

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 27559

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALAKA'I NA KEIKI, INC., Appellant-Appellant

vs.

PATRICIA HAMAMOTO, in her official capacity as
Superintendent of Education, Appellee-Appellee

and

DOES 1-10, Appellees

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 05-1-1659)

CLERK APPELLATE COURTS
STATE OF HAWAII

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SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Appellant-Appellant Alaka'i Na Keiki, Inc.

[hereinafter, ANK] appeals from the October 10, 2005 final judgment of the circuit court of the first circuit¹ which dismissed for lack of jurisdiction ANK's appeal of the decision of Appellee-Appellee the State of Hawai'i Department of Education's Superintendent of Education, Patricia Hamamoto [hereinafter, DOE]. ANK raises one point of error on appeal, to wit, that the circuit court erred in concluding that Hawai'i Revised Statutes (HRS) chapter 103F (Supp. 2005), "Purchases of Health and Human Services," precludes HRS chapter 91 (1993) judicial review of the decision. The DOE counters that the circuit court correctly ruled that HRS chapter 91 jurisdiction

¹ The Honorable Eden Elizabeth Hifo presided over this matter.

does not exist to review the actions of a purchasing agency under HRS chapter 103F.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold that the circuit court did not err in ruling that it lacked HRS chapter 91 jurisdiction in the instant case. See HRS § 91-14(a) (1993) ("Any person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter." (Emphasis added.)); HRS § 91-1(5) (1993) (defining "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing"); HRS § 91-1(6) (1993) (stating that an "agency hearing" "refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14"); Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134, 870 P.2d 1272, 1278 (1994) ("[I]f an agency hearing is 'required by law,' it is a contested case for the purposes of judicial review."); Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) ("In order for a hearing to be 'required by law,' [the hearing]

may be required by statute, agency rule, or constitutional due process." (Citation omitted)).²

The submission of ANK's written protest, the DOE's written response, and ANK's written reply did not constitute a "hearing" within the meaning of HRS chapter 91. Although a "hearing" necessarily requires an aggrieved person to present evidence and/or arguments to a decision-maker, the converse is not true that every time an aggrieved person submits evidence and/or arguments to a decision-maker a "hearing" has occurred. See HRS § 1-14 (1993) ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.").

None of the cases cited by ANK support its definition of "hearing." In East Diamond Head Ass'n v. Zoning Board of Appeals, 52 Haw. 518, 523-24, 479 P.2d 796, 799 (1971), and Town v. Land Use Commission, 55 Haw. 538, 539, 548, 524 P.2d 84, 86, 91 (1974), this court observed that public hearings could constitute contested case hearings. Those cases, however, do not hold that written submissions constitute a "hearing" within the

² As the DOE points out, ANK does not argue that a hearing was required by constitutional due process. As such, this argument is deemed waived. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived.").

meaning of HRS chapter 91. Additionally, ANK's citation to United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), and United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973), for the proposition that "the procedure of notice and written comments satisfies a statutory requirement of 'hearing'" are equally unavailing. Neither case, both of which deal with rule-making proceedings under the Esch Car Service Act of 1917, 49 U.S.C. § 1(14)(a), support ANK's position because the instant case does not concern the Esch Car Service Act, nor, more importantly, does it present this court with the question of whether a hearing requirement is satisfied. Although written submissions may satisfy the Esch Car Service Act's hearing requirement, Florida E. Coast Ry., 410 U.S. at 241, it does not follow that written submissions always constitute a "hearing."

Furthermore, the circuit court correctly ruled that it did not have jurisdiction under HRS chapter 91 to review the decision because neither the plain language of HRS chapter 103F nor that of Hawai'i Administrative Rules (HAR) chapter 3-148 mandate a hearing prior to deciding a protest. See Bush, 76 Hawai'i at 134, 870 P.2d at 1278 ("If the statute or rule governing the activity in question does not mandate a hearing prior to the administrative agency's decision-making, the actions of the administrative agency are not 'required by law' and do not amount to 'a final decision or order in a contested case' from

which a direct appeal to circuit court is possible." (Citations omitted.)).

To the extent that there is any doubt or uncertainty as to whether the legislature intended to require a hearing prior to decision-making under HRS chapter 103F, we construe HRS chapter 103F, the human services procurement code, with reference to HRS chapter 103D, the public procurement code. While HRS chapter 103D provides for a hearing to review any request from a party aggrieved by a determination of the chief procurement officer or head of a purchasing agency,³ a similar provision is

³ HRS § 103D-709 (Supp. 2005), entitled "Administrative proceedings for review," states in relevant part:

(a) The several hearings officers . . . shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-702(g)] may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. The rules of evidence shall apply.

. . . .

(continued...)

conspicuously absent from HRS chapter 103F, thus demonstrating that the legislature did not intend to allow, and certainly did not intend to require, a hearing prior to decision-making under HRS chapter 103F. See State v. Rodgers, 68 Haw. 438, 442, 718 P.2d 275, 277 (1986) (“[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intention existed.” (Ellipsis and citations omitted.)), superseded by statute on other grounds.

Additionally, preclusion of judicial review pursuant to HRS chapter 91 does not preclude judicial review through alternative means.⁴ See HRS § 91-14(a) (“[N]othing in this section [91-14] shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right

³(...continued)

(f) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

⁴ We take judicial notice of Alaka'i Na Keiki v. Patricia Hamamoto, Civ. No. 05-1-1658-09, currently pending in the circuit court, which is ANK's civil action to contest whether the agency has conducted its decision-making activities in accordance with applicable laws. See Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 29 n.7, 79 P.3d 119, 122 n.7 (2003) (noting that this court may take judicial notice of a related case); Roxas v. Marcos, 89 Hawai'i 91, 110 n.9, 969 P.2d 1209, 1228 n.9 (1998) (“[C]ourts have generally recognized that they may, in appropriate circumstances, take notice of proceedings in other courts, both within and without their judicial system, if those proceedings have a direct relation to the matter at issue.” (Brackets and citations omitted.)).

of trial by jury, provided by law." (Emphasis added.); Bush, 76 Hawai'i at 137, 870 P.2d at 1281 (stating that the appellants were "not barred from contesting the [agency]'s actions through alternative means, but they [were] prohibited from accessing review of these actions through inappropriate means").

Therefore,

IT IS HEREBY ORDERED that the circuit court's October 10, 2005 final judgment is affirmed.

DATED: Honolulu, Hawai'i, January 22, 2007.

On the briefs:

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