

## SUBCHAPTER 6

### COMPLAINTS

§04-101-60 Purpose. (a) Pursuant to the charter, the board is charged with initiating, receiving, hearing, and investigating complaints of violations of the code of ethics.

(b) In the course of its investigations, the board shall have the power to administer oaths, subpoena witnesses, and to compel the production of books and papers pertinent thereto.

(c) The board, after due deliberation on issues before it, may make findings of facts and conclusions of law regarding such issues and shall transmit the same to the appropriate appointing authority for appropriate disposition. [Eff October 27, 1996; am and comp 4/29/13] (Auth: Charter §§10-2.2.a, 10-2.2.b, 10-2.2.f, 10-2.3, 10-2.4) (Imp: Charter §§10-2.2.a, 10-2.2.b, 10-2.2.f, 10-2.3, 10-2.4)

§04-101-61 Complaint initiated by a member of the public. (a) A complaint shall set forth a concise statement of the facts constituting the alleged violation, the name and position of the alleged violator, and shall either be sworn to under oath or accompanied by an affidavit subscribed to by the complainant.

(b) Upon receipt of a document that does not comply with the requirements of §04-101-60(a), or which does not in form or substance constitute a complaint, the board shall notify the person signing the document of the insufficiency.

(c) The board may decline further review of a complaint when the complaint concerns matters under review by law enforcement or other investigatory agencies and may refer the complainant to other agencies. The board shall decline review of a complaint when the complaint concerns matters not within the jurisdiction of the board or when the board has deemed the complaint to be frivolous, or when the person signing the document fails to comply with §04-101-60(a), even after being notified of the insufficiency.

(d) A complaint may be withdrawn by written notice of withdrawal, signed and dated by the complainant. [Eff October 27, 1996; am, ren §04-101-50 and comp 4/29/13]

(Auth: Charter §§10-2.2.a, 10-2.2.f) (Imp: Charter §§10-2.2.a, 10-2.2.f)

§04-101-62 Complaint initiated by the board.

(a) Upon receipt of information not under oath, or information obtained at the initiative of the board indicating a possible violation of the code of ethics, the board may verify such facts as may be verified through public documents or the assistance of County officers and employees, including the respondent. Verification may not extend to interviews of persons other than County officers and employees, unless the board, in its discretion, initiates an investigation, the nature and scope of which shall be defined by oral or written resolution, to determine whether a complaint shall be issued. This investigation shall be carried out confidentially by the board or by the board's staff, or a member of the board so delegated by oral or written resolution. After such investigation, the board may file a complaint signed by at least three members.

(b) Upon filing of a complaint, the board shall notify the respondent of the charges in writing and schedule an informal hearing. [Eff 5/20/99, am, ren §04-101-51 and comp 4/29/13] (Auth: Charter §§10-2.2.a, 10-2.2.f) (Imp: Charter §§10-2.2.a, 10-2.2.f)

§04-101-63 Processing of complaints. All filed complaints shall be immediately forwarded to the board's executive secretary who shall assign each complaint a file number and forward the complaint to the board's chair and the board's assigned legal counsel. The chair and the board's assigned legal counsel shall do a preliminary review of the complaint and shall report and make a recommendation to the board regarding the processing of the complaint, however, no complaint shall be processed where:

(a) The complaint is not filed within the statute of limitation period of one year from the alleged violation of the code of ethics by a County officer or employee;

(b) The complaint on its face is speculative, hypothetical, or not based on factual circumstances;

(c) The identical allegations of the complaint are being, or will soon be, litigated in a criminal action;

(d) The complainant has given notice of complainant's intention to seek remedies through a civil suit;

(e) The subject matter of the complaint is not within the jurisdiction of the board; or

(f) The complainant's interest is not of the type which would give that individual standing to maintain an action in a court of law, and the complainant is not an eyewitness to the events which are the basis of the complaint.

Whenever the complaint is not processed for any of the reasons above, the board shall review the decision of the chair and the board's assigned legal counsel at its next meeting. The board may, for good cause, waive any of the bars to processing complaints, and may sustain or reverse the original decision by a majority vote. Where the board decides that the complaint should not be processed, it shall inform the complainant of its decision in writing, giving its reasons therefore, and, where applicable, inform the complainant of alternative remedies.

It shall be up to the board, after consulting with its legal counsel, whether or not the board would like to send a copy of:

- (1) The complaint (with complainant's identity redacted/or not); and/or
- (2) A copy of the letter of non-processing of the complaint, to the subject of the complaint.

Except for good cause appearing on the record, the board shall not defer or postpone the processing of complaints for more than thirty days. [Eff 4/29/13]  
(Auth: HRS §§91-2, 92-5; Charter §§10-2.2.a, 10-2.2.f)  
(Imp: HRS §91-2; Charter §§10-2.2.a, 10-2.2.f)

§04-101-64 Informal hearing. (a) After the filing and approval of the board to process a complaint, the board, or its staff, shall provide respondent with a copy of the complaint, and may request the complainant and respondent's attendance at an informal hearing. The informal hearing may be held in executive session as allowed by Sections 92-4 and 92-5, Hawaii Revised Statutes, and shall be conducted for the purpose of obtaining further information concerning the complaint. The notice of informal hearing shall state the date, time, and place of hearing, and shall be issued to the

respondent no later than fifteen days before the hearing. The hearing may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing by the board.

(b) If the board votes to hold the informal hearing in executive session, the respondent may request an open hearing, in which case an open hearing shall be held.

(c) The presiding officer shall convene the hearing and shall summarize the complaint. The hearing shall be informal. Members shall have an opportunity to direct questions to the respondent and the respondent shall be afforded an opportunity to address the allegations of the complaint. The respondent may attend the informal hearing with counsel or agent.

(d) The board, in its discretion, may interview the complainant, other County officers and employees, or any other person the board believes may have information relevant to its consideration of the complaint during the informal hearing. The board may also obtain or cause to be obtained, in its discretion, documentary evidence which may be relevant to the board's consideration of the complaint. [Eff 4/29/13, ren §04-101-52 and comp 4/29/13] (Auth: HRS §91-2; Charter §§10-2.2.a, 10-2.2.f) (Imp: HRS §91-2; Charter §§10-2.2.a, 10-2.2.f)

§04-101-65 Opinion; service; charge. (a) Within a reasonable time after the informal hearing, the board may, on its own initiative, render an advisory opinion to the respondent. If the respondent fails to comply with the advisory opinion, fails to cooperate with the board during the informal hearing process, or, if at any time, the board determines that there is probable cause for belief that a violation of the code of ethics has occurred and that a formal hearing of the complaint is necessary, the board shall serve or cause to be served a copy of the complaint and a further statement of alleged violation upon respondent. The respondent shall have twenty days after service to answer the complaint and statement in writing. The answer shall specifically admit, deny, or explain the allegations of the complaint and statement, and shall set forth any matter constituting a defense.

(b) If the respondent fails to file an answer or admits the allegations of the complaint, the board shall

transmit its opinion and recommendations, if any, to the prosecuting attorney for appropriate disposition. Copies of the board's opinion and recommendations shall be referred to the respondent's agency for possible disciplinary action.

(c) If at any time before or after the informal hearing the board determines that there is no probable cause for belief that a violation of the code of ethics has occurred and chooses not to render an advisory opinion, the complaint shall be dismissed by the board, and the complainant and respondent so notified in writing. [Eff 4/29/13, ren §04-101-53 and comp 4/29/13] (Auth: HRS §91-2; Charter §§10-2.2.a, 10-2.2.f) (Imp: HRS §91-2; Charter §§10-2.2.a, 10-2.2.f)

§04-101-66 Formal hearings; notice of hearing. (a) The board shall give at least fifteen days written notice to the complainant and respondent before the hearing, unless such notice is waived in writing or by oral testimony before the board by the respondent. The notice of hearing shall state:

- (1) The date, time, and place of hearing;
- (2) The legal authority under which the hearing is held;
- (3) The particular sections of the code of ethics or rules involved;
- (4) The fact that the parties may have counsel present during the hearing; and
- (5) The right of respondent to request an open hearing.

(b) The hearing may be held in executive session, as allowed by Sections 92-4 and 92-5, Hawaii Revised Statutes, and may be continued from day to day or adjourned to a later day or to a different place, without notice other than the announcement thereof at the hearing. [Eff 4/29/13, ren §04-101-54 and comp 4/29/13] (Auth: HRS §91-2; Charter §13-2.15) (Imp: HRS §§91-9, 91-9.5)

§04-101-67 Formal hearings; request for an open hearing. If the board votes to hold the formal hearing in executive session, the respondent may request an open hearing, in which case an open hearing shall be held; provided that, at the board's discretion, the board's deliberations may be closed to the public. [Eff 4/29/13,

ren §04-101-55 and comp 4/29/13] (Auth: HRS §91-2)  
(Imp: HRS §§92-3, 92-5, 92-6(a)(2))

§04-101-68 Formal hearings; pre-hearing conference.

(a) In any action, the board may direct the parties or their agents or attorneys to appear before the board for a conference to consider:

- (1) Simplification of the issues;
- (2) Amendments to the pleadings;
- (3) Avoidance of unnecessary proof by obtaining admissions of fact and of existence and contents of documents;
- (4) Identification and limitation of the number of witnesses;
- (5) Other matters as may aid in the disposition of the complaint.

(b) In a pre-hearing conference, each party shall disclose the theory of that party's case, including the facts each party intends to prove and the names and addresses of all witnesses each party intends to call. Each party shall disclose and permit examination of all exhibits that are in the party's possession or under that party's control and which that party intends to offer in evidence at the hearing. Unless so disclosed, no exhibits required to be disclosed shall be received in evidence at the hearing over objection, unless the board finds that there was reasonable ground for failing to disclose such exhibits prior to hearing. All exhibits required to be disclosed, and any other exhibits as may be requested by counsel presenting the same, shall be marked for identification at least one day before the hearing and shall be listed in any pre-hearing order.

(c) At least seventy-two hours before the hearing, the board shall issue an order that summarizes the actions taken at the conference. Such order shall control the subsequent course of the hearing, unless modified to prevent manifest injustice. The pre-hearing order shall supersede the pleadings where there is any conflict and shall supplement the pleadings in all other respects. [Eff 4/29/13, ren §04-101-56 and comp 4/29/13] (Auth: HRS §91-2; Charter §13-2.15) (Imp: HRS §91-2)

§04-101-69 Formal hearings; procedures. (a) The presiding officer shall convene the hearing and shall read the complaint.

(b) Before presentation of the case, the parties shall have opportunity to make opening statements. Opening statements may be waived by a party. The order of making opening statements shall be as follows:

- (1) Opening statement by the complainant; and
- (2) Opening statement by the respondent. The respondent may reserve the opportunity to make the opening statement until after the complainant has presented the complainant's case.

(c) After any opening statements, the complainant shall present complainant's case. After complainant has concluded, the respondent may present respondent's defense.

(d) Witnesses shall be examined as follows:

- (1) Direct examination by the party calling the witness;
- (2) Cross examination by the other party;
- (3) Redirect examination by the party calling the witness;
- (4) Recross examination by the other party; and
- (5) Examination of the witness by the board at any time.

(e) After all the evidence has been presented, the board shall give the parties the opportunity to summarize. Final arguments may be waived by either party. The order of final arguments shall be as follows:

- (1) Final argument by the complainant;
- (2) Final argument by the respondent; and
- (3) Rebuttal argument by the complainant.

Rebuttal arguments shall be limited to the scope of the other party's final argument. Reasonable time limits may be imposed by the board for final arguments.

(f) After hearing final arguments, the board may direct each party to submit proposed findings of fact and conclusions of law. Each party shall do so within the time set by the board and shall deliver the original and nine copies to the board and shall serve a copy upon each party who has appeared in the action. The board shall determine the findings of fact and conclusions of law to be entered. [Eff 4/29/13, ren §04-101-57 and comp 4/29/13] (Auth: HRS §91-2; Charter §13-2.15) (Imp: HRS §§91-9, 91-10)

§04-101-69.1 Motions. (a) Time. Motions may be made before, during or after a contested case hearing, provided that, the presiding officer may set deadlines for the filing of motions in the pre-hearing order.

(b) Form; contents. All motions other than those made orally during a hearing shall be made in writing to the authority or hearing officer, and shall state the relief sought and be accompanied by an affidavit or legal memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for hearing the motion.

(c) Service of motions. The moving party shall serve a copy of all motion papers on all other parties and shall file with the board the original with proof of service.

(d) Memorandum in opposition. A memorandum in opposition or counter affidavit shall be served on all parties no less than two days before the hearing date. The original and proof of service shall be filed with the board. The presiding officer may extend or shorten the times herein for good cause.

(e) Failure to serve or file a memorandum in opposition to a motion, or failure to appear at the hearing without good cause, may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the motion shall notify the presiding officer and all other parties promptly. [Eff 4/29/13, ren §04-101-57.1 and comp 4/29/13] (Auth: HRS §91-2) (Imp: HRS §91-2)

§04-101-69.2 Complaint disposition/opinion. (a) Within a reasonable time after final arguments have been completed and all requested submissions filed with the board, the board shall render an opinion.

(b) After a hearing or upon review of the board's investigation, the board shall make findings of fact and a conclusion. Said findings of fact and conclusion shall be ratified in open session without disclosing the names of the complainant or the accused employee.

(c) The board may find:

- (1) The complaint was not based on facts, or the alleged incident did not occur and the complaint is unfounded;



- (2) There is insufficient evidence to prove the material allegations of the complaint and the complaint is therefore not sustained;
- (3) The incident complained of occurred, but the act or conduct of the department or employee was either *de minimus*, a result of a choice of evils, lawful and/or proper, and the accused is exonerated; or
- (4) There is sufficient evidence to support the allegation of the complaint and ground to justify a recommendation that appropriate action be taken, including the issuance of a fine not to exceed \$1,000, pursuant to Section 10-5 of the Charter and Section 2.56.010, MCC. If a fine is recommended by the board, the fine shall be collected by the board and be made payable to the County of Maui, and deposited to the general fund.

(d) Every opinion of the board rendered after hearing shall be in writing and shall include findings of fact and conclusions of law as determined by the board. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its opinion a ruling upon such proposed findings. Within forty-five days after an opinion has been rendered, the board shall file a summarized or redacted version of the opinion, which shall be a matter of public record.

(e) The board shall transmit the opinion to the appropriate appointing authority for appropriate disposition.

(f) Any member of the board who agrees with the opinion, but for different reasons, may file a written concurring opinion. Any member of the board who disagrees may file a written dissenting decision opinion. Concurring and dissenting opinions, if any, shall be placed at the end of the majority opinion. [Eff 4/29/13, am, ren §04-101-58 and comp 4/29/13] (Auth: HRS §91-12; Charter §10-2.4) (Imp: HRS §91-12; Charter §10-2.4)

§04-101-69.3 Motion to reconsider. Within ten days after entry of a formal hearing opinion, a party may submit a written motion to the board to reconsider or rehear its final opinion. The board may grant the motion where the petition sets forth facts or law of a convincing nature demonstrating one or more of the following:

- (1) An intervening change in controlling law;
- (2) The availability of new evidence of a type previously unavailable; or
- (3) The need to correct clear error or manifest injustice. [Eff 4/29/13, ren §04-101-59 and comp 4/29/13] (Auth: Charter §§10-2.2.f, 13-2.15) (Imp: Charter §§10-2.2.f, 13-2.15)

§04-101-69.4 Record of the hearing. The record of the hearing shall be compiled pursuant to law. The complainant and the respondent shall be entitled to a copy of the record of the hearing or any part thereof upon application to the board and upon payment of the costs therefor. [Eff 4/29/13, ren §04-101-60 and comp 4/29/13] (Auth: HRS §91-9) (Imp: HRS §91-9)

§04-101-69.5 Petition for impeachment. Where the board has decided that impeachment of the respondent is appropriate, it shall issue a charge. The charge shall be set forth in writing in a verified petition signed by a majority of the members of the board, and shall be filed with the Circuit Court of the Second Circuit. The board may be represented by special counsel in proceedings before the court. Retention of special counsel shall be by application to the council in accordance with §3-6-6 of the Revised Charter of the County of Maui. [Eff 4/29/13, ren §04-101-61 and comp 4/29/13] (Auth: Charter §§10-2.2.b, 13-2.15, 13-13) (Imp: Charter §§10-2.2.b, 13-2.15, 13-13)

§04-101-69.6 Exclusion of witness. (a) At the request of a party, or on its own motion, the board may order the exclusion of a non-party witness from any evidentiary hearing on a complaint so as to prevent the witness from hearing the testimony of other witnesses.

(b) All participants in an evidentiary hearing shall endeavor to avoid the possibility of a witness's testimony being influenced by the testimony of other witnesses. Once an evidentiary hearing has commenced, witnesses shall not discuss, except with their attorney or authorized representative, the questions that were asked of them at the hearing or the testimony that they have given, until after the conclusion of the hearing. [Eff 4/29/13, ren §04-101-62 and comp 4/29/13] (Auth: HRS §91-2) (Imp: HRS §91-2)