*** * * FOR PUBLICATION * * ***

CONCURRING OPINION BY ACOBA, J.

I agree with the result reached in this case. However, after the adoption of HRS § 91-14(g)[1], I do not find any viability in qualifying review of agency decisions "by the principle that the agency's decision carries a presumption of validity[,] and that appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Majority opinion at 10 (quoting In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 420, 83 P.3d 664, 683 (2004)).

As sometimes happens in the law, the misapplication of a standard is perpetuated by its repetition. The fact that the terms "presumption" "heavy burden" "convincing showing" and "unjust and

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[1] HRS § 91-14, entitled "Judicial Review of Contested Cases," provides in relevant part that:

> (g) 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:
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> > (1) In violation of constitutional or statutory provisions; 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.

(Emphases added).

unreasonable consequences" are not found anywhere in Hawai‘i Revised Statutes (HRS) § 91-14(g) is not accidental. The grounds set forth in HRS § 91-14(g) establish the authority of the appellate courts to remand, reverse, or modify an agency decision "if the substantial rights of the petitioners may have been prejudiced[.]"

This authority, proceeds from specific standards referable to agency action. For example, judicial intervention is permitted if the agency exceeded statutory authority, engaged in "unlawful procedure", committed "error of law," was "clearly erroneous," in view of the substantial evidence or was "arbitrary and capricious." HRS § 91-14(g). In light of these grounds, I must conclude that there is little gain in according "deference" to agency decisions, see majority opinion at 12, in terms other than those expressly defined and stated in HRS § 91-14(g). The "deference" to be given agency decisions already inheres in the specific enumerated grounds.

I do however, concur with the majority's clarification that "the 'unjust and unreasonable' language has particular applicability only in the context of decision of the Public Utilities Commission (PUC) made pursuant to HRS § 269-16(a) (Supp. 2003), which provides that '[a]ll rates . . . shall be just and reasonable and shall be filed with the public utilities commission.'" Majority opinion at 15.

Such a standard is not relevant to the present case. The history of the standard plainly demonstrates its inapplicability. See Nakamura v. State, 98 Hawai'i 263, 274-75, 47 P.3d 730, 741-743 (2002) (Acoba, J., dissenting); In re Application of Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 181, 590 P.2d 524, 534 (1978)(hereinafter Kauai Elec.). The words of the standard are taken directly from the text of HRS § 269-16, which pertains to energy rate adjustments and hence, were only intended to implement that statute.[2] See Kauai Elec., 60 Haw. at 181, 590 P.2d at 534; Nakamura, 98 Hawai'i at 274-75, 47 P. 3d at 741-743 (Acoba, J., dissenting). In Kauai Elec. this court concluded that the standard to be applied in energy rate adjustments is whether the order in issue was "just and reasonable" because HRS § 269-16, expressly "requires that all rates and charges must be 'just and reasonable.'" Nakamura, 98 Hawai'i at 275, 47 P.3d at 742 (quoting Kauai Elec. at 181, 590 P.2d at 535).

However, the "unjust and unreasonable" language, has

[2] The Kauai Electric court "adopted the standard set forth in [Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, 602 (1944)]" in which the United States Supreme Court "construed a similar federal statute, 15 U.S.C. § 717c,[] requiring that rates set by the Federal Power Commission be 'just and reasonable.'" Nakamura, 98 Hawai'i at 275, 47 P.3d at 742 (Acoba, J., dissenting). In that case, the Supreme Court "relied specifically upon the language of the statute in declaring that when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Hope Natural Gas, 320 U.S. at 602." Nakamura, 98 Hawai'i at 275, 47 P.3d at 742 (Acoba, J., dissenting) (emphasis added) (footnote and internal quotation marks omitted).

heretofore, crept into various non-rate-making cases as an independent standard of appellate review. Nakamura, 98 Hawai‘i at 275, 47 P.3d at 742 (Acoba, J., dissenting); see e.g., In re Gray Line Hawai‘i Ltd., 93 Hawai‘i 45, 53, 995 P.2d 776, 784 (2000) Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai‘i 217, 229, 953 P.2d 1315, 1327 (1998); Kahana Sunset Workers Ass’n v. County of Maui, 86 Hawai‘i 66, 68, 947 P.2d 378, 380 (1997); Outdoor Circle v Harold K.L. Castle Trust Estate, 4 Haw.App. 663, 639, 675 P.2d 784, 789 (1983). Hence, I agree that "[t]he 'unjust and unreasonable' language does not represent a separate standard of review," majority opinion at 16, but rather applies to HRS § 269-16 only.

I cannot agree, however, that the unjust and unreasonable standard is a species of the abuse of discretion standard. See majority opinion at 16 ("[T]he 'unjust and unreasonable' language represents one application of the more general abuse of discretion standard of review."). The former is a statutory standard binding upon the agency; the latter is a standard circumscribing our review of the agency's application of the statutory standard.

For similar reasons the retention of "high burden," and "heavy burden" as another way "of expressing . . . that a determination made by an [administrative] agency . . . will not be overturned unless "arbitrary, or capricious, or characterized

by . . . [a] clearly unwarranted exercise of discretion HRS § 01-14(g)(6))" majority opinion 17, will cloud the issue. Aside from being "imprecise," the terms "high burden", and "heavy burden" beg the question as to what the burden relates to. If "high burden" or "heavy burden" are used, they may reasonably but mistakenly be perceived as establishing something more than the requirement that the action of the agency be "arbitrary, or capricious or characterized by . . . unwarranted exercise of discretion" to warrant judicial action. HRS § 91-14(g)(6). With all due respect, it would seem more propitious to employ the terms set forth in HRS § 91-14(g)(6) and say what is meant to be said.