

I'd like to congratulate the Commission and its Executive Director for going through the legal process of promulgating these proposed rules. Taking this first step in defining a process for rule-making is encouraging and may lead to improving levels of trust.

Proposed rule §8-502-1 says, "The commission, on its own motion, or on petition of any interested person, group, organization, or agency may hold proceedings as it may deem necessary from time to time for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties, or the formulation of its rules." Rule is defined by §91-1 as a "statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." The State Board of Education maintains exclusive rule-making authority over state educational policy. Therefore proposed rule §8-502-1 empowers the Commission to prescribe law and/or define how laws are implemented according to its organization, procedures and practices. The powers, duties, and liabilities of the Commission are defined in §302D-5 as its "essential powers and duties." One essential duty is "negotiating and executing sound charter contracts with each approved charter applicant and with existing public charter schools." The law specifically says, "An authorizer shall have the power to make and execute contracts and all other instruments necessary or convenient for the exercise of its duties and functions under this chapter."

The contract is clearly an established procedure and practice of the Commission. Unfortunately, the Commission has, thus far, refused to negotiate the contract with individual schools. It should be subject to administrative rules.

On July 14, 2016 I asked the Commission to adopt administrative rules to clarify the Intervention Protocol in our contract. The contract is clearly a legal procedure and practice essential in defining the legal parameters charter schools must operate under in the state of Hawaii. I was stunned upon receiving a letter from Commission Chairperson Payne denying my request on August 12, 2016. Payne wrote, "Regarding your request for the adoption of administrative rules to clarify the Intervention Protocol in the Connections School Contract, the Commission declines to do so and will not be promulgating any administrative rules pursuant to HRS Chapter 91. The Commission declines to promulgate such administrative rules because the Intervention Protocol is part of the contract between the Commission and Connections allowing Connections to operate as a public charter school. The Intervention Protocol which is part of Connections School Contract, does not come within the requirement for rule-making under HRS Chapter 91.

The Intervention Protocol in the Connections School Contract provides for the Commission's management of its oversight duties and powers regarding Connections past and present liabilities related to its performance and legal compliance. Therefore, the Intervention Protocol does not come within the definition of agency statements that are required to be a rule under HRS Chapter 91.

The Intervention Protocol also comes within the exception under HRS Chapter 91 for the internal management of the Commission that does not affect the privacy rights of the public or the procedures available to the public. The Intervention Protocol is part of Connections School Contract with the Commission, a public contract between two public entities that allows Connections to operate as a public charter school. Pursuant to HRS Chapter 302D, the Commission has statutory duties/power to monitor, in accordance with charter contract terms, the performance and legal compliance of Connections.

The Intervention Protocol specifies the Commission's actions regarding the oversight and monitoring of Connections' performance and legal compliance. Such actions are the internal management of the Commission's oversight duties and powers related to Connections'

performance and legal compliance.

Furthermore, the Connections School Contract, including the Intervention Protocol, does not affect the private right of the public nor does the Contract, including the Intervention Protocol, affect public procedures as the Contract only sets forth the contractual rights and obligations between Connections and the Commission, not the general public.

Accordingly, the Commission is not required to promulgate administrative rules clarifying the Intervention Protocol that is part of Connections School Contract and declines your request for the adoption of such administrative rules.”

The “decision” to deny my request was made by the Chair or the Commission. I have found no record of an agenda item pertaining to my request at a Commission meeting after my request was made on July 14, 2016. This “decision” was not made in accordance with the Sunshine Law (§92) and is an example of the Chair acting (illegally) on behalf of the board. Unfortunately, this is not the only time the Chair has acted on behalf of the board. At the December 10, 2015 Commission general meeting another charter school principal, Steve Hirakami, questioned the chairperson of the Commission concerning a letter he had received regarding the distribution of collective bargaining teacher bonuses and his request that this issue be placed on the agenda for the meeting. The letter was signed by Chairperson Catherine Payne and Executive Director Tom Hutton. Chairperson Payne was asked if she had acted on behalf of the Commission in this correspondence. She stated that she had acted as the Chair of the Commission and that the Commissioners had seen a copy of the letter (despite the fact that this issue was never addressed at a Commission meeting).

The Commission can act legally only by majority vote of a quorum at a duly constituted and conducted meeting. Individual board members have no individual management authority simply by virtue of being a member of the Commission. They have a fiduciary duty to act in the best interest of the Commission; to avoid negligence and fraud; and to avoid conflicts of interest. When this fiduciary duty is breached, the individual breaching their duty can be found personally liable for any damages caused by this breach. In the landmark 1982 case *American Society of Mechanical Engineers v. Hydrolevel*, the U.S. Supreme Court determined that an association can be held liable for the actions of its officers, directors, and other volunteers (including actions that bind the association financially), even when the association does not know about, approve of, or benefit from those actions, as long as the volunteer reasonably appears to outsiders to be acting with the association's approval. The Supreme Court made clear that associations are to be held strictly liable for the activities of volunteers that have even the apparent authority of the association.