

DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

MORTGAGE BROKERS AND SOLICITORS PROGRAM  
OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the	)	MBS 2009-14-L
Mortgage Solicitor's License of	)	
	)	DIRECTOR'S FINAL ORDER
GARY V. DUBIN,	)	
	)	
Respondent.	)	
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In the Matter of the	)	MBS 2010-31-L
Mortgage Broker's License of	)	
	)	
DUBIN FINANCIAL, LLC,	)	
	)	
Respondent.	)	
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DIRECTOR'S FINAL ORDER

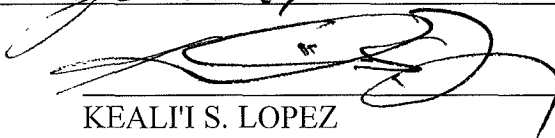
On April 21, 2011, the duly appointed Hearings Officer submitted his proposed Findings of Fact, Conclusions of Law and Recommended order in the above-entitled matter to the parties. The parties were given an opportunity to file written exceptions. On May 9, 2011, Respondents, by and through their attorney Frederick J. Arensmeyer, Esq. filed written exceptions to the Hearings Officer's recommended decision. On May 24, 2011, the Department of Commerce and Consumer Affairs ("Petitioner") by and through its attorney John T. Hassler, Esq. filed a statement in support of the Hearings Officer's recommended decision. Oral arguments were not requested.

Upon review of the entire record of this proceeding, including Respondents' exceptions and Petitioner's statement in support, the Director is of the opinion that the exceptions do not warrant a modification or reversal of the Hearings Officer's findings of fact or conclusions of law. Accordingly, the Director adopts the Hearings Officer's

recommended decision as the Director's Final Order and finds and concludes that Respondents violated Hawaii Revised Statutes ("HRS") §§ 436B-19(2), 436B-19(5) and 454-4(b).

For the violations found, the Director orders that Respondent Dubin Financial LLC's mortgage broker's license be revoked and that it pay a \$1,000.00 fine within sixty (60) days of the Director's Final Order. The Director further orders that Respondent Gary V. Dubin's mortgage solicitor's license be revoked and that he pay a \$1,000.00 fine within sixty (60) days of the Director's Final Order. Respondents are also ordered to return all indicia of licensure to the Executive Officer of the Mortgage Brokers and Solicitors Program. Indicia of licensure include wall certificates and pocket identification cards. Payment of the fine shall be a condition for licensing should Respondents apply for a license under HRS Chapter 454F or any other successor program to the now repealed HRS Chapter 454.

DATED: Honolulu, Hawaii, \_\_\_\_\_

*June 7, 2011*  


KEALI'I S. LOPEZ  
Director  
Department of Commerce  
and Consumer Affairs

2011 APR 21 A 10: 17

HEARINGS OFFICE



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the Mortgage Solicitor's  
License of

GARY V. DUBIN,

Respondent

MBS-2009-14-L

HEARINGS OFFICERS FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
RECOMMENDED ORDER; EXHIBIT  
"A"

In the Matter of the  
Mortgage Broker's License of

DUBIN FINANCIAL, LLC,

Respondent.

MBS -2010-31-L

Senior Hearings Officer:  
David H. Karlen

HEARINGS OFFICERS FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER; EXHIBIT "A"

I. INTRODUCTION

On November 9, 2010, in MBS 2009-14-L, the Department of Commerce and Consumer Affairs, through its Regulated Industries Complaints Office (hereafter "Petitioner"), filed a petition for disciplinary action against the mortgage solicitor's license of Respondent Gary V. Dubin (hereafter "Dubin").

On November 9, 2010, in MBS 2010-31-L, Petitioner filed a petition for disciplinary action against the mortgage broker's license of Respondent Dubin Financial, LLC (hereafter "Dubin Financial").

Notices of Hearing and Pre-Hearing Conference were transmitted to the parties and served on Respondent Dubin and Respondent Dubin Financial on January 20, 2011.

On March 29, 2011, a hearing was conducted by the undersigned Senior Hearings Officer. Petitioner was represented by John T. Hassler, Esq. Respondent Dubin and Respondent Dubin Financial were represented by Frederick J. Arensmeyer, Esq.

Petitioner's Exhibits 1 through 8 were admitted into evidence. Mr. Dubin was called as a witness by Petitioner. Respondents' Exhibits 1 through 5 and 19 through 125 were admitted into evidence. In addition, Respondents' Joint Pre-Hearing Conference Statement, filed with the Office of Administrative Hearings on February 25, 2011, was admitted by stipulation into evidence in lieu of Respondents calling Mr. Dubin for further personal testimony.

Having reviewed and considered the evidence and argument presented at the hearing, together with the entire record of this proceeding, the Senior Hearings Officer renders the following findings of fact, conclusions of law, and recommended order.

## II. FINDINGS OF FACT

1. Respondent Dubin was first licensed as a mortgage solicitor by the Mortgage Brokers and Solicitors Program (hereafter "Program") under License No. MS 18741 on July 28, 2008.

2. Respondent Dubin's mortgage solicitor's license was not renewed and was forfeited on December 31, 2009.

3. Respondent Dubin Financial was first licensed as a mortgage broker by the Program under License No. MB 1317 on or about May 16, 2007.

4. Respondent Dubin Financial mortgage broker's license was not renewed and was forfeited on December 31, 2009.

5. On January 30, 1995, Respondent Dubin was convicted of three misdemeanor counts for failure to file federal income tax returns in the United States District Court for the District of Hawaii in USA v. Dubin, CR93-01434-MLR. These three convictions were not reversed on appeal. In addition, these three convictions have never been vacated, annulled or expunged.

6. On account of these three convictions, Respondent Dubin was incarcerated for approximately nineteen and one-half months in federal prison.

7. Respondent Dubin Financial is a domestic limited liability company organized under the laws of the State of Hawaii on or about December 4, 2006.

8. Respondent Dubin was one of two members of Dubin Financial beginning on or about December 4, 2006. The other member of Dubin Financial was Long Huy Vu (hereafter "Vu").

9. On or about April 30, 2007, Respondent Dubin Financial, through its member Vu, submitted a signed application for a mortgage broker's license (hereafter "mortgage broker's application") to the Mortgage Brokers and Solicitors Program.

10. Question No. 6 on said mortgage broker's application by Respondent Dubin Financial asked the following:

In the past 20 years, has any owner, corporation, officer of the corporation, major stockholder, partner, manager, or member of the entity ever been convicted of a crime in which the conviction has not been annulled or expunged?

Respondent Dubin Financial answered “NO” to this question.

11. Instructions on the mortgage broker’s application submitted by Respondent Dubin Financial included the following:

Circle or underline answers. If response is “YES” to question(s) 3 through 8, provide details on a separate sheet and attach pertinent documentation.

Respondent Dubin Financial did not attach to its mortgage broker’s application any separate sheet or pertinent documentation regarding Question No. 6 on that application.

12. At the time Dubin Financial submitted its mortgage broker’s application, Respondent Dubin was an owner, officer of the corporation, major stockholder, partner, manager, or member of Respondent Dubin Financial.

13. The work of preparing the mortgage broker’s application of Dubin Financial was done by Richard Lindberg (“Lindberg”), and the application was signed on behalf of Respondent Dubin Financial by Vu. Both Lindberg and Vu knew or should have known that Dubin had been incarcerated in prison because of a criminal conviction.

14. There was no evidence that Respondent Dubin took part in the preparation of the mortgage broker’s application of Respondent Dubin Financial or in the submission of that application. In addition, there was no evidence that either Lindberg or Vu consulted Respondent Dubin regarding the contents of the application or that Respondent Dubin had any knowledge of the contents of that application

15. On or about July 23, 2008, Respondent Dubin submitted his application for a mortgage solicitor's license (hereafter "mortgage solicitor's application"). This application was signed by Respondent Dubin.

16. Question No. 8 on Respondent Dubin's mortgage solicitor's application asked:

In the past 20 years, have you ever been convicted of a crime in which the conviction has not been annulled or expunged?

Respondent Dubin answered "NO" to this question.

17. The work of preparing the application of Respondent Dubin, including answering the questions on the mortgage solicitor's application was initially performed by someone other than Respondent Dubin.

18. Respondent Dubin personally reviewed the contents of his mortgage solicitor's application before he signed and submitted it. He changed an incorrect answer to Question No. 3 before signing and submitting the application. He did not change the previously prepared answer "NO" to Question No. 8 before signing and submitting the application.

19. The mortgage solicitor's application form submitted by Respondent Dubin contained the following instructions for all of the questions it asked, including Question No. 8: "Circle answers. Attach detailed statement(s) as needed." Respondent Dubin did not attach any detailed statement to his application.

20. The mortgage solicitor's application form submitted by Respondent Dubin also contained the following instruction in bold type:

If response is "yes" to Questions 6, 7, 8, 9, provide details on a separate sheet and attach documentation from the proper authorities.

Respondent Dubin did not submit any separate sheet or documentation with his application.

21. Respondent Dubin is currently an attorney licensed to practice law in the State of Hawaii and has been so licensed since 1982. He has also been licensed to practice law in the State of California since 1964.

22. Petitioner does not assert or argue that there was an intent to deceive the licensing authority by Respondent Dubin Financial in its answer to Question No. 6 on its mortgage broker's application or by Respondent Dubin in his answer to Question No. 8 on his mortgage solicitor's application.

22. HRS §454-3(d) provides that applications for a license under Chapter 454 shall be on the "forms and in the manner and accompanied by evidence in support of the application as prescribed by the commissioner." That statute further provides that the "commissioner shall require information with regard to the applicant as the commissioner may deem desirable, with due regard to the paramount interests of the public, as to the experience, integrity, and competency of the application as to financial transactions involving primary or subordinate mortgage financing." In addition, HRS §§ 436B-19(12) and 436B-19(14) allow the denial of a license under certain circumstances if the applicant has been convicted of a crime.

23. Question No. 6 on Respondent Dubin Financial's mortgage broker's application and Question No. 8 on Respondent Dubin's mortgage solicitor's on the application require information that the commissioner has determined to be necessary in order to further the appropriate licensing of mortgage brokers and mortgage solicitors pursuant to Chapter 454.



24. A “Yes” answer to those questions would not necessarily result in a denial of a license. However, it would provide information that could lead the commissioner to request further information and/or make further inquiries regarding the reported criminal convictions in order to determine if the convictions had a bearing on the fitness of the applicant for a license. A “No” answer to those questions, on the other hand, would not lead the commissioner to request further information and/or make further inquiries regarding the unreported criminal convictions, and such an answer thus precludes the commissioner from determining whether the criminal convictions have a bearing on the fitness of the applicant for a license.

25. A misrepresentation of the absence of criminal convictions would be likely to induce the commissioner to approve a license application whereas a correct statement about the existence of criminal convictions could detrimentally affect the applicant’s license application.

### III. MOTIONS TO DISMISS

At the commencement of the hearing, Respondents brought an oral motion to dismiss the petitions against them on the basis of lack of jurisdiction, lack of standing, mootness, and failure to state a claim upon which relief could be granted. The motion was taken under advisement by the undersigned at that time. This motion was subsequently denied by an order dated April 14, 2011, a copy of which is attached hereto as Exhibit “A.”

At the conclusion of Petitioner’s case-in-chief, Respondents made an oral motion to dismiss on the basis that Petitioner had failed to prove intentional conduct and failed to prove

any material misrepresentations. This motion was taken under advisement by the undersigned at that time.

IV. CONCLUSIONS OF LAW

Petitioner has charged Respondents with violating the following provisions of the

HRS:

**§436B-19 Grounds for refusal to renew, reinstate or restore and for revocation, suspension, denial, or condition of licenses.** In addition to any other acts or conditions provided by law, the licensing authority may refuse to renew, reinstate or restore, or may deny, revoke, suspend, or condition in any manner, any license for any one or more of the following acts or conditions on the part of the licensee or the applicant thereof:

\* \* \* \* \*

(2) Engaging in false, fraudulent, or deceptive advertising, or making untruthful or improbable statements;

\* \* \* \* \*

(5) Procuring a license through fraud, misrepresentation, or deceit;

**§454-4 Suspension, revocation.**

\* \* \* \* \*

(b) The commissioner may revoke a license if the application for the license contains a material misstatement, the licensee demonstrates by a course of conduct negligence or incompetence in performing any act for which the licensee is required to be licensed under this chapter, or the licensee for a second time is responsible for misconduct which warrants suspension under subsection (a).

Respondent's three federal misdemeanor convictions were convictions of a crime under federal law.

Under Hawaii law, an offense for which a sentence of imprisonment is authorized constitutes a crime. HRS §701-107.

The word "crime" in Question No. 6 of the mortgage broker's application of Respondent Dubin Financial and the word "crime" in Question No. 8 of the mortgage solicitor's application of Respondent Dubin is not ambiguous. Respondent Dubin's three federal tax misdemeanor convictions are all clearly crimes within the meaning of the word "crime" in the aforesaid application questions.

The word "untruthful" in HRS §436B-19(2) means "not truthful." It refers to a statement that is false or inaccurate. Webster's Third New International Dictionary (3<sup>rd</sup> ed. 1967). Proof of an untruthful statement within the meaning of this statute does not require proof of intent to lie or intent to not tell the truth.

Respondent Dubin Financial's response to Question No 6 on its license application was untruthful within the terms of HRS §436B-19(2). Respondent Dubin's response to Question No. 8 on his license application was untruthful within the terms of HRS §436B-19(2).

Proof of a "misrepresentation" as set forth in HRS §436B-19(5) does not require proof of any intentional or fraudulent action. In Kim v. Contractor's License Board, 88 Haw. 264, 965 P.2d 806 (1998), the Hawaii Supreme Court was concerned with a disciplinary action with respect to a contractor's license because of any "misrepresentation of a material fact" in connection with an application for that license. See HRS §444-17 (10). The Court held that the term "misrepresentation" did not require any intentional or fraudulent

misrepresentation. The term “misrepresentation” encompassed any misrepresentation even though it may be the result of carelessness or ignorance. 88 Haw. at 812-813, 965 P.2d at 270-271. The same interpretation should apply to the word “misrepresentation” in HRS §436B-19(5).

Respondent Dubin Financial’s response to Question No 6 on its license application was a misrepresentation within the terms of HRS §436B-19(5). Respondent Dubin’s response to Question No. 8 on his license application was a misrepresentation within the terms of HRS §436B-19(5).

Respondent Dubin Financial and Respondent Dubin procured their licenses through misrepresentation within the meaning of HRS §436B-19(5).

The word “misstatement” in HRS §454-4(b) refers to a statement that is false or incorrect. Webster’s Third New International Dictionary (3<sup>rd</sup> ed. 1967). Proof of misstatement within the meaning of this statute does not require proof of intent to lie or intent to not tell the truth.

Respondent Dubin Financial’s response to Question No 6 on its license application was a misstatement within the terms of HRS §454-4(b). Respondent Dubin’s response to Question No. 8 on his license application was a misstatement within the terms of HRS §454-4(b).

In order to revoke a license pursuant to HRS §454-4(b), the license application must contain a misstatement that is “material.” The misstatements on the license applications of Respondent Dubin Financial and Respondent Dubin were “material” because they would likely induce the commissioner to approve the license applications. See Kim v. Contractor’s License Board, *supra*, 88 Haw. at 813-814, 965 P.2d at 271-272. Contrary to the position of

Respondents, Petitioner did not have to prove that the licenses would not have been issued if Respondents had correctly answered the questions on their license applications and revealed the existence of the criminal convictions.

Respondents' motion at the conclusion of Petitioner's case-in-chief is denied.

V. RECOMMENDED ORDER

For the reasons set forth above and herein, the Senior Hearings Officer recommends that the mortgage broker's license of Respondent Dubin Financial be revoked, that the mortgage solicitor's license of Respondent Dubin be revoked, and that Respondents be ordered to immediately submit all indicia of licensure as a mortgage broker and mortgage solicitor, respectively, in the State of Hawaii to the Executive Officer of the Program. The Senior Hearings Officer further recommends that fines be imposed on both Respondents.

Negligent and careless actions resulting in incorrect responses to questions on the license applications regarding criminal convictions are not "minor." Instead, they detrimentally affect the integrity of the application process. Both applications forms gave ample notice and opportunity to explain the circumstances surrounding Respondent Dubin's convictions and to argue, as Respondent Dubin now argues here at length, that those convictions were unjust and should have no effect on the license applications. Instead of taking that path, the Respondents' incorrect answers on the license applications deprived the licensing authority of the ability to timely obtain full information on the convictions and evaluate the circumstances of those convictions before the applications were approved. Full disclosure of the situation after a subsequent investigation has already begun is no substitute for submitting a correct application in the first place.

Respondent Dubin Financial presented neither an explanation nor any mitigating factors concerning its actions. Therefore, in addition to the recommended revocation of Respondent Dubin Financial's license, the Senior Hearings Officer recommends that Respondent Dubin Financial be fined \$1,000.00.

Respondent Dubin presented some excuses for his actions that can also be considered to be an assertion that there were mitigating factors:

(1) He caught an error on Questions No. 3 on his application and corrected it but might not have looked at the answers to other questions on the application. This is neither an excuse nor a mitigating factor.

(2) He was previously told by someone connected to the Liquor Commission that it was not interested in misdemeanors when he applied for a liquor license, so he thought either that he did not have to reveal the misdemeanor convictions on his mortgage solicitor's application or that his failure to reveal them was not important. The Liquor Commission is an agency of the City and County of Honolulu, and it is not an agency of the State of Hawaii. What the Liquor Commission might have thought is irrelevant to Respondent Dubin's mortgage solicitor application. As an attorney, Respondent Dubin should have known this. Further, it was not Respondent Dubin's prerogative to decide whether the convictions were or were not important. That was for the licensing authority to decide, a decision Respondent Dubin prevented by his answer on the mortgage solicitor's application form.

(3) Because of the history surrounding his convictions and the personal ordeal that he has gone through because of those convictions, Respondent Dubin did not consider himself to have committed any crime. However, this hearing was not the forum in which to relive the history surrounding the convictions. The extensive documentation presented in

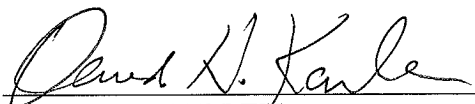
Respondents' exhibits could have been presented to the licensing authority at the time Respondent Dubin applied for his license. The mortgage solicitor application explicitly provided applicants with the opportunity to submit explanatory information, but Mr. Dubin failed to take advantage of that opportunity. He had previously participated in an explanatory process in connection with his liquor license application, but he provided no acceptable excuse as to why he did not go through any explanatory process with respect to the mortgage solicitor application.

Therefore, in addition to the recommended revocation of Respondent Dubin's mortgage solicitor's license, the Senior Hearings Officer recommends that a fine of \$1,000.00 be imposed on Respondent Dubin.

The Senior Hearings Officer further recommends that both Respondents be ordered to pay their respective fines within sixty (60) days of the Director's Final Order. Each Respondent shall send a certified check or money order for the amount of their respective fine, made payable to the DCCA Compliance Resolution Fund, to the Regulated Industries Complaints Office, 235 South Beretania Street, 9<sup>th</sup> Floor, Honolulu, Hawaii 96813 within the specified time. The Senior Hearings Officer also recommends that payment of the fine shall be a condition for licensing should Respondents apply for a license under HRS Chapter 454F or any other successor program to the now repealed HRS Chapter 454.

APR 21 2011

DATED: Honolulu, Hawai'i, \_\_\_\_\_

  
\_\_\_\_\_  
DAVID H. KARLEN  
Senior Hearings Officer  
Department of Commerce and  
Consumer Affairs



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2011 APR 14 P 12: 24

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the Mortgage Solicitor's  
License of

GARY V. DUBIN,

Respondent

In the Matter of the  
Mortgage Broker's License of

DUBIN FINANCIAL, LLC,

Respondent.

MBS-2009-14-L

ORDER DENYING RESPONDENTS'  
ORAL PRE-HEARING MOTION TO  
DISMISS

MBS -2010-31-L

Hearing Date: March 29, 2011

Senior Hearings Officer:  
David H. Karlen

**ORDER DENYING RESPONDENTS'**  
**ORAL PRE-HEARING MOTION TO DISMISS**

This matter came on for hearing on March 29, 2011, Senior Hearings Officer David H. Karlen presiding. Petitioner Department of Commerce and Consumer Affairs, through its Regulated Industries Complaints Office (hereafter "Petitioner") was represented by John T. Hassler, Esq. Respondent Gary V. Dubin (hereafter "Dubin") and Respondent Dubin Financial, LLC (hereafter "Dubin Financial") were represented by Frederick J. Arensmeyer, Esq.

At the commencement of the hearing, Respondents made an oral motion to dismiss both Petitions herein on the grounds that Petitioner had failed to state a claim upon which relief can be granted, that the subject Petitions are moot, that Petitioner lacks standing, and

**EXHIBIT "A"**



that there is no subject matter jurisdiction. After hearing oral argument from the parties, the motion was taken under advisement.

Petitioner was allowed to file a written Memorandum in Opposition to this motion by April 1, 2011, and Petitioner timely filed such a Memorandum. Respondents were allowed to file a Reply Memorandum in support of their motion by April 7, 2011, and Respondents timely filed such a Reply Memorandum.

The Senior Hearings Officer has considered the oral motion, the oral argument on the motion, Petitioner's Memorandum in Opposition, and Respondents' Reply Memorandum.

At the time of the motion, Petitioner had alleged the following facts:

1. On November 9, 2010, in MBS 2009-14-L, Petitioner filed a petition for disciplinary action against the mortgage solicitor's license of Respondent Dubin.

2. On November 9, 2010, in MBS 2010-31-L, Petitioner filed a petition for disciplinary action against the mortgage broker's license of Respondent Dubin Financial.

3. Respondent Dubin was first licensed as a mortgage solicitor under License No. MS 18741 on July 28, 2008.

4. Respondent Dubin's mortgage solicitor's license was not renewed and was forfeited on December 31, 2009.

5. Respondent Dubin Financial was first licensed as a mortgage broker under License No. MB 1317 on or about May 16, 2007.

6. Respondent Dubin Financial's mortgage broker's license was not renewed and was forfeited on December 31, 2009.

The motion to dismiss necessarily assumed that these factual allegations were accurate.

In connection with their Reply Memorandum, Respondents submitted as an exhibit a copy of a May 15, 2009 letter from Dubin Financial, signed by Mr. Dubin, to the Professional Licensing Division of the Department of Commerce and Consumer Affairs by which both Respondents attempted to withdraw their respective licenses. This letter had not been submitted by the Respondents at the time of their oral motion and ordinarily would not be allowed to be submitted at this time in support of the motion. However, for this particular motion no actual prejudice to the Petitioner will arise from the late submittal, and the undersigned will assume for purposes of this motion that Respondents attempted to withdraw their licenses effective May 15, 2009.

**I. Petitioner May Bring This Proceeding After the Nonrenewal and Forfeiture and/or the Withdrawal of Respondents' Licenses**

Although expressed in several formulations such as failure to state a claim, mootness, lack of standing, or lack of jurisdiction, the essence of Respondents' Motion is that the expiration and/or withdrawal of their licenses precludes Petitioner from bringing any proceeding against them.

In response, Petitioner relied on Hawaii Revised Statutes ("HRS") §436B-22, entitled "Relinquishment no bar to jurisdiction," in both its oral argument at the hearing and in its written Memorandum in Opposition. The statute states:

The forfeiture, nonrenewal, surrender, or voluntary relinquishment of a license by a licensee shall not bar jurisdiction by the licensing authority to proceed with any investigation, action, or proceeding to revoke, suspend, condition, or limit the licensee's license or fine the licensee.

The events of nonrenewal and forfeiture of the licenses in question, as alleged by Petitioner, and the event of voluntary relinquishment of the licenses, as alleged by Respondents, are all events that are covered by the terms of this statute. Since both Respondents were licensees

who did not renew and forfeited their licenses and/or voluntarily relinquished their licenses, each of the Respondents is a “licensee” within the terms of this statute. The jurisdiction established by HRS §436B-22 does not depend upon institution of proceedings prior to the nonrenewal or voluntary relinquishment of a license.

The terms of HRS §436B-22 therefore unambiguously authorize Petitioner to bring this proceeding and provide for the relief requested by Petitioner if such relief is found to be warranted as a result of the hearing. This authority can be asserted after the licenses expired and/or were voluntarily relinquished.

## **II. The Remedies Sought by Petitioner Are Available in This Proceeding**

Respondents’ Reply Memorandum does not mention HRS §436B-22. Instead, they discuss whether or not the terms of HRS §§454-4(b) and 436B-19 can apply to them after their licenses were not renewed and/or voluntarily relinquished. They argue that the remedies provided for in these two statutes cannot possibly apply to them.

### **A. Revocation of a License is an Available Remedy**

The remedy provided for in HRS §454-4(b) is revocation of a license. It is also pertinent however, that a license that is not renewed and thus forfeited pursuant to HRS §436B-13 may be restored within one year, or possibly later, pursuant to HRS §436B-14. These proceedings were instituted less than a year after the licenses expired and were not renewed. In addition, a former licensee cannot apply for a new license until five years after the effective date of the revocation of a license. HRS §436B-21.

Revocation of a license can therefore have consequences even though the license was not renewed. Because of the jurisdiction granted by HRS §436B-22, Petitioner does not have to wait until the Respondents apply to renew their licenses or apply for new licenses.

Similar conclusions were reached in Brown v. State, 42 P.3d 976 (Wash. App. 2002), and Wang v. Board of Registration in Medicine, 537 N.E. 2d 1216 (Mass. 1989).

The Petitioner can therefore seek revocation of the licenses in this proceeding under the authority of HRS §454-(b)(4). The same conclusion holds true for Petitioner's request for revocation of the licenses pursuant to HRS §436B-19.

### **B. Imposition of a Fine is an Available Remedy**

Respondents also question the jurisdiction of this proceeding insofar as Petitioner's request for fines is concerned. Their general contention regarding the complete lack of jurisdiction due to the nonrenewal and/or withdrawal of their licenses has already been found to be incorrect.

They are also incorrect with regard to their more specific contention that HRS §436B-19 does not provide for a fine and therefore no fines can be imposed. HRS §436B-18 authorizes the imposition of fines in addition to any sanctions imposed pursuant to HRS §436B-19. In addition, the licensing authority is not limited to imposing fines only upon violation of a condition or limitation on the license, as HRS §436B-18 additionally specifically authorizes the "licensing sanctions or remedies provided by section 92-17 against any licensee." "Imposition of a fine" is a remedy authorized by HRS §92-17(b).<sup>1</sup>

### **III. Conclusion**

Respondents have objected to consideration of previous hearings officers decisions referred to and/or attached to Petitioner's Memorandum in Opposition. This Order is

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<sup>1</sup> Respondents mistakenly assert that HRS §92-17 is limited to consumer complaints. In addition, HRS §436B-18 incorporates the sanctions or remedies contained in HRS §92-17 but does not incorporate any alleged prerequisite of a consumer complaint before any such sanction or remedy can be imposed.

consistent with those prior decisions but does not depend upon them. Accordingly, the Respondents' objections to the prior decisions are moot.

Respondents were licensed pursuant to the provisions of HRS Chapter 454. Chapter 454 has now been repealed, but the repeal was not effective until January 1, 2011, after the petitions herein were initiated. Act 84, §§29 and 38, 2010 Haw. Sessions Laws at 156, 158. Further Act 84, §35 (2010) states:

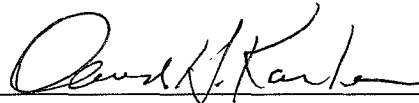
This Act, including the repeal of chapter 454, Hawaii Revised Statutes, effectuated by section 29, does not affect rights and duties that matured, penalties that were incurred and proceedings that were begun before its effective date.

The Petitioner's jurisdiction and standing to seek disciplinary action against the Respondents and Respondents' respective licenses were not affected by the repeal of HRS Chapter 454.

Accordingly, Respondents' Oral Pre-Hearing Motion to Dismiss is hereby denied.

DATED at Honolulu, Hawaii: \_\_\_\_\_

APR 14 2011



\_\_\_\_\_  
DAVID H. KARLEN  
Senior Hearings Officer  
Department of Commerce  
and Consumer Affairs