2011 WL 9158820 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

HOME & COMMUNITY SERVICES OF HAWAII, INC., a Hawaii Corporation,
Preferred Home & Community Based Services, Inc., a Hawaii Corporation, and
Aloha Habilitation Services, Inc., a Hawaii Corporation, Petitioners-Appellants.
and
HAWAII EMPLOYERS' MUTUAL INSURANCE COMPANY, INC., Intervenor-Appellee.

No. CAAP-10-0000197.
April 13, 2011.

Lirab No. AB 2008-521
Appeal from the: 1) Order Denying Motion for Stay, Filed On December 19, 2008
2) Decision and Order, Filed On August 12, 2010 3) Order Denying Motion for
Reconsideration, Filed On November 10, 2010 Labor and Industrial Relations Appeals Board

Petitioners-Appellants' Opening Brief Statement of Related Cases

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1** The Hawaii Supreme Court, in *Ras v. Hasegawa*, 53 Haw. 640, 500 P.2d 746 (1972), has expressly declared that the proper remedy for a compensation claimant to challenge the Director of the Department of Labor and Industrial Relations ("DLIR")'s orders and decisions **is *not* by filing an appeal with the circuit court** in accordance with Hawaii Revised Statutes ("HRS") § 91-14 (directing appeal of administrative decisions to the circuit court), ***but rather* "in the form of an appeal to [L]abor and [I]ndustrial [R]elations [A]ppeals [B]oard"** ("LIRAB") under HRS § 386-73 (directing appeals of the Director's decisions to LIRAB). 53 Haw. at 641, 500 P.2d at 747 (emphases added). The *Ras* Court rejected the claimant's attempt to circumvent HRS § 386-73 by relying upon HRS § 91-14 and affirmed the circuit court's dismissal of his appeal for lack of jurisdiction. *Id.* Ten years later, in 1982, the Hawaii Supreme Court reaffirmed the *Ras* holding in *Travelers Insurance Co. v. Hawaii Roofing, Inc.*, 64 Haw 380, 641 P.2d 1333 (1982), concluding that a workers' compensation carrier could not bring an action challenging the Director's decision in the circuit court, but instead was required to appeal to LIRAB. 64 Haw. at 387, 641 P.2d at 1338. The holdings in *Ras* and *Travelers Insurance* are wholly consistent with HRS chapters 91 and 386 statutory schemes, as discussed below, and Section 91-14's specific instruction that agency appeals must be brought in the circuit court ***unless a statute provides otherwise. HRS §§ 386-73, 386-87, and 386-88 indeed "provides otherwise" mandating that appeals of Director's rulings be filed with LIRAB, and then with the Hawaii Intermediate Court of Appeals ("ICA").

Consistent with this judicial precedent and statutory framework, the DLIR Director, in his ruling, specifically instructed Petitioners-Appellants Home & Community Services of Hawaii, Inc., Preferred Home & Community Based Services, Inc., and Aloha Habilitation Services, Inc. ("collectively, Appellants") to file their appeal with LIRAB. Unfortunately, LIRAB decided to ***2** deviate from this long-established precedent by erroneously dismissing Appellants' timely appeal on the very ground that the Court has already rejected, *i.e.*, that the circuit courts have jurisdiction over appeals of the Director's rulings under HRS § 91-14.

Accordingly, Appellants respectfully request that this Honorable Court vacate LIRAB's Decision and Order, dated August 12, 2010, improperly dismissing Appellants' timely appeal, and remand the matter to LIRAB for consideration on the merits.

I. STATEMENT OF THE CASE

Appellants contracted with the Hawaii State Department of Human Services ("DHS") to provide Medicaid Waiver Services to the **elderly** and disabled adults, delivered through their independent subcontractors ("Subcontractors"). Record on Appeal ("RA"), Docket No. 14 at 16-17. These Subcontractors own their own businesses, deliver their services at their places of business or out in the community, obtain their own insurance, pay their own taxes, hold General Excise Tax licenses, and contract with

multiple agencies, including Appellants and the State of Hawaii, to provide these specified waiver services. RA, Docket No. 25 at 4. Appellants received social service **payments** (authorized by DHS under the Social Security Act), which, in turn, were used to pay the Subcontractors. RA, Docket No. 14 at 17.

A. Prior to 2005, DLIR correctly interpreted the "domestic" exemption of HRS § 386-1 to exclude Appellants' Subcontracts from the term "employment".

The applicable "domestic" exemption of HRS § 386-1 (Supp. 2006) provided in relevant part that "'[e]mployment' does not include":

Domestic, which includes attendant care, and day care services authorized by [DHS] under the Social Security Act, as amended, performed by an individual in the employ of a **recipient of social service payments**[.]

(Emphases added.). Thus, individuals (such as Appellants' Subcontractors) rendering "domestic" services pursuant to the Social Security Act were exempted from "employment" ***3** under Hawaii's Workers' Compensation Law because they provided such services for (and were paid for such services by) the **recipients** of social service **payments** (such as Appellants). [1] RA, Docket No. 14 at 19; No. 25 at 5. In fact, in a September 16, 1991 DLIR Letter to SECOH (the "SECOH Letter"), the DLIR correctly concluded that the "domestic" exemption in HRS § 386-1 exempted SECOH's subcontractors from Hawaii Workers' Compensation Law:

[S]ervices performed by the "home care providers" who are "providers" in their private homes and are contracted through [DHS] and **your agency,** are excluded from the term "employment" as specified under Section 386-1, HRS, of the Workers' Compensation (WC) Law. Therefore, **your agency** is not required to provide WC insurance coverage for these "home care providers".

RA, Docket No. 14 at 19; No. 25 at 6; No. 17 at 13. At the time, SECOH was contracting to provide the very same services using independent subcontractors as Appellants provided through Subcontractors from 2004 to 2006. RA, Docket No. 14 at 19.

B. In 2005, the then-DLIR Director decided to erroneously alter the well-established and plain reading of the "domestic" exemption, leading to the passage of Act 259.

On February 17, 2005, Director Befitel issued a declaratory ruling in *In re Manawa Lea Health Services*, Inc. (the "Manawa Lea Decision") that failed to apply the "domestic" exemption. RA, Docket No. 25 at 7, 19-44. Director Befitel later (in a legislative hearing in 2007, discussed below) explained that he did not apply the "domestic" exemption because he thought it only applied to the "recipient of social service[s]" and not to the "recipient of social service payments". RA, Docket No. 14 at 20; No. 17 at 61. However, that inexplicable interpretation was legally incorrect and led to an absurd result giving the exemption to the disabled recipients of social services who cannot use the exemption because they do not have the capacity to hire the necessary caregivers or otherwise arrange for the needed services. Even ***4** though the Manawa Lea Decision was expressly limited to Manawa Lea and did not apply to Appellants, a dispute arose between Appellants and HEMIC (Appellants' workers' compensation insurer) over the application of the "domestic" exemption to Appellants' Subcontractors. See RA, Docket No. 14 at 14; No. 17 at 53, 56-57.

During litigation between the parties, the Legislature took up the issue in its 2007 session and unanimously passed Act 259 [2] which was signed into law by the then-Governor of the State of Hawaii, Linda Lingle, on July 6, 2007. RA, Docket No. 17 at 14-45; 2007 Haw. Sess. Laws Act 259 at 831-41. Act 259 clarified and reaffirmed the existing "domestic" exemption in HRS § 386-1. Further, in enacting Act 259, the Legislature further determined that the subcontractors of companies, such as Appellants,

were already independent contractors under the existing exemption in HRS § 386-1 prior to Act 259 and therefore retroactive application of Act 259 was unnecessary. Conf. Comm. Rep. No. 142, in 2007 Senate Journal; RA, Docket No. 17 at 47-49.

While your Committee on Conference did contemplate amending this measure to include its retroactive application, this is unnecessary since the existing exemptions under sections 386-1, 392-5, and 393-5, Hawaii Revised Statutes, already exclude individuals in the employ of the "recipient of social service payments" as the term is defined in this measure. Further, the Director of DLIR has previously testified that the decision in *In Re Manawa Lea* was limited to and only applied to *Manawa Lea.* Therefore, the decision does not create a precedent and it need not be addressed by this measure.

Id. at 48 (emphases added).

C. Appellants sought a declaratory ruling from the DLIR that their Subcontractors were not their employees in an attempt to resolve their dispute with HEMIC.

Although the 2007 Legislature has declared that retroactive application of Act 259 was "unnecessary" given that the pre-2007 Section 386-1 "already exclude [d]" Appellants' Subcontractors, Appellants petitioned the DLIR for a declaratory ruling on May 13, 2008 so as to ***5** resolve their dispute with HEMIC. RA, Docket No. 14. Appellants specifically sought a declaration that:

1. In the years 2004, 2005 and 2006, Appellants' Subcontractors who performed Medicaid Waiver Services were independent contractors and not employees of Appellants in the performance of those services; and

2. That in the years 2004, 2005 and 2006, Appellants' Subcontractors who performed Medicaid Waiver Services were excluded from "employment" under the then existing "domestic" exemption of HRS § 386-1 when they performed those services.

Id. at 9. On October 22, 2008, the DLIR Director issued his Declaratory Ruling, curiously maintaining the prior misinterpretation and misapplication of the "domestic" exemption, reasoning that "Act 259 has no relevance because it did not become law until 2007, was not retrospective, and cannot be used to contradict an interpretation of the domestic exception based on the enacting legislature's intent." RA, Docket No. 20 at 41. The Director concluded with an expressed instruction that:

APPEAL: This Declaratory Ruling may be appealed within twenty days by filing a written notice of appeal with [LIRAB] or the [DLIR] pursuant to [HRS §] 386-87 [, governing appeal of a decision of the director to LIRAB].

Id. at 52.

D. Pursuant to the Director's directive, Appellants appealed the Declaratory Ruling to LIRAB, only to be dismissed by LIRAB for lack of jurisdiction.

On November 10, 2008, Appellants followed the DLIR Director's instructions and filed their appeal with LIRAB. *Id.* at 53-54. Ten days after the filing of their appeal to LIRAB, Appellants sought a stay of the application of the Declaratory Ruling until a full and final determination has been made by LIRAB on the merits of Appellants' case. RA, Docket No. 21. Although recognizing that the parties will not suffer any prejudice if the Declaratory Ruling is stayed, LIRAB denied their request on December 19, 2008. RA, Docket No. 24 at 137-38.

***6** On April 12, 2010, LIRAB requested Appellants' explanation as to the reasons the appeal should not be dismissed on the bases that the appeal: (1) fails to present a justiciable controversy; (2) is not ripe; and (3) constitutes an advisory opinion. *Id.* at 162. In response, Appellants asserted that the appeal is ripe for determination because the Declaratory Ruling creates a real threat that the Subcontractors could proceed to enforce the ruling in an attempt to obtain Workers' Compensation benefits from

Appellants for injuries relating to their work in 2004, 2005, and 2006 and HRS § 386-87 permits Appellants to challenge the Director's ruling before LIRAB. RA, Docket No. 25. Appellants further explained that,

[i]f Appellants failed to pursue the present appeal and the ruling becomes final and binding upon Appellants, Appellants would be without a remedy should a claim for benefits be made... Therefore, to dismiss the appeal for lack of a justiciable controversy without disturbing the DLIR Director's October 22, 2008 would render LIRAB's decision contradictory and prejudicial to Appellants and contrary to the public policy of affording access to justice.

Id. at 13-14.

On August 12, 2010, LIRAB dismissed the appeal. *Id.* at 76-83. For the first time, LIRAB concluded that its jurisdiction "does not extend to determining the validity of a statute or agency rule" and that the "Hawaii Supreme Court has consistently recognized that circuit courts have jurisdiction, pursuant to HRS § 91-14, to review orders disposing of petitions for declaratory rulings". *Id.* at 81. LIRAB dismissed the appeal and did not transfer the matter to the circuit court, where it believed jurisdiction is appropriate. *Id.* at 83. On September 1, 2010, Appellants requested reconsideration of the dismissal because they had not previously been provided any warning or opportunity to respond to LIRAB's jurisdictional theory. *Id.* at 84-103.

In a November 10, 2010 order, LIRAB refused Appellants' request for reconsideration and declined to transfer the appeal to the circuit court. Id. at 104-05. Accordingly, on November 30, 2010, Appellants filed a Notice of Appeal with LIRAB appealing its orders to this Court. Id. ***7** at 106-07. Appellants also filed a Notice of Appeal in the circuit court (to preserve its rights in case LIRAB is correct that jurisdiction belongs with that court).

As indicated in HEMIC's Notice of Nonappearance, filed on December 22, 2010, "[i]n light of the settlement between Appellants and HEMIC and HEMIC's withdrawal from the proceeding [on or about January 20, 2009], HEMIC has no interest in the outcome of this appeal and does not intend to make an appearance in the matter". RA, Docket No. 10. Nevertheless, the potential for workers' compensation claims against Appellants remains because HRS § 386-82 permits claims within two years after the manifestation of the injury for up to five years after the date of the accident or occurrence which caused the injury.

II. STATEMENT OF THE POINTS OF ERROR

LIRAB erred in issuing the following orders:
1. The order denying Appellants' motion to stay the Director's October 22, 2008 Declaratory Ruling pending the appeal, entered on December 19, 2008, RA, Docket No. 21;

2. The decision and order, entered on August 12, 2010, dismissing Appellants' appeal from the Director's Declaratory Ruling on the basis that it has no jurisdiction to consider the appeal under HRS § 91-14, which - in its view - allegedly vested jurisdiction of an appeal of a declaratory ruling only upon the circuit court, RA, Docket No. 25 at 76-83; and

3. The order denying Appellants' motion for reconsideration, entered on November 10, 2010, in which LIRAB erroneously maintained its position that the appeal must be dismissed and declined to transfer it to the circuit court to preserve Appellants' timely appeal, *Id.* at 104-05.

III. STANDARD OF REVIEW

A. Administrative Agency Appeal from LIRAB

Appellate review of a LIRAB decision is governed by HRS § 91-14(g), which states that:

***8** 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 the statutory authority or jurisdiction of the agency; 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.

B. Subject Matter Jurisdiction

"Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo."* *Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle,* 124 Hawaii 197, 201, 239 P.3d 1, 5 (2010); *Int'l Bhd. of Painters & Allied Trades, Local Union 1944 v. Befitel,* 104 Hawaii 275, 281, 88 P.3d 647, 653 (2004) ("jurisdiction is concerned with whether the court has the power to hear a case"). When reviewing a case to determine jurisdiction, the "court retains jurisdiction, not on the merits, but for the purpose of correcting the error in jurisdiction". *Amantiad v. Odum,* 90 Hawaii 152, 159, 977 P.2d 160, 167 (1997).

C. Statutory Interpretation

The interpretation of a statute is a question of law reviewable *de novo. Sapp v. Wong,* 62 Haw. 34, 41, 609 P.2d 137, 142 (1980); *Gump v. Wal-Mart Stores, Inc.,* 93 Hawaii 417, 420, 5 P.3d 407, 410 (2000).

D. Motion to Stay

A denial of a motion to stay the Director's Declaratory Ruling pending the outcome of the appeal is reviewed for an **abuse** of discretion. *United States v. Peninsula Commc'ns, Inc.,* 287 F.3d 832, 838 (9th Cir. 2002).

***9 IV. DISCUSSION**

A. LIRAB blatantly ignored judicial precedent and incorrectly dismissed Appellants' timely appeal for lack of jurisdiction.

As mentioned above, the Hawaii Supreme Court in *Ras* and again in *Travelers Insurance* had interpreted HRS chapters 91 and 386 to conclude that the proper forum to challenge the Director's orders and decisions is "in the form of an appeal to [LIRAB]" under HRS § 386-73. *Ras,* 53 Haw. at 641, 500 P.2d at 747; *Travelers Insurance,* 64 Haw at 387, 641 P.2d at 1338.

Contrary to the Hawaii Supreme Court's expressed interpretation, LIRAB dismissed Appellants' appeal on the very basis that the Court has already refuted, *i.e.,* the determination of "the validity of a statute or agency rule" rests with the circuit court under HRS § 91-14. RA, Docket No. 25 at 81. LIRAB reasoned that:

Under HRS § 91-14, any person aggrieved by a final decision and order in a contested case or "a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief" is entitled to judicial review thereof in the circuit court "except as otherwise provided herein." Pursuant to HRS § 371-4, [LIRAB] has the power to decide appeals from decisions and orders of the Director "issued under the workers' compensation law and any other law for which an appeal to the board is provided by law." Under the workers' compensation law, after a hearing awarding or denying compensation, parties may appeal a decision by the Director to the [LIRAB] pursuant to HRS § 386-87... [Appellants'] attempted appeal was not from a contested case hearing held pursuant to HRS § 386-86, a prerequisite to subject matter jurisdiction by [LIRAB] pursuant to HRS § 386-87.

Id. at 81-82. To understand the *Ras* and *Travelers Insurance* Courts' conclusion and the flaws in LIRAB's above reasoning, Appellants begin with the statutory framework of Chapters 91 and 386, taking into consideration the well-established cannons of statutory construction that:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness ***10** of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Awakuni v. Awana, 115 Hawaii 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted).

1. Chapter 91

i. Chapter 91 is divided into two parts, i.e., the ruling-making procedure and the adjudicatory procedure.

The Hawaii's Administrative Procedure Act ("HAPA"), promulgated in HRS chapter 91, sets forth: (1) the "procedural requirement[s] in the adoption and promulgation of administrative codes or rules and regulations," *Turner v. Hawaii Paroling Auth.*, 93 Hawaii 298, 300 n.2, 1 P.3d 768, 770 n.2 (App. 2000); and (2) several means of seeking review of agency determinations, *Citizen Against Reckless Dev. v. Zoning Bd. of Appeals of the City & County of Honolulu*, 114 Hawaii 184, 197, 159 P.3d 143, 156 (2007). As the Hawaii Supreme Court succinctly stated:

> [T]he provisions contained in HRS chapter 91 can essentially be divided into two parts that authorize (1) the promulgation of rules and (2) the establishment of adjudicatory procedures. The ruling-making procedures provide for, *inter alia:* (1) the adoption of rules by agency, HRS § 91-3; (2) the filing and effectuating of rules, HRS § 91-4; and (3) the publication of rules, HRS § 91-5. The provisions governing the establishment of adjudicatory procedures provide for, *inter alia:* (1) **declaratory rulings by agencies, HRS § 91-8;** (2) contested case hearings, HRS § 91-9; and (3) judicial review of contested cases, HRS § 91-14.

Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 405, 146 P.3d 103, 120 (2006).

ii. The adjudicatory procedure of Chapter 91 is further divided to afford review of declaratory rulings and contested cases.

The adjudicatory procedure involves review of, *inter alia*, both declaratory rulings by agencies, HRS § 91-8, and contested case hearings, HRS § 91-9 and § 91-14. *See Sierra Club v. Hawaii Tourism Auth.*, 100 Hawaii 242, 264, 59 P.3d 877, 899 (2002) (explaining that HAPA "applies only to judicial review of contested case hearings, *see* HRS § 91-14, **or... a *11 declaratory order from an agency regarding the 'applicability of any statutory provision or of any rule or order of the agency,' HRS § 91-8"** (emphasis added)). More specifically and as it relates to the present appeal, Section 91-8 provides that:

> Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. *Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition.* Orders disposing of petitions in such cases shall have the same status *as other agency* orders.

(Emphases added.). The Hawaii Supreme Court has declared that,

> [b]y empowering agencies generally with the authority to adopt rules regarding the manner in which declaratory ruling petitions shall be considered and disposed of, the legislature has granted agencies discretion with regard to the consideration of declaratory rulings. The boundaries of that discretion, which normally are defined by the legislature, may in such cases be established with reference to the agency rules themselves, or by reading the statute and the agency rules in tandem.

Citizens Against Reckless Dev., 114 Hawaii at 194-95, 159 P.3d at 153-54 (citation omitted). In other words, even after the legislature expressed its intent to adopt the adjudicatory procedures of Chapter 91 for a particular statute, HRS § 91-8 authorizes and mandates that the governing agency establish rules for the proper submission and adjudication of petitions for declaratory rulings.

iii. Judicial review of declaratory rulings is governed by HRS § 91-14.

Moreover, to afford judicial review of declaratory rulings, HRS § 91-8 specifically provides that "[o]rders disposing of petitions in such cases shall have the *same status* as *other agency orders.*" (Emphases added.). Inasmuch as the phrase "other agency orders" is not defined anywhere in HAPA, this Court may resort to extrinsic aids in order to determine what the legislature intended by "other agency orders." *See Guth v. Freeland*, 96 Hawaii 147, 149-50, 28 P.3d 982, 984-85 (2001) ("When there is doubt, doubleness of meaning, or indistinctiveness ***12** or uncertainty of an expression used in a statute, an ambiguity exists... . In construing an ambiguous statute[,] the courts may resort to extrinsic aids in determining legislative intent.").

One avenue in construing an ambiguous statute is the use of legislative history as an interpretive tool. *Id.* Hawaii adopted HRS chapter 91 based on the Uniform Law Commissioners' Model State Administrative Procedure Act of 1961 (the "Model Act"). The Model Act contained the following provision on "Declaratory Rulings by Agencies":

> Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. *Rulings disposing of petitions have the same status as agency decision or other contested cases.*

Citizens Against Reckless Dev., 114 Hawaii at 199 n.18, 159 P.3d at 158 n.18 (emphases omitted) (citation omitted). The Hawaii Supreme Court has stated that, in adopting Chapter 91,

we presume that the Hawaii legislature was aware of the Model Act as well as all comments related thereto. Furthermore, there is clear evidence in the legislative history that the legislature carefully studied the Model Act before adopting it. *See* [Hse.] Stand. Com. Rep. No. 8, in 1961 House Journal, at 654 ("[Y]our Committee has examined and very carefully reviewed the first tentative draft of the revision of the Model... Act... and the comments made by the committee on the revision of said Model... Act. The basic structure for this bill in the amended form has been the Revised Model Act."). *The language chosen for HRS §*

91-8 is substantially similar to that of the Model Act, and the legislature stated that changes made were for stylistic reasons to conform with other parts of the bill, rather than for substantive alteration.

Id. at 198-99, 159 P.3d at 157-58 (emphasis added) (citations and parenthetical omitted) (brackets in original). Specifically, the legislature stated that "[t]he amendment to [Section 8, Declaratory Rulings by Agencies] changes the style of the language to conform to Section 6 of this bill". Hse. Stand. Com. Rep. No. 8, in 1961 House Journal, at 659. In other words, the legislature intended that the phrase "other agency orders" would permit review of petitions for declaratory relief in the same manner as "agency decision or other contested cases." As declared in *Lingle v. State Government Employees Ass'n,* 107 Hawaii 178, 111 P.3d 587 (2005):

***13** The legislature's statement that Section 8 of the Revised Model Act had been adopted confirms that use of the term "orders" rather than "rulings" or the use of the phrase "other agency orders" rather than "agency decisions or orders in contested cases" did not constitute a substantive change. As stated previously, in HAPA, **the only "other agency orders" are orders resolving contested cases. Hence, the reference to "other agency orders" in HRS § 91-8 is the equivalent of the Revised Model's Section 8 "agency decisions or orders in contested cases".** The legislature expressly stated that it was adopting the Revised Model Act Section 8 with stylistic amendments and, hence, any differences between these two sentences [were] not viewed as substantive.

107 Hawaii at 189-90, 111 P.3d at 598-99 (Acoba, J., concurring) (emphasis added).

Because the phrase "other agency orders" is equivalent to orders resolving contested cases and because judicial review of contested cases is governed by HRS § 91-14, orders disposing of petitions for declaratory rulings under HRS § 91-8 would likewise be appealable pursuant to HRS § 91-14, which provides in pertinent part that:

(a) *Any person aggrieved* by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief *is entitled to judicial review thereof under this chapter*[.]

(b) **Except as otherwise provided herein,** *proceedings for review shall be instituted in the circuit* court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, **except where a statute provides for a direct appeal to the [ICA], subject to chapter 602.**

(Emphases added.). Stated differently, *unless* Hawaii Workers' Compensation Law statute, HRS chapter 386, specifically requires an appeal of an agency decision or order be brought directly to the ICA, appeals of said decisions or orders fall within the circuit court jurisdiction under HRS § 91-14. This is consistent with the principle that "where there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter[, here, judicial review of agency orders], the specific will be favored." *Spirent Holding Corp. v. State, Dep't of Taxation,* 121 Hawaii 220,228, 216 P.3d 1243, 1251 (App. 2009) (internal quotation marks and citation omitted). An examination of Chapter 386, therefore, is now necessary.

***14 2. Chapter 386**

i. Chapter 386 specifically adopts the adjudicatory procedures of Chapter 91 and mandates appellate review of the agency orders and decision be brought directly to the ICA.

Similar to HRS chapters 368 (governing civil rights commission), 431 (insurance), and 432E (patients' bill of rights and responsibilities act) which adopted both the rule-making and the adjudicatory procedures of Chapter 91, HRS chapter 386 specifically announced its adoption of both procedures in HRS §§ 386-72 and 386-73. Section 386-72, entitled "Rulemaking powers", states that:

> In conformity with and subject to [C]hapter 91, the director of labor and industrial relations shall make rules, not inconsistent with this chapter, which the director deems necessary for or conducive to its proper application and enforcement.

HRS § 386-73, entitled "Original jurisdiction over controversies", states:

> Unless otherwise provided, the [DLIR Director] shall have **original jurisdiction** over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. **There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88,** but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders.

(Emphases added.). As HRS § 91-14 authorizes "a statute [to] provide[] for a direct appeal to the [ICA]", Section 386-73 does just that and "remove[s] the circuit court from the appellate process altogether with regard to proceedings brought under HRS [chapter] 386." *Ras*, 53 Haw. at 641, 500 P.2d at 747.

In Ras, the claimant filed an action in the circuit court seeking a preliminary injunction barring the enforcement of the Director's order. *Id.* at 640, 500 P.2d at 747. The circuit court dismissed the action on the ground that it lacked jurisdiction and the claimant thereafter appealed. *Id.* at 641, 500 P.2d at 747. On appeal, the claimant argued that HRS § 91-14 entitled ***15** him to a review by the circuit court of the Director's order. Id. The Hawaii Supreme Court, however, rejected claimant's attempt to circumvent the directives of HRS chapter 386 by relying upon HRS § 91-14 and held that:

> Although the [DLIR], including its direction and appellate board, is an 'agency' within the meaning of HRS § 91-1(1), HRS § 386-73 and HRS § 386-88 [(which provides finality and conclusiveness of the LIRAB's order unless appeal to the ICA)] supersede HRS § 91-14 and removes the circuit court from the appellate process altogether with regard to proceedings brought under HRS ch [apter] 386. Thus, the [claimant] cannot rely upon the recourse which HRS § 91-14 would otherwise afford.

Id. The *Ras* Court further observed that "[i]njunctive relief should not serve to circumvent the pursuit of a timely and statutorily mandated remedy by way of appeal." *Id.* (citation omitted). The Court, thus, affirmed the circuit court's dismissal for lack of jurisdiction on the grounds that claimant's "proper remedy lay in the form of an appeal to [LIRAB]". *Id.*

Ten years later, the Hawaii Supreme Court reaffirmed the *Ras* holding in *Travelers Insurance* when a workers' compensation carrier-appellee attempted to bring an original action to block enforcement of a Director's order in the circuit court. 64 Haw. at 383, 641 P.2d at 1335. The action proceeded in the circuit court with the appellee prevailing on summary judgment. Id. at 383, 641 P.2d at 1336. On appeal, the Court observed that the language of HRS § 386-73 "would preclude original court action to settle controversies involving workers' compensation law" and "relegates the circuit court to a secondary role where workers' compensation is concerned - the enforcement of the Director's decisions." *Id.* at 384, 641 P.2d at 1336. The Court rejected the appellee's contention that circuit courts have "exclusive original jurisdiction over all matters which are incidental and collateral to a worker's compensation claimant's entitlement to compensation". *Id.* The Court agreed with *Ras* that "the legislature has removed the circuit court from the adjudicative process in workers' compensation". *Id.* In concluding ***16** that the remedy for the appellee "lies in appeals from the Director's orders to [LIRAB]", the Court vacated the circuit court's summary judgment in the appellee's favor and remanded with instructions to dismiss the action. *Id.* at 387, 641 P.2d at 1338.

In other words, given HRS § 91-14's explicit instruction to comply with those statutes containing specific direct appeals to the ICA, it must necessarily give way to HRS § 386-73, which provides for a review of an agency decision/order relating to

Chapter 386 first with "the appellate board and thence [with] the intermediate appellate court", as specifically expressed in *Ras* and *Travelers Insurance*. This is further consistent with the principle that courts "favor the specific statute over the general procedural rule in the event of a plainly irreconcilable conflict". *Bank of Hawaii v.Shinn*, 118 Hawaii 132, 185 P.3d 880 (App. 2008).

ii. A declaratory ruling, possessing the "same status as other agency orders", must comply with the review procedure under HRS §386-73, as opposed to HRS § 91-14.

Simply because this action involved a declaratory ruling does not somehow alter the application of the above analysis. As previously quoted, HRS § 91-8 is designed to provide a means for securing from an agency its interpretation of relevant statute and orders and mandates
[e]ach agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

(Emphasis added.).

In this case, the DLIR specifically implemented HAR § 12-1-5 to "prescribe [] the form of the petitions and the procedure for their submission, consideration, and prompt disposition". HRS § 91-8. Section 12-1-5 provides in pertinent part that:
(a) On petition of an interested person or agency, the director may issue a declaratory order as to the applicability of any statutory provision, administrative rule, or order of the director...

***17** (b) Upon receipt of the petition, the director may require the petitioner to file additional data or memoranda in support of the position taken by the petitioner.

(c) The director, without notice or hearing, may dismiss a petition for declaratory ruling for want of a substantial question or for material failure to comply with the requirements of this section, and the petitioner will be so notified in writing.

(d) Although no hearing need be granted to the petitioner or to any interested person in the usual course of disposition of a petition for a declaratory ruling, the director may order a hearing upon written request of the petitioner stating in detail why a hearing is necessary for a fair consideration of the petition.

(e) Notwithstanding any other provisions of this section, the director may issue a declaratory order to terminate a controversy or to remove uncertainty.

Absent from the DLIR's administrative rules is any mention of the review process of the Director's declaratory rulings or rulings dismissing the petition for a declaratory order. This is so because HRS § 91-8 expressly requires that the Director's orders disposing of petitions for declaratory rulings "have the same status as other agency orders." HRS § 91-8. Consequently, orders disposing of petitions for declaratory rulings under HRS § 91-8 are appealable pursuant to HRS § 91-14. However, HRS § 386-73 supersedes HRS § 91-14 and "remove[s] the circuit court from the appellate process altogether with regard to proceedings brought under HRS [chapter] 386." *Ras*, 53 Haw. at 641, 500 P.2d at 747. Thus, a declaratory ruling - having the same status as other agency orders - must comply with the review process of HRS § 386-73. *Travelers Ins.*, 64 Haw at 387, 641 P.2d at 1338 ("[a] statute which provides for a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise or by a different person or tribunal") (internal quotation marks and citation omitted).

iii. HRS § 386-73 and § 386-88, which supersede HRS § 91-14, confer jurisdiction of an appeal of a declaratory ruling to LIRAB and a secondary appeal to the ICA.

As quoted above, HRS § 386-73 states in pertinent part that:

> Unless otherwise provided, the [DLIR Director] shall have original jurisdiction over all controversies and disputes arising under this chapter... *There shall be a* ***18** *right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88[.]*

(Emphasis added.). In turn, HRS § 386-87, entitled "Appeals to appellate board", provides in relevant part:

> (a) A decision of the director shall be final and conclusive between the parties unless within twenty days after a copy has been sent to each party, either party appeals therefrom to the appellate board by filing a written notice of appeal with the appellate board or the department.

(Emphases added.). HRS § 386-88 further provides that

> The decision or order of [LIRAB] shall be final and conclusive... unless within thirty days after mailing of a certified copy of the decision or order, the director or any other party appeals to the intermediate appellate court, subject to chapter 602, by filing a written notice of appeal with the appellate board.

(Emphases added.).

By the plain and unambiguous reading of HRS §§ 386-73, 386-87, and 386-88, a Director's declaratory ruling shall be "final and conclusive" unless appeals are made to LIRAB pursuant to HRS § 386-87. LIRAB's decision, in turn, shall be "final and conclusive" unless challenged in the "intermediate appellate court, subject to chapter 602", HRS § 386-88. It should be observed that, just because HRS § 91-14 directs compliance with a statute that affords direct appeal of an agency decision to the ICA, it does not mean that an appeal of a Director's ruling can circumvent LIRAB and proceed directly to the ICA. DLIR, "including its director and appellate board[, i.e., LIRAB], is an 'agency' within the meaning of HRS § 91-1(1)." Ras, 53 Haw. at 641, 500 P.2d at 747. Thus, a party would be required to exhaust his or her administrative remedies before seeking judicial relief, that is, appeal to LIRAB must be taken prior to judicial review before the ICA. *See Dist. Council 50 of the Int'l Union of Painters & Allied Trades v. Saito*, 121 Hawaii 182, 187, 216 P.3d 108, 113 (App. 2009) ("The doctrine of ***19** exhaustion of remedies in the field of administrative law holds that where a remedy is available from an administrative agency, that remedy must be exhausted before the courts will act to afford relief."). Indeed, the Ras and Travelers Insurance Courts required appeal of the Director's order to be taken first with LIRAB, see *supra.*

3. Jurisdiction to review the Director's October 22, 2008 Declaratory Ruling lies with LIRAB and not with the circuit court.

The procedural history is clear that, on May 13, 2008, Appellants petitioned the DLIR for a declaratory ruling, pursuant to HRS § 91-8, on the interpretation of one of its statute, *i.e.*, HRS § 386-1, and the application of said statute to Appellants' circumstances. The Director, possessing "original jurisdiction over all controversies and disputes arising under [Chapter 386]", HRS § 386-73, issued his ruling on October 22, 2008 and correctly instructed Appellants that an appeal of his ruling must be made in accordance with HRS § 386-87, *i.e.*, appeal to LIRAB.

Based upon the above discussion and given that a declaratory ruling under HRS § 91-8 is afforded the same status as those rulings made by the Director, and further given that HRS § 91-14 specifically relegates its judicial review authority over to those statutes containing specific appeals procedure to the ICA - here, HRS § 386-73 and § 386-88, Appellants must comply with that specified statute in appealing the Declaratory Ruling. In other words, Appellants were mandated to file their appeal of the Declaratory Ruling - first with LIRAB, and then with the ICA.

It is, therefore, disingenuous for LIRAB to hold that its "jurisdiction to hear appeals does not extend to determining the validity of a statute or agency rule" when, in fact, LIRAB recognizes that it "has the power to decide appeals from decisions and orders of the Director issued under the workers' compensation law". RA, Docket No. 25 at 81 (internal quotation marks omitted). The legislature has already declared that a Director's declaratory ruling must be ***20** afforded the same treatment as those rulings made by the Director under HRS chapter 386. HRS § 91-8. By the same token, it is disingenuous for LIRAB to conclude that, because Appellants' appeal of the Declaratory Ruling was not from a contested case hearing, LIRAB did not have jurisdiction over said appeal. RA, Docket No. 25 at 81-82.

To hold as LIRAB contended that appellate review of a DLIR Director's declaratory ruling lies with the circuit court in accordance with HRS § 91-14 would violate the cardinal rule of statutory construction that courts and agencies "are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute," *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) (citations omitted), and undermine the legislature's manifest intent that the appellate procedures of a relevant statute must be followed if that statute affords for direct appeal to the ICA. See HRS § 91-14. HRS § 386-88 expressly provides for a direct appeal to the ICA. LIRAB's decision to rely on one part of HRS § 91-14 (conferring jurisdiction upon the circuit court) and ignore the other portion (conferring jurisdiction upon the ICA when so stated in the statute) renders the phrase "except where a statute provides for a direct appeal to the intermediate appellate court", contained in HRS § 91-14, superfluous, void, and insignificant. *See State v. Haugen*, 104 Hawaii 71, 75, 85 P.3d 178, 182 (2004) ("[a] cardinal canon of statutory construction is that this court cannot change the language of statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts") (internal quotation marks and citations omitted).

Moreover, LIRAB's decision to dismiss the instant appeal for lack of jurisdiction was further misguided by its reliance on three Hawaii cases for the proposition that the circuit courts ***21** have jurisdiction, pursuant to HRS § 91-14, to review orders disposing of petitions for declaratory rulings. *See*, RA, Docket No. 25 at 82. The three cases are inapposite because they involved different statutes with different procedural frameworks. *See Vail v. Employees' Ret. Sys. of the State of Hawaii*, 75 Haw. 42, 856 P.2d 1227 (1993) (HRS chapter 88 and its administrative rules afford the Board of Trustees of the Employee's Retirement System the authority to issue declaratory rulings and specifically require the right of appeal to be with the circuit courts, HAR § 6-20-22); *Fasi v. State of Hawaii Pub. Employment Relations Bd.*, 60 Haw. 436, 591 P.2d 113 (1979) (HRS chapter 89 and its administrative rules allow declaratory rulings by the Hawaii Public Employment Relations Board and appeal of such ruling to the circuit court, HAR § 12-42-9); *Lingle v. State Gov't Employees Ass'n*, 107 Hawaii 178, 111 P.3d 587 (2005) (same). *But see Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.*, 121 Hawaii 16, 211 P.3d 74 (2009) (petitioners appealed the director of the department of planning and permitting's declaratory ruling to the Zoning Board of Appeals before seeking redress with the circuit court). None of these cases involved HRS chapter 386 nor any statutes similar to HRS §§ 386-87 and -88. In fact, cases that pertained to Chapter 386 statutory scheme - as demonstrated in *Ras* and *Travelers Insurance* - specifically required any challenge of the Director's decisions and orders be made with LIRAB under that chapter adjudicatory procedure, not with the circuit court under HRS § 91-14.

4. Assuming that LIRAB lacks jurisdiction over the appeal, it nevertheless erred in refusing to transfer the timely appeal to the circuit court.

"The right of appeal is a right that exists by law, established by judicial precedent and by statute, and the [party] cannot be deprived of it except by statute". *Republic of Hawaii v. Ah Cheon*, 10 Haw. 469, 1896 WL 1671, *3 (1896). Hawaii courts have

adopted the principle of statutory construction that "[s]tatutes governing appeals are liberally construed to uphold the ***22** right of appeal". *Credit Assocs. of Maui, Ltd. v. Montilliano,* 51 Haw. 325, 329, 460 P.2d 762, 765 (1969); *Ariyoshi v. Hawaii Pub. Employment Relations Bd.,* 5 Haw. App. 533, 538, 704 P.2d 917, 923 (1985) (stating that "in this jurisdiction, there is a policy favoring judicial review of administrative decisions"). The policy "has always been to permit litigants, where possible, to appeal". *Jordan v. Hamada,* 62 Haw. 444, 451, 616 P.2d 1368, 1373 (1980). The Hawaii Supreme Court has long-cautioned that courts, as well as agencies, should so act as

> not to deprive parties by [their] own act or permit them to be deprived by the act of an opponent of a right of appeal secured to them by congressional legislation.

William W. Bierce, Ltd. v. Waterhouse, 19 Haw. 594, 1909 WL 1425, *2 (1909).

Although LIRAB concluded that it lacked jurisdiction over the appeal, it acknowledged Appellants' right of appeal - albeit, with the circuit court. Thus, LIRAB's outright dismissal of the appeal deprives Appellants of their entitled right to appeal where Chapters 386 and 91 specifically confer upon them such right. This is particularly troublesome here where Appellants were specifically instructed by the Director to appeal to LIRAB. In fact, courts have recognized and upheld a party's entitled right to nevertheless appeal when he has mistakenly asserted his right in the wrong forum based upon the act or omission of the courts/agencies themselves via the doctrine of equitable tolling. *See Knight v. Schofield,* 292 F.3d 709, 712 (11th Cir. 2002) (granting equitable tolling where petitioner was misled by the court clerk); *Armstrong v. Martin Marietta Corp.,* 138 F.3d 1374, 1393 (11th Cir. 1998) (applying equitable tolling when the EEOC misinformed appellants on statute of limitations); *Sanders v. Veneman,* 131 F. Supp. 2d 225, 230 (D.D.C. 2001) (equitable tolling warranted because plaintiff justifiably relied on agency misrepresentations); *Copeland v. Desert Inn Hotel,* 673 P.2d 490, 492 (Nev. 1983) (allowing equitable tolling because claimant was misled by the Nevada Equal Rights Commission).

***23** In light of LIRAB's conclusion that Appellants' appeal rests with the circuit court under HRS § 91-14 and given the long-standing caution to "act as not to deprive parties by [the court's or agency's] own act... of a right of appeal", *William W. Bierce, Ltd.,* 19 Haw. 594, 1909 WL 1425, *2, LIRAB should have either transferred the appeal or allow Appellants' time to appeal to the circuit court so as to preserve their timely appeal. *See, e.g., Jou v. Hamada,* 120 Hawaii 101, 113-14, 201 P.3d 614, 626-27 (2009) (declaring invalid HAR § 12-15-94(d) prohibiting any appeal of a DLIR director's decision on billing dispute to LIRAB as contrary to the right of appeal under Chapter 386 and, as a result, allowing the appellant additional time to file its appeal with LIRAB); *League of Women Voters of California v. Fed. Commc'n Comm'n,* 751 F.2d 986, 990 n.1 (9th Cir. 1985) ("a litigant who appeals to the wrong forum because of legitimate confusion... need not be precluded from review [as] the [court] may... transfer the appeal to the proper forum"). Dismissal of Appellants' appeal would result in unfairness because they would be prevented from asserting their entitled right of appeal now in the circuit court.

B. LIRAB did not dismiss the appeal based upon justiciable controversy, ripeness, and advisory opinion because they were inapplicable to the present matter.

LIRAB initially believed that this appeal should not be retained for adjudication on the merits on the grounds that: (1) there is no justiciable controversy; (2) any such case is not ripe for determination; and (3) a letter responding to a request for an advisory opinion is not an appealable order under HRS § 386-87. Nevertheless, LIRAB must have believed otherwise inasmuch as it ultimately dismissed Appellants' appeal on the lack of LIRAB's jurisdiction to consider a Director's Declaratory Ruling - albeit, an erroneous basis. Appellants, therefore, contend that the above grounds would not have supported a basis for dismissal.

1. Appellants have presented a justiciable controversy.

It is well-recognized that judicial or administrative agency's intervention in a dispute is ***24** normally contingent upon the presence of a "justiciable controversy". *Life of the Land v. Land Use Comm'n,* 63 Haw. 166, 171-72, 623 P.2d 431, 438 (1981).

A justiciable case or controversy is one which presents issues "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1967).

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.

Id. (footnotes omitted). Likewise, justiciable controversy is unfounded where the parties do not have standing to assert their action. *But see Sierra Club v. Dep't of Transp.*, 115 Hawaii 299, 312, 167 P.3d 292, 319 (2007) ("standing requirements should not be barriers to justice"; "one whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such party should have a chance to show that the action that hurts his interest is illegal") (internal quotation marks and citations omitted).

Of further relevance,

> [d]eclaratory relief is not available unless there is a real dispute between parties, involving justiciable questions relating to their rights and obligations. The fundamental basis of declaratory relief is an actual, present controversy. An actual controversy is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do.

Taxpayers for Improving Pub. Safety v. Schwarzenegger, 91 Cal. Rptr. 3d 370 383 (Cal. Ct. App. 2009) (internal quotation marks, citations and original brackets omitted). In Hawaii, HRS chapter 632 (governing declaratory judgments) interposes less stringent requirements for access and participation in the court and/or administrative agency process:

> ***25** Although HRS § 632-1 provides for standing to sue in cases of actual controversy, HRS § 632-6 (1993) clarifies that the purpose of HRS chapter 632 is to afford relief without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefore. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

Mottl v. Miyahira, 95 Hawaii 381, 389, 23 P.3d 716, 724 (2001) (citation omitted).

Preliminarily, it should be observed that the DLIR Director must have implicitly concluded that an actual justiciable controversy existed for him to proceed with the issuance of a declaratory ruling, albeit, adversely against Appellants. HRS § 386-73 endows the DLIR Director with original jurisdiction over all controversies and disputes arising under HRS chapter 386, such as the present issue whether the subcontractors fall within the definition of employment to be entitled to Workers' Compensation benefits. HRS § 386-73 (the Director "shall have original jurisdiction over all controversies and disputes arising under this chapter"); HRS § 386-73.5 (the Director "shall have original jurisdiction over all controversies and disputes over employment and coverage under this chapter"). Pursuant to the statutory authority vested in the DLIR Director, the Director - rather than dismissing Appellants' petition for declaratory ruling on any of the grounds now contemplated by LIRAB - proceeded to determine the issue as it pertained to the applicability of the Workers' Compensation Law upon Appellants' Subcontractors during the years 2004, 2005, and 2006. Thus, for LIRAB to now dismiss Appellants' appeal grounded upon the lack of justiciable controversy and allow the Declaratory Ruling to stand would be contradictory and, in essence, place Appellants "between a

rock and a hard place", foreclosing Appellants' right to appeal the adverse Declaratory Ruling, as specifically afforded to them in that ruling.

Nevertheless, a justiciable controversy is presented here in this appeal. On October 22, 2008, the Director issued a declaratory ruling requiring Appellants to afford Workers' ***26** Compensation benefits to their subcontractors who performed Medicaid Waiver Services in the years 2004, 2005, and 2006. Thus, even if there are no claims for benefits by the Subcontractors, the justiciable controversy at issue is that the Declaratory Ruling currently mandates Appellants to provide benefits under HRS chapter 386 to their Subcontractors during the above timeframe.

Moreover, even the fear that a claim for benefits by the Subcontractors is sufficient to establish a justiciable controversy. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (in pre-enforcement suits, plaintiffs satisfy their burden of alleging an injury-in-fact when they "allege [] an actual and well-founded fear that the law will be enforced against them"). A party need not wait for an injury to occur to commence an action so long as some actual injury is imminent. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Indeed, the Director specifically required that:

> This Declaratory Ruling may be appealed **within twenty days** by filing a written notice of appeal with [LIRAB] or the [DLIR] pursuant to section 386-87, [HRS].

RA, Docket No. 20 at 52 (emphasis added). The above right to appeal is derived from HRS § 386-73, which provides in relevant part that:

There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders.

(Emphasis added.) Further, HRS § 386-87 expressly states that "[a] decision of the director **shall be final and conclusive** between the parties... unless **within twenty days** after a copy has been sent to each party, either party appeals therefrom to the appellate board[.]" (Emphases added.)

If Appellants failed to pursue the present appeal and the ruling becomes final and binding upon Appellants, Appellants would be without a remedy should a claim for benefits be made. *See, e.g., Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & County of* ***27** *Honolulu*, 114 Hawaii 184, 196, 159 P.3d 143, 155 (2007) (holding that the association cannot use declaratory ruling procedure to challenge issuance of a conditional use permit when it did not appeal such issuance within the time provided by the city land use ordinance). Therefore, to dismiss the appeal for lack of a justiciable controversy without disturbing the Declaratory Ruling would render LIRAB's decision contradictory, prejudicial to Appellants, and contrary to the public policy of affording access to justice.

Accordingly, Appellants were required to file an appeal because the Declaratory Ruling requires them to provide Workers' Compensation benefits for Subcontractors who were exempt under the "domestic" exemption of HRS § 386-1. There is a legitimate fear that claims for benefits will be made by these Subcontractors and the failure to appeal the ruling within twenty days would render the declaratory ruling "final and conclusive" upon Appellants.

2. The appeal is ripe for determination.

It is axiomatic that ripeness is an issue of subject matter jurisdiction. *Kapuwai v. City & County of Honolulu, Dep't of Parks & Recreation*, 121 Hawaii 33, 39, 211 P.3d 750, 756 (2009).

> Because ripeness is peculiarly a question of timing, the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention. The

> ripeness inquiry has two prongs: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The fitness element requires that the issue be primarily legal, need no further factual development, and involve a final agency action. To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible **financial** loss.

Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Hawaii, 121 Hawaii 324, 336, 219 P.3d 1111, 1123 (2009) (citation and italicized omitted) (format altered).

With respect to the first prong of the test, Appellants must show that the issue regarding the interpretation of the "domestic" exemption and "employment" in the context of individuals ***28** subcontracted to provide Medicaid Waiver Services is fit for a decision from LIRAB because the issue "primarily legal, need[s] no further factual development." *Id.; see also Rice v. Cayetano*, 941 F. Supp. 1529, 1538 (D. Haw. 1996). Here, the issue is fit for resolution because Appellants are seeking a determination whether the Director correctly concluded that their Subcontractors, who performed Medicaid Waiver Services in the years 2004, 2005, and 2006, were not excluded from employment under the "domestic" exception of HRS § 386-1. There is no doubt that the issue primarily involves a legal question with no need for further factual development.

With respect to the second prong of the ripeness test, i.e., the hardship requirement, Appellants must show "that withholding judicial review would result in direct and immediate hardship and would entail more than possible **financial** loss". *Office of Hawaiian Affairs*, 121 Hawaii at 336, 219 P.3d at 1123; *Rice*, 941 F. Supp. at 1538. As discussed above, the Declaratory Ruling unfairly imposes Workers' Compensation obligations on Appellants for persons who are not Appellants' employees. There also is a real threat that Appellants' Subcontractors could seek Workers' Compensation benefits from Appellants for injuries relating to their employment in 2004, 2005, and 2006. Further, were LIRAB to determine that Appellant's appeal is not ripe, Appellants may be left without a remedy inasmuch as Appellants are required by HRS §§ 386-73 and 386-73.5 to appeal the DLIR Director's ruling to LIRAB.

3. The Declaratory Ruling is not an advisory opinion.

As previously quoted, HRS § 386-87(a) provides in pertinent part that:

> A decision of the director shall be final and conclusive between the parties, except as provided in section 386-89, unless... either party appeals therefrom to the appellate board by filing a written notice of appeal with the appellate board[.]

On May 13, 2008, Appellants filed with the Director their "Petition for a Declaratory Ruling", pursuant to HRS §§ 386-1 and 386-73.5, and HAR § 12-1-5. On October 22, 2008, the ***29** Director issued his Declaratory Ruling, specifically asserting that such ruling was triggered by Appellants' "petition". At the conclusion of the ruling, the Director specifically informed Appellants of their right to appeal to LIRAB under HRS § 386-87. Accordingly, the Director's ruling is not an advisory opinion for which an appeal cannot be taken under HRS § 386-87.

C. LIRAB erred in failing to stay the Director's Declaratory Ruling pending its review of Appellants' appeal on the merits.

"[T]he rule and the inherent discretion and power of the trial court allow for flexibility in the determination of the nature and extent of the security required to stay the execution of the judgment pending appeal." *Shanghai Inv. Co. v. Alteka Co.*, 92 Hawaii 482, 503, 993 P.2d 516, 537 (2000), *overruled on other grounds by Blair v. Ing*, 96 Hawaii 327, 31 P.3d 184 (2001). A stay of a judgment or ruling pending appeal, therefore, is a discretionary decision, taking into account four factors, to wit:

"(1) whether the stay applicant has made a strong showing that he is likely to success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Marisco, Ltd. V. F/V Madee*, 631 F. Supp. 2d 1320, 1325 (D. Haw. 2009) (citation omitted).

1. Appellants are likely to prevail on their appeal of the Director's Ruling.

The Declaratory Ruling should have been stayed given that the Director's conclusions regarding the applicability of the "domestic" exemption to Appellants' Subcontractors are incorrect and would have been reversed if LIRAB had considered their appeal on the merits.

As previously quoted, the pre-Act 259 "domestic" exemption of HRS § 386-1 stated in relevant part that "[e]mployment' does not include":
Domestic, which includes attendant care, and day care services authorized by the [DHS] under the Social Security Act, as amended, performed by an individual in the employ of a **recipient of social service *payments***[.]

***30** (Emphases added.). By its plain reading, the "domestic" exemption dictated that Hawaii Workers' Compensation Law (HRS chapter 386) did not apply to the provision of the Medicaid Waiver Services performed by persons working for a "recipient of social service payments [*e.g.*, Appellants]". *Id* Appellants were the "recipient[s]" "of social service payments" under the terms of the Medicaid Waiver program and under the terms of DHS contracts. Appellants employed Subcontractors to provide "attendant care, and day care services authorized by DHS under the Social Security Act." RA at Docket Nos. 14 at 16-17; 21 at 7; 24 at 80 & 84; 25 at 87. Therefore, under HRS § 386-1, Appellant's Subcontractors providing "domestic" services pursuant to their employment with the "recipients of social service payments" were excluded from the definition of "employment".

This is the correct interpretation and application of the statute for the following reasons:
First, under a plain reading of HRS §§ 386-1 and 386-73.5, the phrase "recipient of social service *payments"* is not limited to the participants who received the Medicaid Waiver Services. *Schmidt v. Bd. of Dirs. of Ass'n of Apartment Owners of Marco*, 73 Haw. 526, 836 P.2d 479 (1992) ("where the statutory language is plain and unambiguous, our sole duty is to give effect to its **plain and obvious meaning"**) (emphasis added). The plain and unambiguous language of the "domestic" exemption states "recipient of social service ***payments"*** rather than simply "recipient of social service's]". HRS § 386-1 (emphases added). It is significant that the "domestic" exemption did not state "recipient of social service[s]. Rather, it referred to the "recipient" of the ***"social service payments".*** (Emphases added.) Clearly, **"social service[s]** and "social service payments" are two different things. *See Barabin v. AIG Hawaii Ins. Co.*, 82 Hawaii 258, 263, 921 P.2d 732, 737 (1996) (ambiguity exists "only when [the statutory language] is reasonably subject to differing interpretation"). The recipient receives ***"social*** ***31** ***service payments",*** i.e., the person providing the social services for payments, as opposed to the recipient receives "social service", i.e., the person receiving the attendant care and day care services for medical reasons.

It is disingenuous of the Director to claim that the "recipient of social service payments" language is not plain and obvious given that he caused that "confusion and disparity" by issuing the *Manawa Lea* Decision. RA, Docket No. 25 at 19-44. Not only was the *Manawa Lea* Decision incorrect because it failed to apply the plain and obvious meaning of HRS § 386-1, it was inconsistent with all prior Director's correct statutory application and it was expressly limited to *Manawa Lea.* Thus, confusion and disputes arose when insurance companies and others (*e.g.*, DHS) attempted to apply the incorrect and expressly inapplicable Manawa Lea Decision to persons other than *Manawa Lea.* The Director cannot create an ambiguity with his erroneous Manawa Lea Decision in order to read the "domestic" exemption in a manner inconsistent with its plain and obvious meaning. *First Ins. Co. of Hawaii, Inc. v. State ex rel. Minami*, 66 Haw. 413, 423-24, 665 P.2d 648, 655 (1983) (a court must "respect the plain terms of the policy and not create ambiguity where none exists"); *Filipo v. Chang*, 62 Haw. 626, 618 P.2d 295 (1980) (agency estopped from asserting invalidity of an agency interpretation when agency followed that interpretation for 23 years and created reliance).

Second, the Director's further ruling that the "domestic" exemption somehow requires that covered persons be ***both*** (1) ***recipients of social services*** (a new requirement not contained in HRS § 386-1) and (2) recipients of social service payments, is incorrect. The Director and the Court should not engage injudicial legislation to insert a new requirement (*i.e.*, recipient of the social services) that limits the broad plain language of the "domestic exemption" (*i.e.*, recipient of social service ***payments***). ***32** *Hawaii Pub. Employment Relations Bd.*, 66 Haw. at 469-460, 667 P.2d at 789-790. The Director's attempt to judicially legislate a two-pronged "recipient of socials services" and "recipient of social service payments" requirement is an transparent attempt to deviate from the fact that his original interpretation disregarded the word "payments" altogether. In that sense, the Director is admitting that he improperly treated the word "*payments*" in "recipient of social service *payments*" as "superfluous, void or insignificant". *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) ("no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute").

Third, even assuming that the "domestic" exemption were somehow ambiguous and needed interpretation, using interpretive tools ultimately leads to the same conclusion, that is, that Subcontractors were exempted from workers' compensation law. If the 1978 Legislature which enacted the original "domestic" exemptions (in HRS chapters 386, 392 and 393) actually wanted those exemptions to be limited to the "recipient" of the "social service[s]", it would *not* have used the words "payments" or "social service payments". We know this to be true because *IF* the 1978 Legislature truly intended to limit the exemptions in HRS chapters 386, 392 and 393 to the "recipient", it would have simply used the same definition as it did in enacting its amendment to a related statute, HRS § 346-1, to define the term "recipient". **In the *same* 1978 legislative session in which the "domestic" exemptions were enacted, the 1978 Legislature specifically defined the term "recipient" in HRS § 346-1 as "the person for whose use and benefit services are rendered or a grant of public assistance is made."** ***See*** **HRS §346-1.** Further, while enacting the "domestic" exemption, Act 110 simultaneously amended the definition of "money payments" in HRS § 346-1 to exclude "social service payments" *See* 1978 ***33** Haw. Sess. Laws Act 110, § 4 at 190-95.[3] Not only does this prove that HRS § 346-1 is *in pari materia* with "domestic" exemption in HRS § 386-1 (they were amended in the same session and the very same act!), it also proves that "social service payments" differs from "social services".

Finally, the legislative history behind HRS § 386-1 makes it clear that "recipient of social service payments" was meant to be broad to accomplish the legislative purpose of providing Medicaid Waiver Services without state and federal governments having to pay for employee benefits like workers' compensation. The 1978 Legislature exempted Medicaid Waiver Services authorized by DHS under the Social Security Act because:

> Your Committee further finds that if **the specific exemptions** to the State's wage loss replacement and employment insurance programs **are not adopted, the** attendant care-chore services and in-home child care **service payments must be adjusted to include the recipient/employer's contribution to the following programs: State Unemployment Insurance Benefits (UIB); State Worker's Compensation (WC); State Temporary Disability Insurance (TDI); and Prepaid Health Insurance (PPHI).**

Hse. Stand. Comm. Rep. No. 743-78, in 1978 House Journal (emphases added). The 1978 Legislature realized that, without this exemption, the social service payments would need to be increased to cover costs due to liability exposure and the application of other employment laws (*e.g.*, overtime). Thus, the legislative history shows that the 1978 Legislature intended to pass the exemption in order to avoid increasing social service payments to cover workers' compensation benefits. This purpose and intent of the legislature could not be accomplished without applying the HRS § 386-1 "domestic" exemption to Appellants and other agencies like them. *See State v. Ramela*, 77 Hawaii 394, 395, 885 P.2d 1135, 1136 (1994) (the "foremost obligation is to ascertain and give effect to the intention of the legislature") (citation omitted).

Moreover, Act 259 unmistakably confirms this interpretation:

> ***34** The legislature finds that excluding these individuals from "employment" under chapters 383, 386, 392, and 393... ***is consistent with existing law and reflects the past practices under the determinations of the law by the director of the department of labor and industrial relations prior to 2005.***

RA, Docket No. 17 at 48. *Keliipuleole v. Wilson*, 85 Hawaii 217, 226, 941 P.2d 300, 308 (1997) ("[a] court may look to subsequent legislative history or amendments to confirm its interpretation of an earlier statutory provision"); *Macabio v. TIG Ins. Co.*, 87 Hawaii 307, 955 P.2d 100 (1998). The legislature further reiterated the unnecessary amendment for retroactive application

> since the existing exemptions under sections 386-1, 392-5, and 393-5, Hawaii Revised Statutes, already exclude individuals in the employ of the "recipient of social service payments" as the term is defined in this measure. Further, the Director of DLIR has previously testified that the decision in *In re Manawa Lea* was limited to and only applied to *Manawa Lea.* Therefore, the decision does not create a precedent and it need not be addressed by this measure.

Conf. Comm. Rep. No. 142, in 2007 Senate Journal; RA, Docket No. 17 at 48.

2. Appellants continue to be irreparably harmed from LIRAB's failure to stay the Declaratory Ruling.

Enforcement of the Declaratory Ruling in the interim of Appellants' appeal would lead to irreparable harm given that Subcontractors could make claims for benefits and Appellants would have no recourse to recover their losses in paying such benefits. Again, the potential for workers' compensation claims against Appellants remains because HRS § 386-82 permits claims within two years after the manifestation of the injury for up to five years after the date of the accident or occurrence which caused the injury.

3. A stay of the Declaratory Ruling would not have injured HEMIC.

There is no dispute that the stay of the Declaratory Ruling would not have and will not injure any parties.

35** ***4. Public interest.

The public interest clearly lies in favor of proper enforcement of the "domestic" exemption in HRS § 386-1. As the legislative history discussed above indicated, the legislature did not want the public funds to be used for workers' compensation. Hse. Stand. Comm. Rep. No. 743-78, in 1978 House Journal. Forcing Appellants to pay workers' compensation claims pending the appeal may require Appellants to use funds that would otherwise be used to provide Medicaid Waiver Services to pay for workers' compensation claims. Thus, the public interest lies in favor of staying the Declaratory Ruling pending appeal.

V. RELEVANT PARTS OF STATUTES PERTAINING TO THE POINT OF ERROR

The statutes, which relevant languages are quoted above, that pertain to the instant appeal are HRS chapters 91 and 386 - specifically, sections 91-8, 91-14; 386-1; 386-73; 386-73.5; 386-87; and 386-88.

VI. CONCLUSION

Appellants respectfully urge this Honorable Court to uphold its long-established precedent in *Ras* and *Travelers Insurance* and vacate LIRAB's August 12, 2010 Decision and Order and remand the matter to LIRAB for consideration on the merits.

Footnotes

1 A detailed analysis of the independent contractor relationship between Appellants and their respective Subcontractors is contained in Appellants' Supplemental Memorandum in Support of Petition for a Declaratory Ruling. RA, Docket No. 18.

2 Representatives Joe Bertram and Bob Nakasone were excused from the final vote, but Representative Nakasone had already voted to pass the final version of the bill in the Conference Committee. Id. at 50; see http:// www.capitol.hawaii.gov/session2007/status/HB833.htm.

3 "Money payments" means public assistance except for payments for medical care [,] *and social service payments*, including funds received from the federal government." *Id.* (emphasis added).