

ABSTRACT

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Analyzing Hawaii's Rulemaking Procedures: The Need for a Consensus-Seeking Rulemaking Model

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This comment analyzes the State of Hawaii's rulemaking procedures for its state agencies and concludes the best rulemaking procedures for Hawaii state agencies are consensus-seeking procedures similar to, but slightly altered from the federal Negotiated Rulemaking Act (NRMA). Part I of this comment analyzes the Hawaii Administrative Procedures Act's (HAPA) notice-and-public hearing model for rulemaking by reviewing its specific procedures and its shortcomings in assisting state agencies in fulfilling their rulemaking obligations. The analysis shows that the HAPA procedures are not sufficient for meeting the state's needs.

Part II discusses the development of the NRMA procedures and its strengths and weaknesses. Part II analyzes the NRMA procedures by reviewing their advantages in assisting agencies in seeking consensus in rulemakings. The analysis then outlines a few specific statistics of rulemakings by such federal agencies using the NRMA that indicate the NRMA can be improved.

Part III addresses Hawaii's need for consensus driven rulemaking procedures. It does this by first comparing the strengths and weaknesses of the NRMA with those of the HAPA. Next, Part III gives an example of a Hawaii state agency, the State Procurement Office (SPO), which was authorized to use a more informal consensus-seeking procedure than the HAPA in the development of procurement rules for health and human services for individuals with disabilities. The SPO was ultimately much more successful using these procedures that sought broader consensus than it had been in previous rulemakings under HAPA. Part III concludes by outlining the benefits to Hawaii State agencies in using consensus-seeking procedures like the procedures used by the SPO.

Finally, this comment concludes that the State of Hawaii should eliminate the HAPA procedures and adopt rulemaking procedures that are similar to the NRMA, but that allow for more flexibility in seeking broader consensus. A better rulemaking model for Hawaii State agencies would be a model based on the procedures used by the SPO. This recommended model has a few advantages over the HAPA and the NRMA models. First, agencies will be able to secure a broader and more thorough consensus because the recommended model allows more affected parties of a rule to be involved in a rulemaking than does the HAPA or the NRMA and therefore agencies will face less litigation from dissatisfied parties. Second, although a rulemaking under the recommended model will not be the least expensive or quickest in the short-term, for a small state like Hawaii the costs and time to manage a rulemaking will be manageable and acceptable and will actually decrease in the long-term. Finally, the agency will be better educated about possible problems and loopholes in rules and thus further decrease the time, costs and litigation typically involved with rulemaking.