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March 20, 2019

TO: The Honorable Representative Joy A. San Buenaventura, Chair
House Committee on Human Services & Homelessness

FROM: Pankaj Bhanot, Director

SUBJECT: **HCR203/HR 183 - REQUESTING THE DEPARTMENT OF HUMAN SERVICES TO EXAMINE THE IMPLEMENTATION OF ACT 217, SESSION LAWS OF HAWAII 2018, REGARDING MISREPRESENTATION OF SERVICE ANIMALS**

Hearing: March 22, 2019, 8:30 a.m.
Conference Room 329, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent of the resolution, and respectfully offers comments. DHS is concerned that individuals who misrepresent their pet as a service animal may impede or interfere with the work of a service animal or otherwise interfere with the appropriate use of a service animal by an individual with a disability. Individuals with service animals may also experience differences in services in businesses required to accommodate them and their service animal when that business has had negative encounters with owners and their pets. We also acknowledge the business owner who is trying to accommodate customers and those individuals with disabilities with legitimate service animals, and having to also address individuals with their pets. However, in attempting to create a legal sanction against misrepresenting a pet as a service animal, it is unclear how the law can be enforced.

PURPOSE: The purpose of the resolution is to request DHS to examine the implementation of Act 217, Session Laws of Hawaii 2018, regarding misrepresentation of Service Animals.

Last session at the urging of the Senate Committee on the Judiciary to review SB2461 SD1 – Relating to Service Animals, See STAND. COM. REP. NO. 2547, DHS submitted testimony articulating that it did not have the expertise or ability to certify whether an animal is sufficiently trained to be a service animal, nor does it have investigative capabilities to determine where a violation of the proposed measure's provisions have occurred.

As we did in SB2461 SD1, in this year's HB 1074, we encouraged increased public education and outreach regarding the importance of highly trained service animals to those individuals who rely upon such working animals for health, safety, and independence. We also encouraged the legislature to convene a work group and to consider consultation with an ADA specialist of the U.S. Department of Justice. Neither suggestion was taken up by the Legislature.

Following the passing of SB2451 SD1, we reviewed the language of the bill that became Act 217, SLH 2018, and determined that the one fact that can clearly be established is whether the service animal is a dog. If the service animal was another specie, it would clearly be misrepresentation.

Per the U.S. Department of Justice, Civil Rights Division, Disability Rights Section, as provided by the Americans with Disabilities Act (ADA), where it is not obvious that a dog is a service animal, only two specific questions may be asked: (1) is the dog a service animal required because of a disability? and (2) what work or task has the dog been trained to perform?

An owner who answered (1) with "no," would not be misrepresenting their dog as a service animal, and question (2) would not need to be asked.

An owner who answered (1) with "yes," and provided a reasonable response to (2), would not be misrepresenting their service animal as a service animal. It would violate the ADA to ask the person what their disability is, and it would also be a violation to ask the owner to have the service animal demonstrate the task, or require documentation, ID tag, vest, harness, or certification of training.

Potentially, an owner who answered (1) with "yes," and could not answer (2) with a task may be perhaps misrepresenting their pet as a service animal; however, if the person has an anxiety disorder or other cognitive disability (which cannot be asked), and cannot

answer the question in a timely or reasonable way, it would be very difficult to assess whether the person is misrepresenting their pet as a service animal.

DHS reiterates the relevant portion of the Department of the Attorney General testimony submitted before the Senate Committee on Judiciary, SB2461, February 20, 2018,

> "An investigator would have to prove that the animal was not trained to perform tasks to benefit an individual with a disability. An investigator's ability to investigate such an offense is limited by the Americans with Disabilities Act (ADA), which prohibits the following: (1) asking about the nature or extent of the owner's disability; (2) requiring proof that the animal has been certified, trained, or licensed as a service animal (28 C.F.R. 35.136(f)); (3) requiring the animal to wear an identifying vest or tag; and (4) asking the animal to demonstrate its ability to perform the task or work. Moreover, the ADA does not require service animals to be professionally trained. If the owner says he or she is training the animal personally, there is no way to prove otherwise. Finally, documentation that an animal is in fact, a service animal, has been deemed unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA."

Last year, following the enactment of Act 217 (2018), a short meeting with attendees from the Hawaii Civil Rights Commission, the Disability and Communication Access Board, the Department of Human Services, the Attorney General's Office, and the Honolulu Police Department, gathered to discuss how the law could be lawfully and practically enforced.

The representative from the Honolulu Police Department did describe that they would assess situations based upon other current law related to nuisance or assault if the dog were to attack.

The consensus is: the law would be difficult to enforce.

From the DHS perspective, we have not received any complaints or requests to enforce the law since its enactment.

Thank you for the opportunity to provide comments on this measure.

DISABILITY AND COMMUNICATION ACCESS BOARD

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March 22, 2019

TESTIMONY TO THE HOUSE COMMITTEES ON HUMAN SERVICES AND HOMELESSNESS

House Concurrent Resolution 203 and House Resolution 183 – Requesting the Department of Human Services to Examine the Implementation of Act 217, Session Laws of Hawaii 2018, Regarding Misrepresentation of Service Animals

The Disability and Communication Access Board (DCAB) offers comments on House Concurrent Resolution 203 and House Resolution 183 – Requesting the Department of Human Services to Examine the Implementation of Act 217, Session Laws of Hawaii 2018, Regarding Misrepresentation of Service Animals. While we would be willing to cooperate with any study, we do not believe that the resolutions are necessary.

The resolutions ask the Department of Human Services to conduct a study to examine the implementation of Act 217. Act 217 establishes a civil penalty for a person who knowingly misrepresents an animal as a service animal. It was known at the time of Act 217's passage that the ability to enforce Act 217 would be limited due to (1) the restricted nature of questions that can be asked of an individual to ascertain if an animal is, indeed, a service animal required because of a disability, and (2) the absence of any government registry or certification process. While the latter is supported by our agency in concept, it is not a viable solution because documentation cannot be required under the federal Americans with Disabilities Act (ADA).

Having noted the above, DCAB took the initiative to convene a group of stakeholders and also invited the police, at least from the City and County of Honolulu. We also took the initiative to query the four County Police Departments as to their procedures for implementing Act 217. Three of the Counties (excluding Maui) have responded and staff has also discussed the enforcement process in detail with the City and County of Honolulu. In all cases in the three Counties, the Police will respond to a community caller and initiate with a line of questioning that is consistent with the ADA. A determination as to whether to issue a citation or to refer the issue to the Prosecutor's Office is within the discretion of the police officer.

There are several points worth noting. The standard of "probable cause" is replaced by "clear and convincing evidence" which will make the issuance of a ticket much more difficult. Also, the Act does not make it illegal to have a so-called "fake service animal" but to "knowingly misrepresent a dog as a service animal." Thus, if a person has an emotional support animal and believes that the animal is truly a service animal because he/she believes that emotional support is a service, the person has not knowingly misrepresented the dog because the representation is consistent with their belief system. The standard of "knowing misrepresentation" goes to the state of mind of the person, not the status of the

animal. One of the takeaways from this is a reminder that this is not a fake service dog law. It is a law about knowingly misrepresenting a dog in order to gain access to a public accommodation or state/local government facility that would otherwise be denied because the establishment has a no pets policy. It is about the person's intent and action, not the dog.

We do believe that there is a benefit to a coordinated community education process, which could include the continuation of regular meetings between community stakeholders, particularly the Police Departments, human service agencies, people with disabilities, and civil rights or disability organizations, in addition with continued monitoring of how other states or municipalities have tried to address this issue.

Thank you for the opportunity to provide comments on these measures.

Respectfully submitted,

Francine Wai

FRANCINE WAI
Executive Director

HAWAI'I CIVIL RIGHTS COMMISSION

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March 22, 2019
Room 329, 8:30 a.m.

To: Hon. Representative Joy San Buenaventura, Chair
Members of the House Committee on Human Services & Homelessness

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: H.C.R. No. 203 and H.R. No. 183

The Hawai'i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai'i's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai'i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

H.C.R. No. 203 and H.R. No. 183 require the Department of Human Services (DHS), in consultation with the Hawai'i Civil Rights Commission (HCRC) and the Disability and Communication Access Board (DCAB), to examine and report on implementation of Act 217, Leg. 2018, and for DHS "to issue guidance about misrepresentation of a service animal for use law enforcement and the business community."

Act 217, enacted in 2018, amended HRS chapter 347 to establish a new civil penalty for "Misrepresentation of a service animal." The penalty for a violation would be a fine of not less than $100 and not more than $250 for a first offense, and not less than $500 for any subsequent offense. The statute requires that violation be proven by clear and convincing evidence. Act 217 provided no statutory enforcement mechanism, but the new civil penalty was placed under HRS chapter 347, under DHS jurisdiction.

At the time of enactment of Act 217, concerns were raised about the new state law encouraging inquiries prohibited under federal law, beyond the specific questions that a business

or law enforcement agency are allowed to ask under the Americans with Disabilities Act (ADA). There were also concerns that that the creation of a new civil penalty would have a chilling effect on the exercise of rights by persons with disabilities.

Under Title II and Title III of the ADA, when an individual with a service animal comes to a government office or a business with a service animal, if the individual's disability and the service the animal provides is not obvious, ***only*** two limited inquiries are allowed by law: 1) whether the dog is a service animal required because of a disability; and, 2) what work or task the dog has been trained to perform. Pursuant to U.S. Department of Justice guidance, no other inquiry or request for documentation or proof is allowed.

Conclusion

Enactment of Act 217 created a substantial and uncapped civil penalty for "misrepresentation of a service animal," but with concerns over enforcement and enforceability.

The new law penalizes the knowing false representations of a dog as a service dog. This has the potential chilling effect on the rights of persons with disabilities to exercise their right to request reasonable accommodation in the use of a service animal, under Title II and Title III of the ADA. It also potentially penalizes persons with disabilities who mistakenly characterize their (non-service) assistance animals as service animals.

State law should not encourage unlawful inquiries of persons who attempt to access government offices or businesses accompanied by a service animal, as is their right under the ADA, whether those inquiries are made by staff, agents, or third party proxies.