* * * NOT FOR PUBLICATION * * *

NO. 25630

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of

DUANE LEE CHAPMAN, Respondent-Appellant,

vs.

J.P. SCHMIDT, INSURANCE COMMISSIONER,
Complainant-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 02-1-0129-01)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

On March 30, 2005, petitioner/respondent-appellant Duane Lee Chapman filed an application for writ of certiorari [hereinafter, application] to review the Intermediate Court of Appeals (ICA) February 14, 2005 summary disposition order (SDO) affirming in part and vacating in part, the first circuit court's[1] January 13, 2003 judgment affirming the State of Hawai'i, Department of Commerce and Consumer Affairs, Insurance Division's [hereinafter, Insurance Division or agency] (1) October 29, 1997 Notice of Intent to Issue Order Revoking License [hereinafter, the Notice] and (2) January 9, 2002 order denying Chapman's motion for reconsideration of the Notice.

[1] The Honorable Eden E. Hifo presided over the matter at issue on appeal.

In his application, Chapman argues that: (1) the ICA gravely erred in holding that the circuit court did not have jurisdiction over his appeal from the Notice; and (2) the circuit court erred in concluding that his due process rights were not violated by the Notice. For the following reasons, we vacate the ICA's February 14, 2005 SDO, vacate the circuit court's January 13, 2003 judgment to the extent that it affirms the Notice, and remand the instant case to the circuit court with instructions for the circuit court to, in turn, remand this case back to the Insurance Division for proceedings consistent with this opinion.

I. BACKGROUND

Prior to October 1997, Chapman was issued a Hawai'i general insurance agent license which, at some point, became "inactive." On October 29, 1997, the Insurance Division issued a notice of intent to issue an order revoking Chapman's general agent's license due to Chapman's repeated failures to return cash and other forms of collateral, resulting in several claims being filed with the Insurance Division. The Notice specified that it would become a final order revoking Chapman's license on November 21, 1997 if he did not request a hearing prior to that date. See HRS § 431:9-236 (1993).[2] Pursuant to Hawai'i Revised Statutes

[2] HRS § 431:9-236(1) provides:

> The commissioner may suspend, revoke, or refuse to extend any such license for any cause specified in this article:
> (1) By order given to the licensee not less than fifteen days prior to the effective date thereof, subject to the right of the licensee to have a hearing as provided in

(continued...)

(HRS) § 431:2-202(c) (1993),[3] copies of the Notice[4] were sent on the same day (October 29, 1997), by registered mail, return receipt requested, to Chapman at 2357 S. Beretania Street, #1132-287, Honolulu, Hawai'i 96814 (Beretania address) and 1232 Waimanu Street, Honolulu, Hawai'i 96814 (Waimanu address), which were the two addresses the Insurance Division claims were on record with the agency.

On October 31, 1997, the Notice mailed to the Waimanu address was returned unopened to the Insurance Division as undeliverable, with no forwarding address. On November 17, 1997, the Notice mailed to the Beretania address was returned unopened to the Insurance Division as "unclaimed." There was no record that Chapman had reported a written change of residential or business address to the Insurance Division. However, Chapman claims he notified the Insurance Division of his change of address through oral communications with Cecilia Chock, an investigator at the Insurance Division. Inasmuch as Chapman did not request a hearing prior to November 21, 1997, the Insurance

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[2](...continued)

section 431:2-308 and pending such hearing the license shall be suspended[.]

[3] HRS § 431:2-202(c) provides:

> An order or notice may be given by delivery to the person to be ordered or notified or by mailing it, postage prepaid, and registered with return receipt requested addressed to the person at the person's residence or principal place of business as last of record in the [Insurance Division].

[4] The record is unclear as to whether the copies of the Notice mailed to Chapman on October 29, 1997 were "certified."

Division deemed the Notice as a final order revoking Chapman's license, effective November 21, 1997.

On January 9, 1998, an uncertified[5] copy of the Notice was sent, pursuant to Chapman's request, by registered mail to P.O. Box 24, Commerce City, Colorado 80228 (Commerce City address).[6] On January 13, 1998, "Wesley D. Chapman"[7] signed the return receipt for the Notice sent to the Commerce City address.

On November 9, 1999, Alice Barmore, who identified herself as Chapman's Executive Assistant in Colorado, telephoned the Insurance Division requesting the status of Chapman's license and a copy of the Notice. An uncertified copy of the Notice was sent by facsimile to Barmore and by certified mail to Chapman at P.O. Box 281084, Lakewood, Colorado 80228 (Lakewood address). On November 19, 1999, an individual (whose signature is illegible) signed the return receipt for the uncertified copy of the Notice mailed to the Lakewood address.

On April 28, 2000, John A. Chanin, Chapman's attorney in Denver, Colorado, requested a copy of all complaints and orders pertaining to Chapman's license from the Insurance Division. On May 2, 2000, the Insurance Division sent Chanin, by

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[5] As more specifically demonstrated, infra, Chapman appears to take the position that any time requirements placed upon him to take action in this case did not begin to run until he received a certified copy (as opposed to an uncertified copy) of the Notice.

[6] The record is unclear as to how Chapman became aware of the Notice such that he would be prompted to request that it be sent to the Commerce City address.

[7] The record does not indicate the relationship between Wesley D. Chapman and petitioner Duane Lee Chapman.

certified mail, a written response and an uncertified copy of the Notice. On May 5, 2000, "Bruce Lemberg" signed the return receipt for the response and Notice. On August 17, 2000, Chanin mailed the Insurance Division a formal request to reinstate Chapman's license and impose a retroactive suspension nunc pro tunc. On January 11, 2001, the Commissioner responded in writing that Chanin's request was denied and that Chapman could re-apply for a license on November 21, 2002.

On December 6, 2001, Howard Glickstein, Chapman's attorney in Honolulu, requested a certified copy of the Notice, which the Insurance Division mailed to him on December 18, 2001. On December 20, 2001, pursuant to Hawai'i Administrative Rules (HAR) Rule 16-201-23 (1990),[8] Chapman filed a motion to reconsider the revocation of his license with the Insurance Division on the ground that the Notice deprived him of his license without due process of law. Specifically, Chapman contended that: (1) he did not receive the Notice prior to November 21, 1997, the date the Notice became a final order revoking his license; (2) service of the Notice was improper because it did not comply with HAR Rule 16-201-12 (1990);[9] and

[8] HAR Rule 16-201-23 provides in pertinent part that "[a]ny party, within ten days after receipt of any final order may move the [Insurance Division] to reconsider its final order or decision."

[9] HAR Rule 16-201-12 provides:

> (a) Unless otherwise provided by this chapter or by other applicable law, whenever service is required to be made on any party to a proceeding before the authority, the service shall be made personally or by first class mail, the (continued...)

(3) he provided his Colorado address to the Insurance Division during a telephone conversation with Insurance Division investigator Chock, which had occurred sometime before the Notice was mailed on October 29, 1997.[10]

On January 9, 2002, the Insurance Division entered an order denying Chapman's motion for reconsideration on the ground that, inasmuch as the Insurance Division complied with the statutory notice requirements of HRS § 431:2-202(c), and Chapman failed to fulfill his statutory duty to provide the Insurance Division with written notice of his business address change pursuant to HRS § 431:9-228(c) (1993),[11] Chapman's due process

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[9](...continued)
document to be served at the party's last known address or to the party's attorney of record or to any other individual representing the party in the proceeding.

(b) If personal service by mail is unsuccessful the authority or hearings officer may authorize service by publication if permitted by statute. The authority or hearings officer may require that personal service be attempted prior to permitting service by publication. After service by publication has been authorized, whenever service is required to be made on that party thereafter, service by first class mail to the party's last known address shall be sufficient.

[10] It should be noted that there is nothing in the record via affidavit or otherwise to substantiate Chapman's claim that investigator Chock acknowledged or admitted having received information from Chapman regarding his current address. In support of his assertion that the Insurance Division had actual knowledge of his Commerce City address, Chapman refers to three letters he received from Chock prior to October 29, 1997. The letters -- dated February 13, 1997, March 21, 1997, and April 18, 1997, -- however, are all addressed to his Waimanu Street address in Honolulu. Nevertheless, Chapman apparently believes that the letters establish that, prior to the Notice being sent on October 29, 1997, he was in communication with the Insurance Division and that, during that period, he orally communicated his current address to Chock. However, there is nothing in the letters referencing any conversations between Chock and Chapman.

[11] HRS § 431:9-228(c) provides that "[t]he licensee shall promptly notify the commissioner of change of business address." We note that written notice is not specified by the statute.

rights were not violated. The Insurance Division also denied Chapman's motion on the ground that it was untimely. Specifically, the agency stated,

> HAR § 16-201-23 (6/26/90) allows any party to file for reconsideration of a final order within ten days after receipt of the final order. Since the final order was served on October 29, 1997, [Chapman's] motion for reconsideration is untimely, pursuant to HAR § 16-201-23. Accordingly, [Chapman's] motion is denied on procedural grounds.

On January 16, 2002, Chapman filed his notice of appeal from (1) the Notice, which became a final agency order on November 21, 1997, and (2) the Insurance Division's January 9, 2002 order denying his motion for reconsideration, to the first circuit court. On appeal, Chapman contended that the Insurance Division erred in concluding that: (1) he was required to provide written notice of his change of address; and (2) his motion was untimely inasmuch as he filed his motion for reconsideration on December 20, 2001, within ten days of receipt of a certified copy of the Notice (on December 18, 2001), pursuant to HAR Rule 16-201-23.

On January 13, 2003, the circuit court entered an order affirming the Insurance Division, stating:

> The court finds that Appellant Chapman's due process rights to notice and an opportunity to be heard were fulfilled by actual receipt in January, 1998, of [an uncertified copy of the Notice], and that he did have an opportunity to seek relief from [the Notice], by, among other things, seeking review of that order by motion for reconsideration, by appeal to the circuit court, or other avenues of relief.
>
> The court concludes that by failing to exercise the opportunity to appeal or otherwise seek relief after receiving actual notice of the entry of [the Notice] in a timely manner after January 13, 1998, Appellant Chapman is foreclosed from such relief in these proceedings. Therefore, [the Notice], dated October 29, 1997, and Order

> Denying [Chapman's] [m]otion for [r]econsideration, entered January 9, 2002, are hereby AFFIRMED.

On February 14, 2003, Chapman filed his notice of appeal from the circuit court's January 13, 2003 order, in which he contended that the circuit court erred in concluding that his "due process rights to notice and an opportunity to be heard were fulfilled by actual receipt in January, 1998, of [an uncertified copy of the Notice]."[12] Specifically, Chapman contended that the Insurance Division was obligated to afford him his due process rights to notice and an opportunity to be heard prior to revoking his license and, therefore, inasmuch as he received the Notice after his license had already been revoked, the Insurance Division violated his due process rights. Rather than rule on the merits, the ICA held that "the circuit court had no jurisdiction to review [the Notice] because Chapman's [m]otion for [r]econsideration [to the Insurance Division] was untimely filed." As such, the ICA (1) vacated the circuit court's January 13, 2002 judgment to the extent that it affirmed the Notice, and (2) affirmed the judgment to the extent that it affirmed the order denying Chapman's motion for reconsideration. On March 30, 2005, Chapman timely applied for a writ of certiorari, which this court granted.

[12] On appeal, Chapman did not assert that the circuit court erred in affirming the Insurance Division's order denying his motion for reconsideration.

II. STANDARD OF REVIEW

In granting a writ of certiorari, this court reviews the decision of the ICA for (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the ICA with that of the supreme court, federal decisions, or its own decisions, and the magnitude of such errors or inconsistencies dictating the need for further appeal. HRS § 602-59(b) (Supp. 1997).

III. DISCUSSION

A. Jurisdiction Over Chapman's Appeal from the Notice

Chapman contends that the ICA gravely erred in holding that the circuit court did not have jurisdiction over his appeal from the Notice. Appeals from a final agency order are governed by HRS § 91-14 (1993) and Hawai'i Rules of Civil Procedure (HRCP) Rule 72 (1996). See HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs, 69 Haw. 135, 144, 736 P.2d 1271, 1276 (1987). HRS § 91-14(b) provides that "proceedings for review shall be instituted in the circuit court within thirty days . . . after service of the certified copy of the final decision and order of the agency[.]" (Emphasis added); see also HRCP Rule 72(b) ("The notice of appeal shall be filed in the circuit court within 30 days after the person desiring to appeal is notified of the rendering or entry of the decision or order . . . in the manner provided by statute."). In Korean Buddhist Dae Won Sa Temple of Hawai'i, Inc. v. Zoning Bd. of

Appeals of Honolulu, 9 Haw. App. 298, 837 P.2d 311, reconsideration denied, 9 Haw. App. 659, 833 P.2d 98, cert. granted, 73 Haw. 626, 834 P.2d 1315, cert. dismissed, 74 Haw. 651, 843 P.2d 144 (1992), overruled on other grounds by Rivera v. Dep't of Labor & Indus. Relations, 100 Hawai'i 348, 352 n.7, 60 P.3d 298, 302 n.7 (2002), the ICA held that the thirty-day period for filing an appeal under HRS § 91-14(b) begins when a certified copy of a final agency order is deposited in the mail. Id. at 305, 837 P.2d at 314-15.

In Gealon v. Keala, this court held that a "final order," for the purposes of an agency appeal under HRS § 91-14(b) and HRCP Rule 72(b), is "an order ending the proceedings, leaving nothing further to be accomplished. Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action." 60 Haw. 513, 520, 591 P.2d 621, 626 (1979) (citations omitted).

In the instant case, the Notice, when mailed to Chapman on October 29, 1997, was merely a notification to him that his license would be revoked on November 21, 1997. According to the Notice, Chapman was entitled to contest the revocation by requesting a hearing before that date. Only if Chapman did not request a hearing would the Notice take effect as a final order revoking his license. However, if Chapman did contest the proposed revocation, the Insurance Division would hold a hearing on the merits before entering a final order. Thus, on October

29, 1997, Chapman's rights were not yet determined and the Insurance Division still retained the matter for further action. As such, the Notice, by its own terms, was not a "final order" when it was mailed to Chapman on that date. See Gealon, 60 Haw. at 520, 591 P.2d at 626. Therefore, the period of appeal did not begin to run on October 29, 1997 because the Insurance Division did not deposit a final order in the mail on that date. See Korean Buddhist Dae Won Sa Temple of Hawai'i, Inc., 9 Haw. App. at 305, 837 P.2d at 314-15.

The record is clear that Chapman did not request a hearing in the time allotted by the Notice and, thus, the Notice became a final agency order on November 21, 1997. Consequently, pursuant to Korean Buddhist Dae Won Sa Temple of Hawai'i, Inc., 9 Haw. App. at 305, 837 P.2d at 314-15, the thirty-day appeal period would begin to run when the Insurance Division deposited a certified copy of the Notice in the mail to Chapman on or after November 21, 1997. Inasmuch as the first certified copy of the Notice sent to Chapman after November 21, 1997 was mailed to him on December 18, 2001, the appeal time began to run on that date. Because Chapman filed his notice of appeal on January 16, 2002, within the thirty-day period for appeal, his appeal from the Notice was timely. Therefore, the circuit court had jurisdiction to review the Notice as a final agency order. Accordingly, we hold that the ICA gravely erred in holding that the circuit court did not have jurisdiction to review the Notice in the instant

case. Moreover, inasmuch as jurisdiction was proper, the circuit court's original judgment stands, and, therefore, this court must review it.

B. Due Process

Chapman next contends that the circuit court erred in concluding that his due process rights were not violated by the November 21, 1997 final order revoking his license. "Due process is not a fixed concept requiring a specific procedural course in every situation. Due process is flexible and calls for such procedural protections as the particular situation demands." Sandy Beach Def. Fund v. City Council, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citation, brackets, and quotation marks omitted). "Except in emergency situations[,] due process requires that when a State seeks to terminate an interest such as [an insurance license], it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." See Gionorio v. Gomez, 301 F. Supp. 2d 122, 133 (D.P.R. 2004) (brackets and quotation marks omitted) (emphases added) (citing Bell v. Burson, 402 U.S. 535, 542 (1971)).

With respect to notice, the statutory notice requirement applicable to notices and orders from the Insurance Division is prescribed by HRS § 431:2-202(c), see supra note 2, which provides that notice may be given by "delivery to the person to be ordered or notified or by mailing it, postage

prepaid, and registered with return receipt requested addressed to the person at the person's residence or principal place of business as last of record in the [Insurance Division]." However, compliance with statutory notice requirements alone does not establish that the notice requirements for due process have been satisfied. See Pfeil v. Amax Coal W., Inc., 908 P.2d 956, 961 (Wyo. 1995) ("[C]ompliance with statutory requirements of notice and hearing does not always satisfy constitutional requirements of due process."). Thus, even though statutory requirements are met, we must also examine whether an agency's notification passes constitutional muster.

Under constitutional due process principles:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonable to convey the required information. If with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

In re Herrick, 82 Hawai'i 329, 343, 922 P.2d 942, 956 (1996) (citation omitted) (emphasis added). Moreover, when a party seeking to affect a property interest is itself on notice of the failure of a mailed notice to inform an interested party, the party must take further action to determine a more accurate address or otherwise ensure receipt of meaningful notice. For example, in Plemons v. Gale, 396 F.3d 569 (4th Cir. 2005), the Fourth Circuit Court of Appeals held:

> [Although] initial reasonable efforts to mail notice to one threatened with loss of property will normally satisfy the requirements of due process[,] when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient.

Id. at 576 (emphasis added); see also Malone v. Robinson, 614 A.2d 33, 38-39 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action." (Citations omitted.)); Schwartz v. Dey, 665 S.W.2d 933, 935 (Mo. 1984) ("[W]hen the party seeking to affect a property interest is itself on notice of the failure of mailed notice to inform an interested party, the party must take further action to determine a more accurate address or otherwise ensure receipt of meaningful notice." (Citations omitted.) (Emphasis added.)).

In the instant case, the circuit court concluded that Chapman's due process rights were not violated on the ground that he received an uncertified copy of the Notice in January 1998 and could have, "among other things, [sought] review of [the Notice] by motion for reconsideration, by appeal to the circuit court, or other avenues of relief." As a preliminary matter, it is undisputed that Chapman's license was a constitutionally protected property interest that could not be revoked without due process. As such, absent an emergency situation, Chapman was entitled to notice and an opportunity to be heard before the Insurance Division revoked his license. See Gomez, 301 F. Supp. 2d at 133.

When Chapman received the uncertified copy of the Notice in January 1998, the Notice was already effective as a final order of the Insurance Division revoking his license. In other words, the deprivation of property (e.g., Chapman's license) had already taken place. Thus, Chapman's ability to move the Insurance Division for reconsideration of the license revocation or appeal the revocation to the circuit court did not satisfy due process because he was not afforded notice and an opportunity to be heard before his license was revoked. See Gomez, 301 F. Supp. 2d at 133; Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261. Moreover, the Insurance Division did not allege, and the circuit court did not find, that an emergency situation existed to justify an exception to the due process requirements of notice and an opportunity to be heard. See Gomez, 301 F. Supp. 2d at 133; see also City of Philadelphia, Bd. of License & Inspection Review v. 2600 Lewis, Inc., 661 A.2d 20, 22, reargument denied, (Pa. Commw. Ct. 1995). Therefore, to the extent that the circuit court's conclusion that Chapman's due process rights were not violated was based on Chapman's ability to seek reconsideration of his license revocation from the Insurance Division or appeal the revocation to the circuit court, we hold that the circuit court was wrong. Consequently, our inquiry turns on whether Chapman was afforded due process before his license was revoked.

We begin our inquiry by first examining the statutory notice requirements of HRS § 431:2-202(c). See supra, note 3. Although the record is clear that the Insurance Division mailed the Notice to Chapman, postage prepaid, and registered with return receipt requested, the record does not establish whether the Notice was mailed to Chapman's last address of record with the Insurance Division. Specifically, the Insurance Division claims it mailed the Notice to Chapman at his last addresses of record with the agency; however, Chapman contends that he had provided an oral change of address to the Insurance Division during a telephone conversation with an investigator for the agency. Inasmuch as the agency did not make a finding as to whether Chapman's actual address was on record with the Insurance Division when it considered his motion for reconsideration, this court is without the means to determine whether the Insurance Division complied with the statutory notice requirements of HRS § 431:2-202(c).

With respect to the constitutional due process notice requirements, the record demonstrates that the copies of the Notice that were mailed to Chapman were returned undelivered. However, the record does not indicate what, if any, efforts were made by the Insurance Division to determine Chapman's actual address after the mailings were returned as undeliverable. As such, this court does not have the means to determine whether

adequate notice, for due process purposes, was provided to Chapman by the Insurance Division.

IV. CONCLUSION

Accordingly, based on the foregoing, we vacate the ICA's February 14, 2005 SDO, vacate the circuit court's January 13, 2003 judgment to the extent that it affirms the Notice, and remand the instant case to the circuit court with instructions for the circuit court to, in turn, remand this case back to the Insurance Division for a determination as to whether the agency satisfied the statutory and constitutional due process requirements of notice before it revoked Chapman's license.

DATED: Honolulu, Hawai'i, May 6, 2005.

Michael Jay Green and
Howard Glickstein, or
respondent-appellant,
on the writ