

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

May 1, 2003

MEMO TO: Dennis Schwind, Executive Assistant
Office of the Mayor

F R O M: Laureen ^{JM} Martin, Deputy Corporation Counsel

SUBJECT: **Retention of E.E.O.C. and Civil Rights complaints**

On February 14, 2003, you requested an opinion on the following issues:

1. **What are the responsibilities of the E.E.O.C. compliance officer as they relate to the storage, retrieval and retention of such records?**

The sexual harassment policy¹ for the County of Maui (hereinafter referred to as "the Policy") defines "EEO Officer" as "an individual designated as an Equal Employment Opportunity officer who is responsible for overseeing compliance with EEO guidelines. Some large departments may have an EEO officer. The County's EEO officer is the Managing Director." See p. 2 of the Policy attached hereto.

The Policy states the following regarding the retention of records:

- A. Reports and supporting documentation of complaints that are deemed to be true shall be retained by the departmental EEO officer for at least two (2) years after

¹It is unclear why the policy addresses only sexual harassment which is one form of discrimination based upon sex. In addition, sex is only one of several protected classes. For example, H.R.S. §378-2 prohibits discrimination based upon race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record. For the purposes of this opinion, it is assumed that the policy for complaints of discrimination for any protected class is the same as that outlined in the sexual harassment policy which is attached hereto. It may be appropriate to revise the policy to include all protected classes.

the offender terminates service as a County officer or employee, or six (6) years after the latest incident of harassment or retaliation, whichever date is later. After that, such documentation may be forwarded to the County EEO officer for decision on retention or destruction, unless there is a litigation pending or in progress.²

- B. Reports of dismissed complaints shall be forwarded and retained by the County's EEO officer or designee for preservation of evidence.³

See pp. 9-10 of the Policy.

The time period outlined in the Policy differs from federal and state law. State law requires the employer to preserve all records, including personnel records relevant to the complaint, until final disposition of the complaint or action. Final disposition is defined as one of the following: (1) an agreement approved by the Hawaii Civil Rights Commission, or (2) the expiration of the statutory period to file an action in Circuit Court (generally ninety days after the right to sue letter is issued)⁴, or (3) if litigation is pursued, the time for filing a notice of appeal has expired. Hawaii Administrative Rule §12-46-21.

²Although the policy requires retention of records for complaints that "are deemed to be true", the determination of whether the allegations are true is often difficult and usually the subject of dispute or litigation. Therefore, a more prudent and practical approach may be to retain all complaints for the specified period of time regardless of whether they are "deemed to be true". This approach would not violate the Policy since it is clear that those that "are deemed to be true" have been retained.

³The Policy does not specify any method or procedure for "preservation of evidence" relating to dismissed complaints. Therefore, such matters appear to be within the discretion of the compliance officer. The Policy does address confidentiality of records. The issue of confidentiality is addressed *infra*.

⁴Generally the deadline for filing a lawsuit is ninety days after the right to sue letter is issued. However, H.R.S. §378-3(10) may extend this period of time when the complaint is based upon sexual harassment.

Federal law requires state and local governments to keep personnel records for two years from the date of the record or the personnel action involved, whichever is later. Where a charge of discrimination has been filed the records are required to be kept until the final disposition of the charge or action. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought, the date on which such litigation is terminated. 29 C.F.R. 1602.31. Therefore, the definition of "final disposition" pursuant to federal law is similar to that contained in state law.⁵

The longest period of time required by federal law, state law and the Policy is the appropriate period of time to be utilized for any given case. For example, if an employee accused of harassment terminates employment shortly after the allegation the period of time outlined in the Policy may expire before there is a final disposition as defined by federal and state law.⁶ In such a case, the records must be kept until there is a final disposition.

If the Policy results in a longer period of time than federal or state law, the Policy will be applicable. For example, if a complaint was filed against an employee and a final disposition (as defined by federal and state law) occurred within six years of the last incident of harassment, the records would no longer need to be retained pursuant to federal and state law. However, pursuant to the Policy the records would need to be retained until two years after the employee terminated employment or six years after the last incident (whichever is longer).

⁵For purposes of this opinion, federal and state law requirements for records retention will be treated as the same since the "final disposition" standard is similar. However, as noted the statutes are not identical and, therefore, differences exist.

⁶Since the Policy requires the records to be kept six years after the last incident of harassment, it is likely that the Policy period will be after that required by federal and state law. However, it is possible that the Policy period may expire before that required by law and therefore, a determination of time period must be made on a case by case basis.

2. Who is authorized to access the information?

The confidentiality of these records is discussed on page 8 of the Policy. The Policy states the following:

Each department shall maintain the confidentiality of the written report on a complaint and investigation. In order to minimize employer exposure to liability, inspection of the complaint report shall be permitted only by the following:

1. Officers or employees involved in the management, supervision or disciplining of the parties to the complaint;
2. County's EEO Officer, or designee;
3. Director of Personnel Services or designee; and
4. Other individuals authorized by law, ordinance, or union contract.

For requests which may fall under section 4, an analysis must be made on a case-by-case basis. Consideration must be given to the County of Maui's obligation to disclose information pursuant to chapter 92F of the Hawaii Revised Statutes ("H.R.S."), the Uniform Information Practices Act.⁷ The determination of who may have access will require an examination of the circumstances surrounding the request for access, the type of records sought, and whether any of the exceptions to the general rule of disclosure apply. For example, in certain cases, it may be necessary to determine whether disclosure of the records sought would constitute a clearly unwarranted invasion of personal privacy. The final outcome will vary on a case by case basis as well as the specific information contained in the file. For example, information may not be subject to disclosure while the action is pending.⁸ However, the same information may be subject to disclosure once the action is closed. In addition, when a witness provides information subject to an assurance of confidentiality, this information is generally not

⁷In addition to Chapter 92F other statutes may be applicable. For example, H.R.S. §368-4 provides for confidentiality of such records. It is unclear whether this statute is applicable to records which have been submitted to the Hawaii Civil Rights Commission ("HCRC") or whether the statute is applicable to records in the possession of HCRC only.

⁸See, H.R.S. §92F-22(4).

subject to disclosure. Since the disclosure of information must be made on a case-by-case basis, it is recommended that once a request for disclosure is made, it should be forwarded to Corporation Counsel for determination as to whether the information is subject to disclosure.

- 3. If the individuals involved in the complaints or their representatives ask to see the files, what procedure(s) should be followed?**

Confidentiality of records is discussed within the Policy at pp. 8-9. In addition, see answer to question 2, *supra*.

- 4. What are the record retention requirements for these files?**

See pp. 9-10 of the Policy. In addition, see answer to question 1, *supra*.

- 5. Are there other department's [sic] that keep copies of these investigations? If so, what are their responsibilities? Who would have access to their records?**

Once complaints are filed with the Equal Employment Opportunity Commission or Hawaii Civil Rights Commission, Corporation Counsel generally files a response. Therefore, Corporation Counsel should have a copy of the complaint and the response.

In addition, the department involved would receive a copy of the complaint in order to conduct an investigation. The process for the investigation is set forth in the Policy at pp. 6-7.

Pursuant to the Policy, the departmental E.E.O. officer has the responsibility for records retention for specified periods of time, as discussed in our response to question 1. After the lapse of the specified period, the County E.E.O. Officer receives the records and determines whether it is to be retained or destroyed.⁹ See pp. 9-10 of the Policy.

Confidentiality of records is discussed within the Policy at pp. 8-9 and detailed in response to question 2 above.

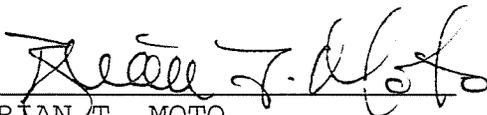
⁹As noted, *supra*, federal and state law requires retention of the records until final disposition of the matter. Therefore, the County E.E.O. officer would need to make a determination that a final disposition has occurred prior to the destruction of any records.

Dennis Schwind
May 1, 2003
Page 6

If you have any questions, please do not hesitate to contact me.

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cc: Jack Kulp, Managing Director
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APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

LINDA CROCKETT LINGLE
Mayor
TELEPHONE 243-7855



OFFICE OF THE MAYOR
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII 96793

April 17, 1995

ADMINISTRATIVE DIRECTIVE

TO: ALL DEPARTMENT HEADS AND EMPLOYEES
FROM: MAYOR LINDA CROCKETT LINGLE *L.C.L.*
SUBJECT: REVISED SEXUAL HARASSMENT POLICY

Sexual harassment is not only offensive, it is illegal. It is inconsistent with the practices and management philosophy of the County of Maui and sexual harassment claims can cost taxpayers huge amounts of money. For these reasons, I am sending you this revised policy which replaces the "Guide for the Prevention of Sexual Harassment" dated January 2, 1992.

Each department and agency head shall adopt and enforce this policy to ensure uniformity and compliance. Any change in this policy requires the concurrence of the Director of Personnel Services.

The sections on "Training" and "Dissemination of Information" include the need for all employees to receive training in sexual harassment. Every employee should be given a copy of the policy. Every employee must sign an acknowledgment that they have received this information, have received training, and know where and how to file a claim.

If you have any questions regarding this matter, please contact the Department of Personnel Services at 243-7850 or ext. 7850.

Attachment





COUNTY OF MAUI SEXUAL HARASSMENT POLICY

The purpose of this policy is to prohibit the sexual harassment of any officer, employee, individual under consideration for County employment, or any member of the public by a County officer or employee and to establish procedures for sexual harassment complaints, investigations and resolution.

I. POLICY

- A. It is illegal and against County policy for any officer or employee to sexually harass or engage in the sexual harassment of another officer, employee, the public, or individual under consideration for County employment. All employees have a legitimate right to expect a workplace devoid of sexual harassment. The County, its departments and agencies, its management and supervisory personnel, have a responsibility to prevent acts of sexual harassment.
- B. The County will not condone or tolerate sexual harassment in the workplace. Violations of the sexual harassment policy by any officer or employee will result in disciplinary action up to and including termination.
- C. Each department and agency head shall adopt and enforce this policy to ensure uniformity and compliance. Any change to this policy requires the concurrence of the Director of Personnel Services.

II. DEFINITIONS

- A. "Complaint" means an allegation of sexual harassment which may be made formally or informally. A formal complaint is a written and signed allegation and an informal complaint is an unsigned or verbal allegation of sexual harassment.
- B. "Due process" means a course of proceedings carried out regularly and in accordance with established rules and principles, including the right of the accused to hear and respond to accusations.

- C. "EEO officer" means an individual designated as an Equal Employment Opportunity officer who is responsible for overseeing compliance with EEO guidelines. Some large departments may have an EEO officer. The County's EEO officer is the Managing Director.
- D. "Investigator" means an individual or group of individuals assigned to gather information regarding any report of sexual harassment.
- E. "Just cause" means proper or sufficient reasons for disciplinary measures imposed on workers by management where management has acted in good faith upon a fair investigation and has imposed a penalty not inconsistent with similar cases or a penalty that is fair and just under the circumstances.
- F. "Malicious false complaint" means knowingly and intentionally making a false (untrue) complaint.
- G. "Offender" means an officer or employee who has engaged in sexual harassment.
- H. "Sexual harassment" means unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or visual display of a sexual nature directed by an officer or employee to another officer, employee or a private individual or an individual under consideration for County employment when:
1. Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
 2. Submission to or rejection of such conduct is used as the basis for employment decisions or as the basis to employ or reject the individual for County employment; or
 3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or the individual's application for County employment; or

4. Such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.

I. "Victim" means an officer, employee, a private person, or an individual under consideration for County employment who has been subjected to sexual harassment.

III. COVERAGE

This policy covers and is applicable to all officers and employees, whether under civil service, exempted from civil service, or under personal services contract, and to individuals who are under consideration for County employment.

IV. INDIVIDUAL RESPONSIBILITIES

All personnel, whether an officer or an employee, must refrain from the following conduct:

- A. Making unwelcomed sexual advances or requests for sexual favors;
- B. Making remarks of a sexual nature;
- C. Using gender based or sexually abusive language and sexual innuendoes;
- D. Visually displaying materials of a sexual nature;
- E. Physical contact of a sexual nature; and
- F. Any other similar actions.

V. SUPERVISORY RESPONSIBILITIES

- A. The supervisor represents management to subordinate employees. Therefore, each supervisor is accountable for the proper conduct of all employees under his/her supervision, including preventing sexual harassment and taking measures to stop sexual harassment should it occur.

- B. Each supervisor/manager should use reasonable effort and diligence to see that every employee (1) has received a copy of the County of Maui "Sexual Harassment Policy," (2) has received training in the prevention of sexual harassment, (3) knows where to file a claim, and (4) has a signed certification in the employee's personnel file verifying that the sexual harassment policy and training were received.

- C. Failure by a supervisor to control sexual harassment may be cause for disciplinary action against the supervisor. Supervisors may be held to a higher standard of accountability as management's representative.

VI. MANAGEMENT RESPONSIBILITIES

- A. Management should use reasonable effort and diligence to communicate this policy and the avenues available for resolution of sexual harassment issues at the worksite to all employees (See Section V.B above). Management shall keep supervisors aware of the requirement to guard against the various types of harassment which might potentially occur within their area of responsibility.

- B. Management should use reasonable effort and diligence to ensure that the department head is informed of all complaints and that a sexual harassment complaint within his/her area of responsibility is properly investigated and expeditiously acted upon in accordance with the procedures outlined in this policy. Upon completion of the investigation, results should be reported to the department head and the complainant.

- C. Management should use reasonable effort and diligence to ensure compliance with all procedures of this policy. All actions or inactions by

management will be examined to ascertain the extent of their efforts to control sexual harassment. Failure by managers to prevent and/or take action against sexual harassment may be cause for disciplinary action.

- D. Under the Federal EEOC Guidelines, management may be held responsible for sexual harassment occurring at the workplace by supervisory level employees, co-workers, and individuals from outside the workplace if it knew, or should have known, that sexual harassment was occurring.

VII. USE OF THE "REASONABLE PERSON OF THE SAME GENDER STANDARD"

In determining whether alleged conduct constitutes sexual harassment, an officer, employee, or team investigating a complaint of sexual harassment shall use the "reasonable person of the same gender standard." Under this standard, sexual harassment shall be considered from the perspective of a reasonable person of the alleged victim's gender.

VIII. COMPLAINT AND INVESTIGATION PROCEDURES

A. WHO MAY FILE A COMPLAINT

1. Any officer or employee who feels subjected to sexual harassment should immediately make a complaint to his/her immediate supervisor unless the supervisor is the individual committing the alleged harassment. If the immediate supervisor is the alleged offender, such conduct should be reported to the next higher level supervisor, department director or EEO officer, or the County's EEO officer.
2. An individual under consideration for County employment who feels subjected to sexual harassment, should immediately make a complaint to the alleged offender's immediate supervisor, department director or EEO officer, or the County's EEO officer.

B. COMPLAINT

1. Each department shall allow an alleged victim of sexual harassment to make an informal complaint, verbally or in writing, or a formal complaint, in writing. When making a complaint, the alleged victim shall name the alleged offender and state the nature and circumstances of the alleged sexual harassment.
2. A formal complaint may be made without first making an informal complaint or while an investigation or resolution of an informal complaint is pending, if the alleged victim so desires.
3. Each department will designate one or more management employees to be investigators. In the event of a sexual harassment complaint, the investigator shall be selected by the alleged offender's director or designee, or if the director is the alleged offender, by the County's EEO officer. For purposes of this paragraph (and convenience), the following departments shall be consolidated and considered as a single department:
 1. Civil Defense, Office of the Mayor, Management, and Personnel Services;
 2. Corporation Counsel, Prosecuting Attorney, and Liquor Control.

C. INVESTIGATION

1. The investigation shall be conducted in an unbiased, fair and discreet manner with appropriate safeguards to maintain confidentiality and protection from embarrassment.
2. Pertinent provisions of the applicable collective bargaining agreements shall be followed regarding union representation rights.
3. The investigator shall allow the alleged offender to respond to the complaint.

4. The investigator's goals will be to ascertain the facts, contribute to the immediate cessation of any harassment and recommend disciplinary action if appropriate. In determining whether conduct constitutes sexual harassment, the investigator shall consider the record as a whole and the totality of the circumstances, such as the nature of the sexual harassment and the context in which the alleged incidents occurred.
5. The investigator shall investigate, interview all witnesses and prepare a written report that includes the findings of the investigation within 10 working days after the making of the complaint. Any extension beyond 10 working days must be justified to, and approved by the County's EEO officer or the EEO officer's designee.
6. Before finalizing a decision that recommends disciplinary action, the investigator shall ensure that 'just cause' standards are met.
7. The investigator shall promptly inform the department head or designee of the findings and recommended disciplinary action, if any. The department head shall review the findings and recommended action and shall approve or modify the recommended disciplinary action. Any modification shall be accompanied by a written explanation.
8. The complete original record, including the investigator's findings and recommendation as well as the department's recommendation, shall be expeditiously forwarded to the Director of Personnel Services or designee for review and forwarding to the County's EEO officer for final approval.

IX. DISCIPLINARY AND OTHER ACTIONS

- A. An officer or employee who is found, after an investigation, to be an offender shall be warned not to sexually harass or retaliate against the victim; or as deemed warranted, shall be appropriately disciplined.

- B. Any disciplinary action shall be determined in accordance with 'just cause' standards.
- C. All disciplinary actions, prior to implementation, shall be reviewed by the Director of Personnel Services and approved by the County's EEO officer.
- D. If the complaint is deemed true, the offender shall be notified in writing of the investigation results, any discipline if warranted, and informed that sexual harassment and victim retaliation is a violation of Federal and State laws and County policy. Due process procedures shall be adhered to when imposing any discipline in accordance with Section IX of this policy. The victim shall be notified that appropriate disciplinary action has been taken and that there will be no retaliation.
- E. If the complaint is deemed false or is not supported by sufficient evidence, the complaint shall be dismissed. Both parties shall be notified in writing of the dismissal.
- F. A complete confidential record of the investigation shall be maintained for future reference and proceedings.
- G. All disciplinary actions shall be in accordance with civil service rule or applicable collective bargaining agreement.
- H. A sexual harassment violation committed by any employee may mean heavy monetary costs, including complainant's attorney costs, punitive damages and back and front pay, if, for example, the employee was dismissed wrongfully or denied employment as a result of such harassment.

X. CONFIDENTIALITY

- A. The names of the alleged victim and offender(s) during the investigation of a complaint shall remain confidential to the extent possible, but may be revealed to the following:

1. Each other;
 2. Any officer or employee investigating a complaint;
 3. The alleged victim's or alleged offender's department head;
 4. County's EEO Officer;
 5. Director of Personnel Services or designee;
 6. Witnesses to the alleged sexual harassment; and
 7. Any other person to whom revealing the names is necessary for a comprehensive investigation.
- B. Witnesses and all others involved in the investigation shall be directed to maintain the confidentiality of the incident and investigation. The investigator's report, supporting documents and other related material shall remain confidential.
- C. Each department shall maintain the confidentiality of the written report on a complaint and investigation. In order to minimize employer exposure to liability, inspection of the complaint report shall be permitted only by the following:
1. Officers or employees involved in the management, supervision or disciplining of the parties to the complaint;
 2. County's EEO Officer, or designee;
 3. Director of Personnel Services or designee; and
 4. Other individuals authorized by law, ordinance, or union contract.
- D. Because the investigation requires that potentially defamatory statements be repeated, absolute confidentiality shall not be promised; however, the investigation shall be conducted as professionally and as discreetly as possible, with disclosures made only when the investigation requires.

XI. RETENTION OF WRITTEN REPORT ON COMPLAINT AND INVESTIGATION

- A. Reports and supporting documentation of complaints that are deemed to be true shall be retained by the departmental EEO officer for at least two (2) years after the offender terminates service as a County officer or employee, or six (6) years after the latest incident of harassment or

retaliation, whichever date is later. After that, such documentation may be forwarded to the County EEO officer for decision on retention or destruction, unless there is a litigation pending or in progress.

- B. Reports of dismissed complaints shall be forwarded and retained by the County's EEO officer or designee for preservation of evidence.

XII. ADDITIONAL ACTION AVAILABLE

The complainant may:

- A. Submit a grievance under the collective bargaining grievance procedure, if applicable; or
- B. File a complaint with the Civil Service Commission, if applicable; or
- C. File a complaint with the Hawaii Civil Rights Commission (1-800-468-4644 Ext. 68636 or 1-808-586-8636) within 180 calendar days of the alleged occurrence of sexual harassment, if applicable; or
- D. File a complaint with the Federal EEO Commission within 300 calendar days from the alleged occurrence of sexual harassment. The toll-free number is 1-800-669-4000; the number on Oahu is (808) 541-3120 and the address is 300 Ala Moana Blvd., Room 7123A, Honolulu, HI 96850.

It is strongly encouraged that any individual who feels that he/she is the subject of sexual harassment first seek internal remedies before using outside agencies.

XIII. NON-RETALIATION

- A. There shall be no retaliation or discrimination against an officer or employee who has complained of sexual harassment, conducted an investigation of a complaint, or acted as a witness during an investigation of a complaint. Retaliatory conduct is illegal and constitutes a separate violation of laws and rules. Any retaliation or discriminatory action

should be reported by the individual and dealt with promptly by management.

- B. An officer or employee who retaliates against another officer, employee or an individual under consideration for County employment shall be disciplined in accordance with applicable provisions of this policy or other appropriate disciplinary action authorized by law, ordinance or rule. If the officer or employee is covered by a collective bargaining agreement, the disciplinary action against the officer or employee shall comply with such agreement.

XIV. FOLLOW-UP

- A. Follow-up inquiries shall be made by the department EEO officer, department head, or designee, to ensure that harassment has not resumed and the victim has not suffered retaliation. If inquiries reveal such occurrences, they shall be promptly and severely dealt with by management. Management shall notify the Director of Personnel Services and the County's EEO officer of the occurrences and their corrective action.
- B. Even where the results are inconclusive, the situation shall be closely monitored and reviewed by the department EEO officer, department head, or designee, to ensure that the problem has been resolved.

XV. MALICIOUS FALSE COMPLAINT

- A. An officer or employee shall not make a malicious false complaint of sexual harassment.
- B. An officer or employee who makes a malicious false complaint shall be subject to appropriate disciplinary action.
- C. Disciplinary action against an officer, employee or individual making a malicious false complaint shall not be considered retaliation as prohibited under Section XIII.

XVI. TRAINING

- A. All management and supervisory personnel, the department EEO officer and the County's EEO officer shall complete a training program on sexual harassment. The program shall include procedures for:
1. Identifying and investigating sexual harassment;
 2. Interacting with an alleged victim, alleged offender and witnesses during an investigation; and
 3. Applying and interpreting this policy and pertinent laws on sexual harassment.
- B. All management and supervisory personnel shall complete refresher classes annually, on items in A1-3, or other appropriate sexual harassment prevention training.

XVII. DISSEMINATION OF INFORMATION

The County of Maui shall use reasonable diligence and effort to see that this policy is communicated to all employees, including supervisors, through normal departmental channels and may be posted on employee bulletin boards. This policy may be posted at workplaces where applications for County employment are accepted. This information should be discussed with new employees in orientation and training classes and, at least annually, in departmental staff meetings or other meetings called specifically for training in sexual harassment and other areas of concern. Each employee shall acknowledge, with a signed notification, that the employee has (1) received a copy of this policy, (2) has received training in the prevention of sexual harassment, and (3) knows where and how to file a claim. Widespread dissemination of this information and compliance with this policy will be evidence of affirmative action in the evaluation of the County's anti-discrimination program.

REFERENCES: Section 703 of Title VII of the Civil Rights Act of 1964, as amended; Civil Rights Act of 1991; Hawaii Revised Statutes (Section 76-1, Section 76-44, and Chapter 378); Rules and Regulations of the Hawaii State Department of Labor and Industrial Relations, Chapter 46; and the Rules and Regulations of the Department of Personnel Services, County of Maui.