, Kōkua Council accessed DOH's website to view inspection reports mandated by HRS § 321-1.8 (Supp. 2017)). This provision required DOH, "[b]eginning with inspections occurring on January 1, 2015," to "post on its website electronic copies of reports for all inspections [DOH] performs" of, among others, ARCH, "within five working days of the conclusion of each inspection[.]" HRS § 321-1.8(a), (b).⁴ On the date of Kōkua Council's review, the DOH website contained a total of only 469 healthcare facilities inspection reports, none of which were for ARCH and only three for expanded ARCH. As of December 13, 2015, there were, collectively, approximately 500 ARCH licensed to operate in the State of Hawai'i.

³(...continued)

jurisdiction. Relief heretofore available by mandamus may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules. In any action in the nature of mandamus the court may shorten the time prescribed by these rules for pleading or doing any other act.

⁴ HRS § 321-1.8(a) and (b) provide, in pertinent part,

(a) Beginning with inspections occurring on January 1, 2015, the department of health shall post on its website electronic copies of reports for all inspections it performs of the following state-licensed care facilities:

. . . .

(6) Long-term care facilities as defined in section 349-21(f);[]

. . . .

(b) Each report shall be posted on the department of health's website within five working days of the conclusion of each inspection[.]

Under HRS § 349-21(f) (2015), "long-term care facility" includes "[a]dult residential care home, including any expanded adult residential care home[.]"

The following day, Kōkua Council began a series of attempts to obtain these inspection reports, both directly from DOH and through the Office of Information Practices (OIP).

Eventually, on January 29, 2016, DOH's Office of Healthcare Assurance (OHCA), which is designated by DOH to perform all state licensing activities on healthcare facilities, agencies, and organizations in the State of Hawai'i, e-mailed Kōkua Council, offering that, although inspection reports "are available online on [DOH's] website, and more are being posted. They are and will be free of charge," it would grant Kōkua Council's request to provide these records in hard copies "upon receipt of a prepayment for the records."

By letter dated January 29, 2016, Kōkua Council acknowledged OHCA's e-mail, noting that from the time of Kōkua Council's December 14, 2015 letter and United Information Practice Act (UIPA) request, 271 reports for ARCH and expanded ARCH had been posted on the DOH website. Kōkua Council further reminded OHCA of the outstanding request for the remainder of the inspection reports that had not yet been posted and an inventory of licensed facilities that DOH was required to maintain pursuant to HRS § 321-15.62(e) (2010).⁵

The next day, OHCA e-mailed Kōkua Council a "Notice to Requester" pursuant to Hawaii Administrative Rules (HAR) § 2-71-32⁶ to explain that ARCH inspection reports for 2015 were not

⁵ HRS § 321-15.62(e) provides that, "[t]he department shall maintain an inventory of all facilities licensed under this section and shall maintain a current inventory of vacancies therein to facilitate the placement of individuals in such facilities."

⁶ § 2-71-32 Waiver of fees when public interest served. (a) An agency shall waive \$60 of the fees that may be assessed under section 2-71-31 when:

- (1) The request for a waiver of fees is supported by a statement of facts, including the requester's identity, in accordance with section 2-71-12; and
 - (2) The agency finds that the waiver of fees would be in the public interest pursuant to this section.
- (b) A waiver of fees is in the public interest when:
- (1) The requested record pertains to the operation or activities of an agency; however, the agency shall not consider the record's relative importance to the public in applying this subsection;

(continued...)

posted on the DOH website because the ARCH facilities had not been inspected or the inspection reports were not finalized.

On March 4, 2016, OIP issued a letter to Kōkua Council, advising that "[o]n March 2, 2016, [OIP] discussed the DOH's January 30 and February 4, 2016, responses and the Reports posted on the DOH's website . . . which, combined, appear to respond to your request for the Reports." While OHCA "did not provide an itemized fees and costs structure" to Kōkua Council, OIP closed the UIPA request at Kōkua Council's request. Thereafter, no further communications between Kōkua Council and OHCA transpired. Kōkua Council filed no formal appeal from OIP's decision.

On July 25, 2016, Kōkua Council filed a four-Count Complaint against the Director. Relevant to this appeal, Kōkua Council alleged, in Count III, an "Action in the Nature of Mandamus" because the Director failed to fulfill his ministerial duty to the public to post inspection reports within five business days after the inspection, and that Kōkua Council lacked alternative legal means to redress this wrong or obtain this action.

In response to Kōkua Council's December 23, 2016 motion for summary judgment, the Circuit Court concluded that, as to Count III, it lacked jurisdiction to grant mandamus relief under HRCF Rule 81.1 and, even if the court had jurisdiction, Kōkua Council had

not demonstrated a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action. Kema v. Gaddis, 91 [Hawaii] 200, 982 P.2d 334 (1999). Therefore, the motion is DENIED as to Count III.

In addition, the Circuit Court determined that HRS § 92F-15 provides a remedy of judicial enforcement and an "alternative

⁶(...continued)

- (2) The record is not readily available in the public domain; and
- (3) The requester has the primary intention and the actual ability to widely disseminate information from the government record to the general public at large.

means to address the alleged wrong and obtain the requested action."⁷

II.

Kōkua Council raises the following three points of error on appeal:

(1) the circuit court committed clear error and incorrectly dismissed Count III⁸ on the basis, in part, that HRS § 92F-15 provided "other means" whereby Kōkua Council could obtain for DOH's failure to post the inspection reports within five days[;]

(2) the circuit court incorrectly interpreted HRCF Rule 81.1, providing for mandamus, and other authorities as depriving the circuit court of jurisdiction to issue the order in the nature of mandamus requested under Count III[;]

(3) the circuit court clearly erred, abused its discretion, and incorrectly concluded that Kōkua Council had not shown a clear and indisputable right to the mandamus relief requested under Count III.

III.

The gravamen of this appeal is whether the Circuit Court properly denied Kōkua Council's motion for summary judgment as to Count III of the Complaint, which asked for relief in the nature of mandamus. The Circuit Court ruled that it lacked jurisdiction, under HRCF Rule 81.1, to grant relief in the nature of mandamus but, assuming it had jurisdiction, Kōkua Council had not made a sufficient showing of entitlement to such relief.

"On appeal, the grant or denial of summary judgment is reviewed de novo." Peer News LLC v. City & Cty. of Honolulu, 138 Hawai'i 53, 60, 376 P.3d 1, 8 (2016) (internal quotation marks omitted) (quoting Lales v. Wholesale Motors Co., 133 Hawai'i 332, 343, 328 P.3d 341, 352 (2014); First Ins. Co. of Hawaii v. A & B Props., Inc., 126 Hawai'i 406, 413, 271 P.3d 1165, 1172 (2012)).

⁷ Subsequently, in conjunction with its decision to deny Kōkua Council's motion for summary judgment on Count IV and Count VI, added in an April 7, 2017 Amended Complaint, the Circuit Court, the Honorable Keith K. Hiraoka presiding, interpreted the five-day posting deadline contained in HRS § 321-1.8 as the earlier of (1) the department's determination that there are no violations, or (2) the department's approval of the care home's plan of correction pursuant to HRS § 321-1.8(b).

⁸ Although the Circuit Court did not dismiss Count III during the February 2, 2017 hearing or the April 5, 2017 Order denying Kōkua Council's motion for summary judgment cited in this point on appeal, the Final Judgment dismissed Count III.

This case turns on the Circuit Court's authority to grant mandamus relief. The Circuit Court rested its decision, in this regard, on HRCF Rule 81.1.

In 1972, HRCF Rule 81.1 was added and read,

The writ of mandamus is abolished in the circuit courts, except when directed to a court of inferior jurisdiction. Relief heretofore available by mandamus may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules. In any action in the nature of mandamus the court may shorten the time prescribed by these rules for pleading or doing any other act.

(Emphasis added).

As reflected in the language of this rule, the writ, but not the remedy available in a mandamus action, was eliminated, except with regard to a writ directed to a court of inferior jurisdiction. As Kōkua Council sought, in Count III of their Complaint, relief *in the nature of mandamus*, the Circuit Court was not prohibited, by virtue of HRCF Rule 81.1, from issuing an order granting such relief.

However, our review of the relevant statutory authority leads us to the conclusion that the Circuit Court could not issue an order in the nature of mandamus to a public officer.

Along with adoption of the newly minted Hawaii Rules of Civil Procedure, of which HRCF Rule 81.1 was a part, the 1972 Legislature passed wholesale changes to the Hawaii Revised Statutes.

The purpose of the statutory revision program of the Committee on Coordination of Rules and Statutes (Committee on Coordination) and of Your Committee has been to review and revise the Hawaii Revised Statutes and rules relating to civil procedure so as to coordinate them and eliminate inconsistencies; delete outmoded provisions; make improvements of a technical nature; and transfer procedural matters to court rules where advisable. Such comprehensive updating and unifying of statutes is long overdue in [Hawaii]. Obsolete civil procedure provisions dating from legislative acts of 1869 are now to be found in our statutes. When the [Hawaii] Rules of Civil Procedure were adopted, revision became a critical need. While many other states have permanent law revision commissions, the work undertaken by the Committee on Coordination and this Committee is the first comprehensive revision of statutory procedural provisions of [Hawaii] in this century.

Spec. Comm. Rep. No. 9, *reprinted in* 1972 House Journal, at 1115-16; see also S. Stand. Comm. Rep. No. 623-72, in 1972 Senate Journal, at 1006.

As a part of this comprehensive revision, HRS § 603-21.7(b) (1972) was created, in large part reenacting the longstanding authority granted to the circuit courts with regard to extraordinary remedies:

Of actions or proceedings in or in the nature of habeas corpus, prohibition, mandamus, quo warranto, and all other proceedings in or in the nature of applications for writs directed to courts of inferior jurisdiction, to corporations and individuals, as may be necessary to the furtherance of justice and the regular execution of the law.

(Emphasis added); see also, HRS § 603-22(8) (1968) and Pringle v. Bicknell, 22 Haw. 589, 590 (Haw. Terr. 1915) (As far back as 1892, "it was provided that 'The judges of the several circuit courts shall have power in chambers within their respective jurisdictions, but subject to appeal . . . to issue writs of . . . mandamus . . . to courts of inferior jurisdiction, to corporations and individuals.'" (ellipses in original) quoting S.L. 1892, Ch. 57, § 37; Revised Laws of Hawaii, ch. 131, § 2272 (1915)).

Thus, the circuit courts have had the authority, even before territorial times, to issue mandamus to "individuals." However, DOH argued below and on appeal, that the Director is not an "individual" but a public officer, and as such is not subject to mandamus but by the Hawaii Supreme Court as provided by HRS § 602-5(a)(3) (2016).

Relevant to this case, in the 1972 comprehensive revision, the legislature added to the supreme court's jurisdiction and powers the ability

[t]o exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law[.]

1972 Haw. Sess. Laws Act 88, § 2, at 326. This language remains unchanged to the present. HRS § 602-5(a)(3).

In light of this amendment, the question then becomes whether the circuit courts' mandamus jurisdiction over individuals includes, or is exclusive of, public officers. Based on the historical evolution of this extraordinary remedy, we believe it is the latter.

Writs of mandamus have been recognized in the islands as early as 1876, when it was defined as an order, issued by the supreme court or a justice thereof, on behalf of the government (sovereign or the territory) "addressed to an individual, or corporation or court of inferior jurisdiction, directing him or it to perform some certain act belonging to the place, duty or quality, with which he or it is clothed." Compiled Acts of the Hawaiian Kingdom, L. 1876, c.39, § 1; Cp.L. p. 587. Furthermore, "[t]he order may be directed to individuals, whether holding offices or not, to corporations, and to judges on inferior tribunals[,]" id. § 3, and "[i]t may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them." Id. at § 5.

In 1915, the circuit courts were included in this statutory definition of mandamus relief. Revised Laws of Hawaii (RLH), ch. 151, §§ 2675, 2677, 2679 (1915). However, also in 1915, referencing the mandamus chapter 151, the circuit courts were given the power

To issue writs of error, certiorari, mandamus, ne exeat, prohibition and quo warranto, and all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law[.] [see c. 151]

RLH, ch. 131, § 2272, Eighth (1915). By contrast, in 1915, the supreme court's jurisdictional statutes gave it

original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals. . . .

RLH § 2252 (2015). The supreme court was also given the

. . . power to . . . allow the issuance of writs of error, certiorari, mandamus, prohibition and injunction according to law, to circuit courts, circuit judges, district magistrates and other judicial tribunals and to parties litigant before such courts, judges, magistrates, and tribunals. . . .

RLH § 2253 (1915). The statutes then in existence regarding authority of the supreme and circuit courts to issue mandamus were interpreted as follows:

Thus construed it is clear that while this court has original jurisdiction in mandamus in cases where the writ is directed to a circuit court, circuit judge, magistrate or other judicial tribunal, the jurisdiction to issue the writ against an individual in the first instance has been confided to the circuit judges, the jurisdiction of this court in such cases being appellate only. Sections 2675 and 2682 are definitional in character while sections 2252, 2253 and 2272 confer jurisdiction.

Pringle, 22 Haw. at 591 (interpreting all five sections together as they were *in pari materia*).

Fast forward to the 1972 changes, the mandamus sections in Chapter 659, "Extraordinary Legal Remedies," were deleted, but had provided, in pertinent part,

Part 1. Mandamus

§659-1 **Definition.** This is an order issuing in the name of the State, by the supreme court or any justice thereof or a circuit judge, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing him or it to perform some certain act belonging to the place, duty or quality, with which he or it is clothed.

.

§659-3 **Directed to whom.** The order may be directed to individuals, whether holding offices or not, to corporations, and to judges of inferior tribunals.

When officer dead or resigned. It may be directed to an individual, as to the heir or other legal representative of a deceased public officer, or to the officer himself, if he be alive, or has resigned, or has been removed, to compel him to deliver to the successor of the officer, the papers and other effects belonging to his office.

To compel officers to perform duty. It may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them.

Along with eliminating the mandamus sections,⁹ 1972 Haw. Sess. Laws Act 90, § 3(j) at 355-56, the 1972 amendments retained the circuit courts' power to issue mandamus to "individuals," without amendment, 1972 Haw. Sess. Laws Act 88, § 3 at 330, and amended¹⁰ the supreme court's powers with regard

⁹ However, the legislature disavowed abolishing the writ of mandamus despite the deletion of the provisions regarding mandamus. 1972 Haw. Sess. Laws Act 90, § 4 at 356.

¹⁰ Prior to 1972, the supreme court's powers were as follows:

§602-5. **Jurisdiction and powers.** The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which are

(continued...)

to mandamus as follows:

- (4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law.

1972 Haw. Sess. Laws Act 88, § 2 at 326. The provisions regarding the supreme court and circuit courts' powers remain unchanged until the present.

This historical review reveals that the power of the supreme court to issue a writ was long limited to inferior courts and judges, and a circuit court's power was limited to courts inferior to it, as well as to corporations and individuals. Although the meaning of the term "individuals" was defined as all-encompassing, i.e., "whether holding offices or not," HRS § 659-3 (1968) in the mandamus provisions, the 1972 amendments resulted in explicitly adding public office holders to the jurisdiction of the supreme court while not adding this expansive language previously used in the definitional provisions of the mandamus chapter to define the individuals to whom the circuit court could issue its mandamus orders. Taking the legislature's changes in context, it seems clear that it intended to carve out a species of "individual" i.e., public officers, for the supreme court's writs, while leaving the circuit courts to issue mandamus relief to other individuals.

¹⁰(...continued)

properly brought before it on exceptions, error, or appeal duly perfected from any other court, judge, magistrate, or tribunal, according to law or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition, and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals and returnable before the supreme court. The supreme court and the several justices thereof in aid of the appellate jurisdiction of the court may issue writs of mandamus, certiorari, prohibition, and habeas corpus and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court. Each of the justices shall have original jurisdiction and power to issue writs of habeas corpus and may make the writs returnable before himself or the supreme court or before any circuit court or any judge thereof.

HRS § 602-5 (1968) (emphasis added).

As Kōkua Council sought mandamus relief against the Director, an appointed officer of the Hawai'i State Department of Health, we conclude the Circuit Court did not have the authority to grant such relief and was correct, albeit for different reasons, to deny Kōkua Council's motion for summary judgment in, and ultimately dismissing, Count III of its complaint.

Our resolution of this issue makes it unnecessary to address the other arguments raised in this appeal.

IV.

For the reasons stated, we affirm the Circuit Court of the First Circuit's April 5, 2017 Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment, Filed December 23, 2016, and the November 9, 2017 Final Judgment.

DATED: Honolulu, Hawai'i, December 24, 2018.

On the briefs:

Lance D. Collins
for Plaintiff-Appellant.

Heidi M. Rian
Angela A. Tokuda,
Deputy Attorneys General,
for Defendant-Appellee.


Presiding Judge


Associate Judge


Associate Judge