

DISSENTING OPINION BY NAKAMURA, J.

The majority concludes that: (1) in accordance with Hawaii Revised Statutes (HRS) § 91-14 (1993 & Supp. 2006), E & J Lounge Operating Company, Inc. (E&J) was entitled to seek judicial review of the decision of the Liquor Commission of the City and County of Honolulu (Honolulu Liquor Commission) to deny E&J's application for a liquor license, but (2) the Honolulu Liquor Commission was not required to hold a "contested case" hearing, pursuant to HRS Chapter 91, on E&J's application for a liquor license.<sup>1</sup> The latter conclusion leads the majority to hold that the Honolulu Liquor Commission was not required to comply with the procedures for "contested cases" set forth in HRS Chapter 91 in deciding E&J's liquor license application. On this basis, the majority vacates the Judgment of the Circuit Court of the First Circuit (First Circuit Court).

The majority provides cogent reasons why it may be impractical to apply the procedural requirements for "contested cases" set forth in HRS Chapter 91 to hearings held by the Honolulu Liquor Commission in deciding whether to grant or deny liquor licenses. However, I cannot square the majority's conclusion that the Honolulu Liquor Commission was not required to hold a "contested case" hearing on E&J's application for a liquor license with the Hawai'i Supreme Court's decision in Singleton v. Liquor Comm'n, County of Hawai'i, 111 Hawai'i 234, 140 P.3d 1014 (2006). I read Singleton as implicitly holding that the hearing under HRS § 281-59 (Supp. 2006), which is held by county liquor commissions in ruling on a liquor license

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<sup>1</sup> The parties to this case on appeal are: 1) Appellee-Appellant/Cross-Appellee Liquor Commission of the City and County of Honolulu; 2) Appellant-Appellee/Cross-Appellee E & J Lounge Operating Company, Inc.; and 3) Intervenor-Appellees/Intervenor-Cross-Appellants H. James Stahl, Tyson J. Thomas, Randi Thomas, Emily Reed, and Bill Maxwell (collectively, the "Intervenors").

application, is a "contested case" hearing.<sup>2</sup> I also cannot reconcile the majority's conclusion that no "contested case" hearing was required on E&J's liquor license application with the legislative history of HRS Chapter 91, which indicates that the definition of "contested case" was intended to include the denial of a liquor license application. Accordingly, I respectfully dissent.

I.

HRS Chapter 281, entitled "Intoxicating Liquor," establishes the jurisdiction and powers of county liquor commissions. HRS § 281-17 (Supp. 2006) vests a liquor commission, within its own county, with broad power, authority, and discretion to, among other things, "grant, refuse, suspend, and revoke any licenses for the manufacture, importation, and sale of liquors." HRS § 281-17(a)(1). With respect to judicial review of liquor commission actions, HRS § 281-17(b) provides:

The exercise by the commission . . . of the power, authority, and discretion vested in it pursuant to this chapter shall be final and shall not be reviewable by or appealable to any court or tribunal, except as otherwise provided in this chapter or chapter 91.

(Emphasis added.) HRS Chapter 281 does not provide for judicial review of a decision by a liquor commission to grant or deny an application for a liquor license. Thus, such a decision would only be subject to judicial review if "provided in . . . [HRS] [C]hapter 91."

In Singleton, the Hawai'i Supreme Court considered a secondary appeal challenging the grant of a liquor license by the Liquor Commission of the County of Hawai'i (Hawai'i County Liquor

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<sup>2</sup> Hawaii Revised Statutes (HRS) § 91-1 (1993) defines "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

Commission) after a public hearing held pursuant to HRS § 281-59 -- the same type of hearing held by the Honolulu Liquor Commission in denying E&J's application for a liquor license. Singleton, 111 Hawai'i at 236-38, 140 P.3d at 1016-18.<sup>3</sup> The case was before the Hawai'i Supreme Court on appeal of the final judgment of the Circuit Court of the Third Circuit (Third Circuit Court) affirming the Hawai'i County Liquor Commission's decision. The supreme court stated:

Generally, pursuant to HRS § 281-17 (Supp.2005),<sup>12</sup> [Hawai'i County Liquor Commission's] decisions are final subject to judicial review under HRS chapter 91. See HRS § 91-14(g) (1993).<sup>13</sup> On appeal this court determines whether the circuit court's decision on review of the agency decision was right or wrong.

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12. HRS § 281-17, entitled "Jurisdiction and powers," states in relevant part:

(a) The liquor commission, within its own county, shall have the *sole jurisdiction, power, authority, and discretion*, subject only to this chapter:

(1) *To grant, refuse, suspend and revoke any licenses for the manufacture, importation, and sale of liquors;*

....

(4) *From time to time to make, amend, and repeal such rules, not inconsistent with this chapter, as in the judgment of the commission seem appropriate for carrying out this chapter and for the efficient administration thereof, and the proper conduct of the business of all licensees, including every matter or thing required to be done or which may be done with the approval or consent or by order or under the direction or supervision of or as prescribed by the commission; which rules, when adopted as provided in chapter 91 shall have the force and effect of law;*

....

*The exercise by the commission or board of the power, authority, and discretion vested in it pursuant to this chapter shall be final and shall not be reviewable by or*

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<sup>3</sup> The appellant in Singleton v. Liquor Comm'n, County of Hawai'i, 111 Hawai'i 234, 140 P.3d 1014 (2006), was an individual who opposed the application for the liquor license and apparently lived near the premises for which the liquor license was sought. Id. at 239-41, 140 P.3d at 1019-21.

*appealable to any court or tribunal, except as otherwise provided in this chapter or chapter 91.*  
(Emphases added.)

13. HRS § 91-14, entitled "Judicial review of contested cases," states in relevant part:

(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[.]

...

....

(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:

- (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.

Id. at 241, 140 P.3d at 1021. The supreme court assumed jurisdiction over the appeal and applied the standards set forth in HRS § 91-14(g) in determining whether the Third Circuit Court's review of the decision of the Hawai'i County Liquor Commission had been proper. Id. at 241-42, 140 P.3d at 1021-22.

The only statutory provisions referred to by the supreme court in support of its assumption of jurisdiction over in the appeal in Singleton were HRS § 91-14(a) (quoted in part in footnote 13 of the supreme court's opinion) and HRS § 91-14(g) (cited in the text and quoted in footnote 13). Id. at 241, 140 P.3d at 1021. HRS § 91-14 is entitled "Judicial review of contested cases" and HRS § 91-14(a) provides that "[a]ny person aggrieved by a final decision and order in a contested case . . .

is entitled to judicial review thereof under this chapter[.]"  
(Emphasis added.) HRS § 91-14(g) sets forth the grounds and standards for judicial review of an agency's decision in a contested case.

The portions of HRS § 91-14 quoted by the supreme court provide for judicial review of contested cases. Thus, the supreme court, in assuming jurisdiction over the appeal in Singleton, must have determined that the hearing held under HRS § 281-59 by the Hawai'i County Liquor Commission in deciding the liquor license application at issue in Singleton was a "contested case" hearing. Indeed, there does not appear to be any basis for the supreme court to have assumed jurisdiction in Singleton besides judicial review of a contested case authorized under HRS § 91-14(a). Based on Singleton, the HRS § 281-59 hearing held by the Honolulu Liquor Commission on E&J's application for a liquor license was a "contested case" hearing, and the Honolulu Liquor Commission was required to comply with the "contested case" procedures set forth in HRS Chapter 91 in rendering its decision.

Neither the Honolulu Liquor Commission nor the *pro se* Intervenor suggest a way around Singleton's implied holding that the HRS § 281-59 hearing held by a liquor commission in ruling on a liquor license application is a "contested case" hearing. The Honolulu Liquor Commission avoids addressing the implied holding in Singleton by stating that it is not challenging a party's ability to appeal the denial or granting of a liquor license on the grounds provided under HRS § 91-14(g). The Honolulu Liquor Commission does not, however, explain how judicial review of the decision regarding an application for a liquor license is possible if the hearing under § 281-59 does not qualify as a "contested case" hearing. The *pro se* Intervenor address the implied holding of Singleton head on but fail to offer a viable solution. The Intervenor argue that because the

Hawai'i Supreme Court did not fully consider the contested case issue in Singleton, this court should "ignore that the Hawai'i Supreme Court ruled that it had jurisdiction in the Singleton case."

II.

The legislative history of HRS Chapter 91 supports the conclusion that the hearing held by the Honolulu Liquor Commission in denying E&J's application was a "contested case" hearing. In 1961, House Bill No. 5 was introduced and was eventually enacted into law as Act 103, 1961 Haw. Sess. Laws 85, and codified as HRS Chapter 91. The House Judiciary Committee issued Standing Committee Report No. 8 on House Bill No. 5 (hereinafter, the "House Committee Report"). Hse. Stand. Com. Rep. No. 8, in 1961 House Journal, at 653-61.

In discussing the definition of "contested case" contained in House Bill No. 5, House Draft 1, the House Committee Report addressed a question from the Honolulu Liquor Commission regarding whether the denial of a liquor license application came under the definition of a "contested case." Id. at 656. The House Committee Report stated that the Judiciary Committee intends the definition of a "contested case" to include the denial of a liquor license application. Id. The relevant portion of the House Committee Report is as follows:

The Liquor Commission of the City and County of Honolulu raised the question whether denial of a liquor license application came under [the definition of "contested case"]. A summary submitted by the liquor commission indicates that there is judicial review in 27 states and no judicial review in 21 states although it has been urged by the liquor commission to exclude matters of liquor license application from under the definition of a "contested case". There has been no real showing why the liquor license application should be excluded and your Committee intends said definition to include the denial of said liquor license application.

Id. (emphasis added). The definition of "contested case" contained in House Bill No. 5, House Draft 1, that was discussed

in the House Committee Report is the same as the definition of "contested case" under current law, HRS 91-1 (1993).

III.

In light of Singleton and the legislative history of HRS Chapter 91, I conclude that the hearing held by the Honolulu Liquor Commission before it denied E&J's application for a liquor license was a "contested case" hearing. Therefore, the Honolulu Liquor Commission was required to comply with the "contested case" procedures set forth in HRS Chapter 91 in deciding E&J's application. I would affirm the First Circuit Court's Judgment.<sup>4</sup>

*Craig H. Nakamura*

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<sup>4</sup> The Circuit Court of the First Circuit (First Circuit Court) entered a Judgment "consistent with the [First Circuit Court's] Findings of Fact, Conclusions of Law[,] and Decision and Order." I construe the First Circuit Court's Decision and Order to mean that the First Circuit Court "vacated" rather than "reversed" the decision of the Liquor Commission of the City and County of Honolulu (Honolulu Liquor Commission), and I conclude that the First Circuit Court intended to refer to "HRS § 281-57" rather than "HRS § 291-57" in paragraph number 2 of the Decision and Order. I do not decide whether Conclusion of Law No. 9 is correct because it was not necessary to the First Circuit Court's Decision and Order. Subject to these qualifications, I would affirm the First Circuit Court's Judgment.