

HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

PART I

PUBLIC SCHOOLS

CHAPTER 62

MERIT APPEALS BOARD

SUBCHAPTER 1

GENERAL APPLICABILITY

§8-62-1 Purpose. The rules in this chapter govern practice and procedure before the department of education merit appeals board under the civil service and compensation laws, chapter 76, Hawaii Revised Statutes, as provided for under chapters 91 and 92, Hawaii Revised Statutes. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §76-14)

§8-62-2 Definitions. As used in this chapter:

"Adverse action" means an involuntary separation from service, an involuntary demotion, involuntary transfer, a suspension without pay, a reduction in pay, or denial or delay of a standard pay adjustment. Adverse action does not include a notice to improve performance, a performance improvement period, or a return to the employee's former

position or comparable position as required by law because of a failure to successfully complete a new probationary period.

"Aggrieved" means an individual who has suffered a loss such as the denial of some personal or property right. As used in section 8-62-33(b)(1), concerning examination appeals, it includes, in addition to other examination issues, a person whose application has been rejected for failure to meet the qualification requirements for a class, a person who has been terminated during an initial probationary period for failure to successfully complete an initial probationary period, and a person whose non-selection involved improprieties.

"Appointing authority" means the superintendent or designee having power to make appointments or changes in status of employees in the department of education.

"Assistant superintendent" means the assistant superintendent for human resources.

"Board" means the department of education merit appeals board.

"Chairperson" means the chairperson of the board.

"Civil service employee" means an employee who meets all requirements for membership in the civil service.

"Classification" means the assignment of a civil service position to a class of work.

"Day" means a calendar day unless otherwise specified.

"Employee" means a person holding a position in the service of the department of education, irrespective of status or type of appointment; provided that, if the context clearly applies only to an employee who is a member of the civil service, "employee" means a civil service employee.

"Employer" means the department of education, and any individual who represents or acts in the interest of the department in dealing with public employees in the department of education.

"Examination" means any test or accepted personnel assessment technique used to measure the fitness and ability of applicants for employment which may include, but is not limited to: written tests, oral tests, interviews, essays, tests of physical fitness or ability, medical examinations, performance tests, training and experience

evaluations, background and suitability determinations, probation periods, in-basket assessments, biodata assessments, personality measures, and assessment center evaluations.

"Ex parte communications" means private communications or arguments with members of the board or the presiding officer as to the merits of a proceeding that could be construed as influencing the outcome of the case.

"Hearing" means any proceeding governed by sections 76-14 and 76-47, Hawaii Revised Statutes.

"Hearings officer" means a competent and qualified disinterested person appointed by the board to hear an appeal.

"Initial pricing" means the determination of the appropriate pay range and pay relationships for a new class based on appropriate factors.

"Mediation" means the process whereby a neutral third party or "mediator" is authorized in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

"Meeting" means the convening of the board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

"Merit appeals board" means the department of education's appellate body consisting of three members appointed by the superintendent for purposes of section 76-14, Hawaii Revised Statutes. The term of appointment of members and the appointment of a chairperson of the department of education merit appeals board are to be established by the superintendent.

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding.

"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than governmental agencies.

"Presiding officer" with respect to proceeding means the chairperson and includes any member of the board designated as such, or other persons authorized by law, to conduct hearings.

"Proceedings" means the board's consideration of the relevant facts and applicable law and action thereupon with respect to a particular subject within the board's jurisdiction, initiated by filing a submission or request or a board's notice or order. It shall include proceedings involving adopting, amending or repealing any rule of the board, whether initiated by the board order or notice or petition of any interested person. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-3 Construction of rules. The rules shall be liberally construed to secure the just and speedy determination of every proceeding. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §302A-1112) (Imp: HRS §§76-14, 76-47)

§8-62-4 Limitation of jurisdiction. (a) Where the terms of collective bargaining agreements pursuant to chapter 89, Hawaii Revised Statutes, conflict with these rules, the terms of the agreements shall prevail; provided that the terms are not inconsistent with section 89-9(d), Hawaii Revised Statutes.

(b) The board shall defer action on an appeal if there is controversy on whether the matter is within its jurisdiction or that of the Hawaii labor relations board. The Hawaii labor relations board shall determine which of these boards has jurisdiction in the appeal.

(c) The board shall not act on an appeal if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement.

(d) All internal complaint procedures, including administrative reviews and complaint procedures, must be exhausted before an appeal may be accepted by the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §76-14)

§8-62-5 Procedure and terms. (a) The terms used in rules adopted by the board pursuant to powers granted by statute shall have the meaning defined by statute, unless the context specifically requires otherwise.

(b) A rule that defines a term without express reference to the statute or to these rules or to a portion thereof, defines the term for all purposes as used both in the statute and in these rules, unless the context otherwise specifically requires.

(c) Words importing the singular number may be extended and applied to several persons or things; words importing the plural may include the singular; and words importing the masculine gender may be applied to females. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§1-14, 1-15, 1-16, 1-17)

§8-62-6 Composition of the board. (a) The superintendent of the department of education shall appoint three persons to the board.

(b) The board members shall be appointed for three year terms and may be reappointed without limitation, or may be removed by the superintendent before the ending of the term. At the initial establishment of the board, the members shall be appointed to staggered terms of one, two, or three years. Subsequent appointments or reappointments shall be for three years. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-7 Department of education merit appeals board office. (a) The office of the board is in Honolulu, Hawaii. All communication to the board shall be addressed to department of education merit appeals board, c/o Assistant Superintendent, Office of Human Resources, Queen Liliuokalani Building, 1390 Miller Street, Honolulu, Hawaii , 96813, telephone (808) 586-3400, unless otherwise specifically directed.

(b) The office of the board shall be open from 7:45 a.m. to 4:30 p.m. of each workday, excluding state holidays, or unless otherwise provided by statute or executive order.

(c) The office of the assistant superintendent will assign administrative support to the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-8 Meetings. The board may meet and exercise its powers in any part of the State of Hawaii. (a) For the purpose of minimizing travel and per diem expenses, the board may utilize, whenever practicable, other means such as teleconferencing which does not require all parties to convene at a single site to conduct its proceedings.

(b) Special meetings of the board for the transaction of its business may be held at any time and place as scheduled by the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-9 Minutes. The board shall keep written minutes or recordings of all meetings. Unless otherwise required by law, a full transcript of the meeting is not required, but the written minutes or recording shall reflect matters discussed and the views of the participants. The minutes or recording shall include but need not be limited to:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;
- (3) The substance of all matters proposed, discussed, or decided, and a record, by individual member, of any votes taken; and
- (4) Any other information that any member of the board requests be included or reflected in the minutes and or recording.

The minutes or transcript of the recording shall be a public record and shall be available within thirty days after request, except where such disclosure would be inconsistent with chapter 92F, Hawaii Revised Statutes. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-10 Hearings. All parties shall be afforded an opportunity for a hearing after reasonable notice. The notice shall include a statement of:

- (1) The date, time, place, and nature of the hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement, in plain language, of the issue(s) involved and the facts alleged by the party in support thereof; provided that, if the party is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issue(s) involved; and

(5) The fact that any party may retain counsel or any other person to whom written or verbal authority has been given if the party so desires. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-11 Quorum and number of votes necessary to validate acts. A majority of all members to which the board is entitled, two out of three members, shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the board is entitled shall be necessary to validate any action of the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-12 Administration. (a) The chairperson of the board shall be responsible for the administrative functions of the board.

(b) All decisions, orders, and other actions of the board shall be authenticated or signed by the board members acting in the proceeding or by the chairperson upon delegation by the board members acting in the proceeding. Official copies of decisions, orders, and other board actions may be certified under the signature of the chairperson or the chairperson's designate.

(c) All documents required to be filed with the board shall be filed in the office of the board in Honolulu, Hawaii, within the time limits as prescribed by the rules of the board, or by the order of the board. Requests for public information or the opportunity to inspect public records may be made to the board's office.

(d) The board may delegate to any competent and qualified individuals, the power or authority vested in the board as it deems

reasonable and proper to carry out its functions as prescribed by chapter 76, Hawaii Revised Statutes, except the power to make, amend, or repeal rules.

(e) The board may, by written resolution adopted by a majority of the members to which it is entitled, appoint a hearings officer. The hearings officer shall hear the matter in the same manner as if it were before the board. Upon the conclusion of the hearing, the hearings officer shall transmit to the board a record of the hearing, including a recording or transcript and a summary of evidence taken at the hearing. After a review of the testimony and evidence, a majority of the members, two out of three members, to which the board is entitled shall render a decision.

(f) The board may develop and promulgate procedures needed to carry out its functions.

(g) No board member shall be held liable in any civil action for damage, injury, or loss caused by or resulting from the member's performance or failure to perform any duty required or authorized to be performed by a person who holds the position to which the member was appointed, unless the member acted with a malicious or improper purpose, except when the plaintiff in a civil action is the department of education. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47, 26-35.5)

§8-62-13 Government records. (a) The term "government records" as used in this chapter is defined as in chapter 92F, Hawaii Revised Statutes, and shall include all rules, written statements of policy or interpretations formulated, adopted or used by the board, all complaints, opinions and orders, written testimony, minutes of meetings of the board and any other material on file in the office of the board unless accorded confidential treatment pursuant to law or the rules of the board.

(b) Government records printed or reproduced by the board shall be provided to any person requesting the same and who shall pay the fees established by the department of education fee schedule or by section 92-21, Hawaii Revised Statutes.

(c) Requests for public information, for permission to inspect government records, or for copies of government records shall be handled expeditiously. Records involving the board shall not be released without written approval of the chairperson or the

chairperson's designee. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §91.2)

SUBCHAPTER 2

PROCEEDINGS BEFORE THE BOARD

§8-62-14 General provisions. (a) The board may hold proceedings as it may deem necessary in the performance of its duties or the formation of its rules.

(b) Procedures to be followed by the board shall be that which will best serve the purpose of the proceeding, as determined by the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-15 Appearances and practices before the board. (a) Appearances before the board may be made as follows:

- (1) A person may appear on the person's own behalf.
- (2) An employee may be represented by an employee organization.
- (3) An employee organization may be represented by a person or persons duly designated and authorized by the employee organization.
- (4) A public employer may appear on its own behalf or through a person or persons duly designated and authorized by the employer.

(b) In any proceeding under these rules, a person, employee organization, or public employer may be represented by counsel or any other person to whom written or verbal authority has been given.

(c) When an individual acting in a representative capacity appears in person or signs a waiver of appearance before the board, the personal appearance or signature shall constitute a representation to the board that, under the provisions of these rules and the law, that person is authorized and qualified to represent the particular person. The board may at any time require any person transacting

business with the board in a representative capacity to provide proof of that person's authority and qualification to act as a representative.

(d) Limitations to appearances before the board are as follows:

(1) No individual who has been associated with the board as a member, officer, employee, or counsel shall be permitted to appear before the board as a representative of any party in any proceeding or matter that the individual has handled or passed upon while associated with the board.

(2) No person or agency appearing before the board in any proceeding or matter shall, in relation thereto, knowingly accept assistance from or compensate any individual who would be barred by this subsection.

(3) No person who has been associated with the board as a member, officer, employee, or counsel shall be permitted to appear before the board as a representative of, any party in any proceeding or matter that was pending before the board at the time of that person's association with the board, unless that person first obtains written consent from the board.

This subsection shall not apply to any individual or agency who has terminated association with the board for a period of one year. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: §§76-14, 76-47)

§8-62-16 Disqualification of board member, legal counsel, or hearings officer. Any party to a hearing may file an affidavit or declaration that one or more of the board members, legal counsel, or a hearings officer has a personal bias or prejudice. The affidavit or declaration shall state the facts and reasons for the belief that bias or prejudice exists and shall be filed at least five days before the hearing, or good cause shall be shown for the failure to file it within that time. The person against whom the affidavit or declaration is so filed may answer the affidavit or declaration or may file a disqualifying certificate with the board. If the person chooses to answer the affidavit or declaration, the remaining board members where a board member is involved, shall decide by a majority of all the members to which the board is entitled whether that person shall be disqualified from proceeding therein. Any person may file with the chairperson a certificate providing that the person is

unable, for any reason, to participate with impartiality in the pending hearing. Upon completion of disqualification proceedings, a hearing shall continue in accordance with section 8-62-36. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-17 Consolidation. The board, upon its own initiative or upon motion, may consolidate two or more appeals that involve substantially the same parties or issues. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-18 Filing of documents. (a) All documents required to be filed with the board in any proceeding shall be filed at the office of the board in Honolulu, Hawaii within the time limits prescribed by the rules of the board or by order of the board. The date on which the papers are received constitute the date of filing.

(b) Appeals shall identify the issue on appeal, including a concise statement of the relevant facts, and the remedy sought, including the rationale and legal basis, as appropriate, for the remedy.

(c) All requests and appeals filed with the board shall be handwritten in black ink, typewritten, photo-copied, or printed; shall be plainly legible; and shall be on strong, durable paper no larger than 8 ½" x 11" in size, except that maps, charts, tables, and other like documents may be larger, folded to the size of the papers to which they are attached.

(d) All documents shall be signed in ink by the party or the party's duly authorized agent. The signature of the person signing the document constitutes a certification that the person has read the document; that to the best of that person's knowledge, information and belief, all statements contained therein are true and not misleading; and are not interposed for delay.

(e) Unless otherwise specifically provided by a particular rule, or order of the board, an original and four copies of all papers shall be filed. Facsimile copies will not be accepted.

(f) All documents filed by any person or agency in any proceeding shall state on the first page thereof the name, mailing address, and telephone number, if any, of the individual or individuals who may be

served with any documents filed in the proceeding. [Eff 6/11/2010]
(Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-19 Amendment of documents and dismissal. If a document filed in a proceeding is not in conformity with the applicable rules of the board as to contents thereof, or is otherwise insufficient, the board may, on its own motion or on motion of any party, strike the document or require its amendment. If amended, the document shall be effective as of the date of receipt of the amendment. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-20 Retention of documents. All documents filed with or presented to the board shall be retained by the board. The board may permit the withdrawal of original documents upon submission of properly authenticated copies such as photocopies, microphotographs, reproduction on film, or electronic forms, as defined in section 92-31, Hawaii Revised Statutes, to replace the documents. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47, 92-31)

§8-62-21 Computation of time. In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default, after which the designated period of time is to run, is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or state holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or a holiday. Intermediate Saturdays, Sundays and holidays shall not be included in a computation when the period of time prescribed or allowed is ten calendar days or less. Unless otherwise indicated, computation of time shall be based on calendar days. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-22 Continuances or extensions of time. Where these rules specify a deadline upon which action must be taken, the board may, upon motion and the concurrence of a majority of all the members to which the board is entitled, extend the time specified if the delinquency

is shown to have been unavoidable and excusable. [Eff 6/11/2010]
(Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-23 Service of process. (a) The board shall serve all orders, notices, and other papers it issues, together with any other papers that it is required by law to serve. Such service shall be upon the party, the party's representative, or counsel. All other papers shall be served by the parties filing them. Any other papers filed with the board shall be served upon the board.

(b) Any counsel entering an appearance subsequent to the proceeding shall notify all other counsel presently of record and all parties not represented by counsel of that fact.

(c) Service of papers shall be made upon the party, the party's representative, or counsel personally or by registered or certified mail return receipt requested to the last known address.

(d) Service upon parties, other than the board, shall be regarded as complete by mail upon deposit in the United States mail, properly stamped and properly addressed to the parties involved. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-24 Intervention in proceeding. (a) In any proceeding other than representation proceedings, a petition to intervene and become a party thereto shall be submitted in writing to the board.

(b) The petition shall contain the following:

- (1) Nature of petitioner's statutory or other right;
- (2) Nature and extent of petitioner's interest;
- (3) Effect of any decision in the proceeding on petitioner's interest;
- (4) Other means available whereby petitioner's interest may be protected;
- (5) Extent petitioner's interest may be represented by existing parties;

(6) Extent petitioner's participation can assist in development of a sound record;

(7) Extent petitioner's participation will broaden the issue or delay the proceeding;

(8) Extent petitioner's interest in the proceeding differs from that of the general public; and

(9) How the petitioner's intervention would serve the public interest.

(c) The original and five copies of the petition with certificate of service on all parties, shall be filed with the board.

(d) Intervention shall not be granted except on averments which are reasonably pertinent to the issues already presented but do not unduly broaden them. If intervention is granted, the petitioner thereby becomes an intervenor and a party to the proceeding to the degree indicated by the order allowing intervention. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

SUBCHAPTER 3

RULES APPLICABLE TO RULE MAKING PROCEDURES

§8-62-25 Initiation of rule making proceedings. The board may, at any time on its own motion, initiate proceedings adopting, amending, or repealing any rule of the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-26 Filing of rules. The board, upon adopting, amending, or repealing a rule approved by the superintendent, shall maintain a copy of the approved rule(s) with the assistant superintendent. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-27 Effective date of rules. Each rule adopted, amended or repealed shall become effective ten days after approval by the board.

If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty days after the approval by the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-28 Availability of rules. The board shall, as soon as practicable, compile, index, print, or otherwise make available all rules adopted by the board and remaining in effect. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

SUBCHAPTER 4

RULES APPLICABLE TO DECLARATORY RULINGS

§8-62-29 Petitions for declaratory rulings. (a) On petition of an interested person or agency, the board may issue a declaratory order as to the applicability of any rule or order of the board. Questions concerning the interpretation of any of chapter 76, Hawaii Revised Statutes, may be submitted to the attorney general for review.

(b) The petition shall be prepared in a manner prescribed by the board. The original and five copies thereof shall be filed with the board. The petition shall conform to the requirements prescribed by board rules and shall contain the name, address, and telephone number of each petitioner; the signature of each petitioner; a designation of the specific rule or order in question, together with a statement of the controversy or uncertainty involved; a statement of the petitioner's interest in the subject matter, including the reasons for submitting a petition; a statement of the petitioner's position or contention; and a memorandum of authorities, containing a full discussion of reasons and legal authorities, in support of the position or contention.

(c) Within sixty days after the submission of a petition for declaratory ruling, the board shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order concerning the matters contained in the petition, or set the matter for hearing; provided that if the matter is set for hearing,

the board shall render its findings and decision within sixty days after the close of the hearing.

(d) The board may, without notice or hearing, dismiss a petition for declaratory ruling that fails in material respect to comply with the requirements of this section or for other reasons as determined by the board.

(e) Any party may intervene subject to the provisions of section 8-62-24 insofar as they are applicable. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-30 Request for hearing. In the usual course of the disposition of a petition for a declaratory ruling, no formal hearing will be granted to the petitioner or to a party. The board may, however, in its discretion, order a proceeding set for hearing. Any petitioner or party in interest requesting a hearing on a petition for a declaratory ruling shall set forth in detail the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memorandum of legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit or declaration establishing facts in accordance with these rules. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-31 Applicability of order. An order disposing of a petition shall apply only to the factual situation described in the petition of set forth in the order. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-32 Refusal to issue declaratory order. The board, for good cause, may deny a request for a declaratory order with specific reasons for its decision. The board may refuse for reasons including but not limited to the following:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts that can be expected to exist in the near future;

(2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;

(3) The issuance of the declaratory order may affect the interests of the board in litigation that is pending or may reasonably be expected to arise; or

(4) The matter is not within the jurisdiction of the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

SUBCHAPTER 5

RULES APPLICABLE TO APPEALS

§8-62-33 Standing to appeal. (a) Only persons who have exhausted the internal complaint procedures and whose appeal is not barred by other provisions of these rules shall have standing to file an appeal with the board.

(b) The board shall decide appeals from any action taken by the superintendent, the assistant superintendent, an appointing authority, or a designee acting on behalf of one of these individuals, relating to:

(1) Recruitment and examination for civil service positions, including non-selection or failure to complete the initial probationary period;

(2) Classification and reclassification of a civil service position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization;

(3) Initial pricing of a new class. A civil service incumbent of a position in a new class as of the effective date of the initial pricing action may file an appeal if the employee has suffered a legal wrong by that action; and

(4) Other employment actions, including disciplinary actions and adverse employment actions for failure to meet performance requirements, taken against civil service employees who are

excluded from collective bargaining coverage under section 89-6, Hawaii Revised Statutes.

(c) Any person alleging adverse action related to employment under subsection (b) (1) or aggrieved by such action shall be entitled to appeal to the board.

(d) Any employee covered by chapter 76, Hawaii Revised Statutes, alleging adverse action related to employment under subsection (b) (2) or (3) shall be entitled to appeal to the board.

(e) Employees covered by chapter 76, Hawaii Revised Statutes, who are excluded from collective bargaining, alleging adverse action related to employment under subsection (b) (4) shall be entitled to appeal to the board. Appeals under this section shall be filed within time limits and in the manner provided by the rules of the board. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-34 Filing of appeal. (a) Time. Any person who has standing to appeal shall file a petition of appeal to the board within twenty working days from the date of the written notice of the assistant superintendent, appointing authority, or designee. If a person files the petition by postal service, it must be postmarked by midnight on the twentieth working day of the filing period. The petition of appeal shall be filed with the merit appeals board at 1390 Miller Street, c/o Assistant Superintendent, Office of Human Resources, Queen Liliuokalani Building, Honolulu, Hawaii 96813, between the hours of 7:45 a.m. to 4:30 p.m. of each workday, excluding state holidays. The date notice of the action is sent shall be construed as:

(1) The date the assistant superintendent or appointing authority mails the notice to the person's last known address; or

(2) The date the notice is hand delivered or sent by facsimile to the person.

All petitions submitted to the board beyond the twenty working day period shall be deemed untimely and shall not be considered unless an extension is granted by the board on or before the twentieth working day.

(b) Form. The form of the petition of appeal shall conform to the requirements of the board for the filing of documents.

(c) Content. The petition of appeal shall contain the following information:

(1) The name and signature of each petitioner;

(2) The address and telephone number of each petitioner or the designated representative for a petition having four or more petitioners;

(3) A concise statement of relevant facts for each issue and a description of how these facts support the appeal specifying how and in what manner the particular rule, regulation, statute, or policy is claimed to have been violated by the superintendent, assistant superintendent, or appointing authority;

(4) A statement of the issues involved in the appeal and the remedy sought, including the rationale and the legal basis, as appropriate, for the remedy;

(5) Initial pricing appeals shall contain information provided in paragraphs (1), (2), (3), and (4), and be subject to the additional requirements:

(A) Initial pricing appeals shall be limited to a single class and be based on conditions existing at the time of the dated position description on which the new class and the initial pricing action was taken.

(B) All other materials intended to support the pricing appeal issues shall be submitted with the proper number of copies and within fourteen days after submission of the pricing appeal.

(C) Amended pricing appeals which are submitted within the period prescribed herein shall be effective as of the date of the original filing. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-35 Notice. All parties shall be given written notice of the hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing. If service by registered or certified mail is not made because of the refusal to accept service

or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §§76-14, 76-47)

§8-62-36 Appeal hearing. (a) The board shall, upon receipt of an appeal, order the matter set for hearing. In any appeal, all parties shall be afforded an opportunity for a hearing after reasonable notice. Opportunities shall be afforded all parties to present evidence and support their position on all issues involved. Any procedure may be modified or waived by stipulation of the parties and informal disposition may be made of any appeal by stipulation of the parties and informal disposition may be made of any appeal by stipulation, agreement, consent order, or default.

(b) The hearing shall be held at the time and place set forth in the notice of hearing, but may, at the time and place, be continued from day to day, to a later day, or to a different place without notice other than the announcement thereof by the presiding officer at the hearing.

(c) Appeals shall be heard before the board or its appointee.

(d) When a proceeding is conducted before the board itself, the proceeding shall be presided over the chairperson of the board, or, in the chairperson's absence, by another member designated by the board.

(e) The presiding officer at a proceeding shall have authority to control the course of the hearing; to hold conferences on which the parties have had notice, for settling or simplifying issues; to administer oaths and affirmations; to grant application for and issue subpoenas; to take or cause depositions to be taken; to rule upon offers of proof and receive relevant evidence; to limit lines of questioning or testimony that are irrelevant, immaterial or repetitious; to rule upon all objections, procedural requests and motions that do not involve the final determination of proceedings; to dispose of any other matter that normally and properly arises in the course of the proceeding; and to take all other actions authorized by chapter 76, Hawaii Revised Statutes, rules of the

board, or by any other statute, that are deemed necessary to the orderly and just conduct of the hearing.

(f) No member of the board, or its appointee who has any pecuniary interest in any matter or business involved in the proceeding; who is related within the second degree by blood or marriage to any party to the proceeding; who has participated in an investigation preceding the institution of the proceeding or in a determination that it should be instituted or in the development of the evidence to be introduced therein; or where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the person's impartiality shall be assigned to serve in any proceeding.

(g) The record of the hearing shall be compiled. The board shall make provisions for recording testimony, but need not transcribe the record unless requested for purposes of rehearing or court review. A copy of the record of a hearing or any part thereof may be obtained as provided under board rules.

(h) Subpoenas requiring the attendance of witnesses or the production of documentary evidence from within the State may be compelled at any designated place of a hearing as may be issued by the presiding officer, any designated member of the board, or its appointee. Application for subpoenas shall be made in writing to the board. The application shall specify the particular documents or data desired and shall show their relevancy to the issues involved. Applications shall be made at least ten days prior to the hearing. If the application is made at a later time, the board or its appointees may, in its discretion, issue subpoenas or continue the hearing or any part thereof or both. Enforcement of obedience to subpoenas issued and served pursuant to these rules shall be effected by written application of any member of the board to any circuit court judge.

(i) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State and the fees and mileage shall be paid by the party at whose instance the witnesses appear. Fees for the depositions shall be paid by the party at whose instance the depositions are taken. Witnesses shall be placed under oath or affirmation prior to testifying.

(j) At the commencement of the hearing, the presiding officer shall read the notice of hearing and shall then outline briefly the procedure to be followed.

(k) All parties shall be given reasonable opportunity to offer testimony with respect to the matters relevant to the proceeding. All

witnesses, before proceeding to testify, shall state their name, address, and whom they represent at the hearing and shall give such information respecting their appearance relevant to the proceedings as the presiding officer may request. The presiding officer shall confine the testimony to the matters for which the hearing has been called, but need not apply the technical rules of evidence except as required by statute. Each witness shall be subject to questioning by members of the board and its appointees. Each witness shall also be subject to cross-examination by the adverse party. Each party shall have the right to submit rebuttal evidence and rebuttal arguments.

(l) The presiding officer shall take notice of judicially recognizable facts and may take notice of generally recognizable technical or scientific facts within the board's or its appointee's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and are afforded the opportunity to contest those facts.

(m) At the hearing, the presiding officer may require the production of further evidence upon any issue.

(n) After all the evidence has been presented, the presiding officer shall give the parties an opportunity to summarize their respective positions. Within a reasonable time after such final arguments have been completed and all requested memoranda submitted, the presiding officer shall bring the matter to a close.

(o) The board or its appointee shall permit parties to file proposed findings and conclusions of law, together with the reasons thereof at the close of the hearing or within the time specified by the board or its appointee. The proposal shall be in writing and shall contain reference to the record and to the authorities relied upon. Copies thereof shall be furnished to all parties.

(p) Board action on appeals shall be as follows:

(1) For actions taken by the superintendent, assistant superintendent, or appointing authority based on failure to meet performance requirements, the board shall determine whether the conditions listed in section 76-41(b), Hawaii Revised Statutes, were met when determining whether or not the action is with or without merit.

(2) If reasons for the action by the superintendent, assistant superintendent or appointing authority are not substantiated in

any material respect, the board shall order that the employee be reinstated in the employee's position, without loss in pay.

(3) If the reasons are substantiated or are only partially substantiated, the board shall sustain the action of the superintendent, assistant superintendent, or appointing authority; provided that the board may modify the action of the superintendent, assistant superintendent, or appointing authority if it finds the circumstances of the case so require and may order the disposition of the case it deems just provided that the disposition is consistent with laws, rules, and policies.

(q) In conducting its business and rendering its decision, the board shall serve as an appellate body and shall not impinge on the authority of the superintendent in matters of policy, methodology, and administration. All decisions and orders of the board shall be made in accordance with personnel rules, policies, and practices.

Every decision and order adverse to a party to the proceeding, rendered by the board, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its decision a ruling upon each proposed finding presented. The findings and decisions of the board shall be final on all appeals, unless an appeal is taken to the circuit court pursuant to section 76-47, Hawaii Revised Statutes.

(r) In its actions on classification related appeals, the board shall not consider in its deliberation the classes in other jurisdictions or the classification of positions in other jurisdictions.

(s) The board shall, as soon as practicable and unless otherwise stipulated by the parties, not later than sixty days after the close of the hearing, notify the parties to the proceeding of the decision and order. Parties to the proceeding shall be notified in accordance with board rules.

(t) The charging party, in asserting an improper action or violation of the statute(s) or rule(s), shall have the burden of proving the allegations by a preponderance of the evidence.

(u) Unauthorized ex parte communications are defined as private communications or arguments with members of the board or the presiding officer as to the merits of a proceeding with a view

towards influencing the outcome of the case, except that the following ex parte communications shall not be prohibited:

(1) Those which relate solely to matters which a board member or the hearings officer is authorized by the board to dispose of on an ex parte basis;

(2) Requests for information with respect to the status of a proceeding;

(3) Those which all parties to the proceeding agree or which the board has formally ruled may be made on an ex parte basis;

(4) Those with representatives of any news media on matters of public information.

(v) If the appellant or the appellant's representative fails to appear before the board as scheduled and notified, the appeal shall be dismissed with prejudice, and the appellant shall not be permitted to request another hearing.

(w) The following additional requirements shall apply to the board and its functions relating to the receiving and processing of initial pricing appeals:

(1) After the hearing, the board shall review the facts presented, deliberate and render a decision which shall conform with the policies, standards, and guidelines governing initial pricing promulgated by the superintendent. The board shall not consider in its deliberations, the pricing of classes in other bargaining units.

(2) Decisions on initial pricing appeals shall be limited to the appropriate pay grade of the class and may not require a change in bargaining unit for full implementation.

(3) All decisions of the board resulting in a higher pay grade assignment shall be retroactive to the date of the initial pricing action of the superintendent.

(4) If the evidence submitted indicates significant changes have occurred in the work of the position, the board shall remand the case to the superintendent for a classification review.

(5) The person filing the appeal has the burden of proof.

(6) Substantial weight shall be given to the technical determination of the superintendent in pricing the new class.

(x) In its action on appeals filed under section 8-62-33(b) (1), (2), and (3), the board shall generally confine itself to the issue of whether legal requirements were met, rules were properly applied, and appropriate procedures were followed. In the event the board finds that these requirements were not met or appropriate procedures were not followed, the board shall remand the case to the superintendent and require that the process and action be redone in accordance with applicable requirements and procedures. [Eff 6/11/2010] (Auth: HRS §§302A-1112, 76-14, 76-47) (Imp: HRS §76-47)

§8-62-37 Enforcement of order. If any party fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit judge of the judicial circuit wherein such party resides or usually transacts business for the enforcement of the order and for appropriate temporary relief or restraining order, and shall certify the file in the court the record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which the order was entered, and the decision and order of the board. Upon such filing the board shall cause notice thereof to be served upon the party by mailing a copy to the party's last known post office address, and thereupon the judge shall have jurisdiction in the premises. [Eff 6/11/2010] (Auth: HRS §§76-47) (Imp: HRS §§76-47, 92-12)

§8-62-38 Judicial review of contested cases. Any person aggrieved by a final decision and order in a contested case before the merit appeals board is entitled to judicial review. Proceedings for review shall be instituted in the circuit court within thirty days after service of the certificated copy of the final decision is made upon the parties. [Eff 6/11/2010] (Auth: HRS §§76-47, 91-14) (Imp: HRS §§76-47, 91-14)