

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION

Wednesday, April 9, 2008 - 10:00 a.m.

101 Aupuni Street, Suite 230 (Conference Room)

Hilo, Hawai'i 96720

Present: Wayne Joseph, Chair
Ann Lum, Vice Chair
John Dill, Member (*present 10:15 a.m. to 11:00 a.m.*)
Tricia Malanka, Member
Marilyn Nicholson, Member
Renee N. C. Schoen, Deputy Corporation Counsel
Mary E. Crosson, Secretary for the Board

Present briefly: Diane Noda (Deputy Corporation Counsel) and Ryan Kanakaole (UHH intern)

1. CALL TO ORDER

The Chair called the meeting to order at 10:00 a.m.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

No one from the public was present.

3. APPROVAL OF MINUTES

Minutes of the March 12, 2008, Regular Session.

Motion and vote: Ms. Nicholson moved to approve the Regular Session minutes from March 12, 2008. Ms. Lum seconded the motion, and all members present voted aye.

Minutes of the March 12, 2008, Executive Session.

Motion and vote: Ms. Malanka moved to approve the Executive Session minutes from March 12, 2008. Ms. Lum seconded the motion, and all members present voted aye.

4. COMMUNICATIONS

a. *Communication No. 2008-37: From Lincoln Ashida to Hope Cermelj, dated March 14, 2008, regarding Ms. Cermelj's request to withdraw her petition.*

Motion and vote: Ms. Nicholson moved to accept and file the communication, and Ms. Lum seconded the motion. All members present voted aye.

- b. *Communication Nos. 2008-39 and 2008-40: Informal Advisory Opinions regarding Petition Nos. 2008-1 and 2008-2 from Elizabeth Hultman-Salfen.*

Motion and vote: Ms. Lum moved to approve the above informal advisory opinions, and Ms. Malanka seconded the motion. All members present voted aye.

- c. *Communication No. 2008-38: Informal Advisory Opinion regarding Petition No. 2008-3 from Barbara Lively.*

Motion and vote: Ms. Nicholson moved to approve the informal advisory opinion, and Ms. Lum seconded the motion. All members present voted aye.

- d. *Communication No. 2008-35: Renee Schoen's March 11, 2008, letter to Wayne Joseph regarding the Executive Session minutes of February 13, 2008.*

Ms. Lum asked the Chair whether he wanted to discuss the letter, and the Chair stated that he just wanted it on the Regular Session agenda.

Motion and vote: Ms. Lum moved to accept and file the letter, and Ms. Nicholson seconded the motion.

Discussion: Ms. Lum asked the Chair if he wanted anything done with the letter, and the Chair said he just wanted it to be public. Ms. Lum clarified that the letter was being made a part of the public record, and Ms. Nicholson noted that just the letter itself, and not the attachments, were being made public record.

Vote: All members present voted aye.

5. NEW BUSINESS

- a. *Petition No. 2008-5: From Councilmember Bob Jacobson, requesting an opinion on the use of his photograph on his Council stationery letterhead.*

The Chair stated that Mr. Jacobson's office had sent a request that the petition be moved to the May agenda because he would be in a County Council meeting this morning.

Ms. Lum said she would like to honor that request.

Motion: Ms. Nicholson moved to continue the petition to the May meeting, and Ms. Lum seconded the motion.

Discussion: Ms. Lum said she would not be present for the May meeting, and the Chair said that he would not be present, either.

Ms. Schoen said that to make the record clear, the request to continue the hearing on the petition came from Liz Hultman-Salfen, who sent an email to the Board's secretary requesting that Petition No. 2008-5 be continued because Mr. Jacobson was scheduled to attend a County Council meeting, and that email was subsequently forwarded to the Board members. She suggested that the Board schedule the petition to be heard at their next Board meeting.

Motion amended: Ms. Nicholson amended her motion to continue the petition, at Mr. Jacobson's request, to their next meeting. Ms. Lum seconded the motion.

Discussion: Ms. Lum stated she would be unavailable from May 14 through 18, 2008. The Chair said that because their regular June meeting date fell on a holiday (June 11), they had agreed to hold their June meeting on Tuesday, June 10, 2008.

The Board was unable set a firm date for the next meeting due to conflicting schedules, and the secretary was assigned to work out a date between Mr. Jacobson and the Board members.

Vote: All members present voted aye on the motion to schedule Mr. Jacobson's petition for whenever their next meeting is.

- b. Review and possible pursuit of an amendment to Section 2-85(b) of the Hawai'i County Code (the Ethics Code) regarding the prohibition of contracting with former employees and retirees.*

Ms. Schoen explained that an attorney in her office was doing research on contracts and noticed a discrepancy between Section 2-85(b) and Section 2-91.2(c) of the Ethics Code. Section 2-85(b) basically protects the County by prohibiting it from entering into a contract with a business or person who has been assisted by another person who was formerly employed by the County. However, it did not make sense when compared to Section 2-91.2(c) of the Code, which deals with the rehiring of former County officers and employees. Section 2-91.2(c) says that the County is not prohibited from contracting with a former officer or employee to act on matters on behalf of the County. It turns out that our Code, which is patterned after the State's Code, is missing the word "is" in Section 2-85(b). It should say that a County agency "shall not enter into a contract with any person or business which *is* represented or assisted personally in the matter by a person who has been an employee of the agency . . ."

Ms. Schoen said she wanted to bring this to the Board's attention and propose amending Section 2-85 so that it would make sense. Section 2-85(b) is aimed at protecting the interests of the County, whereas Section 2-91.2(c) is aimed at permitting the County, in appropriate situations, to contract with a former employee because of that employee's special expertise.

The Chair asked Ms. Schoen what the Board was to do, other than become aware of it. Ms. Schoen said she just wanted to make them aware so that they could voice their opinion as to whether or not they wanted the language rectified.

Ms. Lum said that whoever works on revising Section 2-85(b) should look at the sentence structure and clean it up. She asked who would go about making the change, and Ms. Schoen said the Board could initiate it.

Ms. Nicholson said they could recommend at the very least that the word “is” be inserted, but they could also recommend that the overall language be looked at and clarified.

Ms. Schoen suggested that this matter be continued to the next meeting so that she could do more research and provide some suggestions. The Board members agreed to continue it to the next meeting for additional clarification.

6. UNFINISHED BUSINESS

- a. *Report from counsel on the status of the Board’s request for a time limit for incumbents who are seeking reelection in an election year on sending mail-outs using County funds.*

Ms. Schoen reported that the second reading of Bill 258 was on today’s Council agenda.

The Chair asked if it had been amended, to her knowledge, and Ms. Schoen said no.

- b. *Report from counsel on whether the Board is allowed to make grammatical and typographical corrections to its Rules of Practice and Procedure without following the public hearing requirements of Section 91-3 of the Hawai‘i Revised Statutes.*

Ms. Schoen reported that she did find one case which said that if there were substantial changes to be made, a public hearing was required. However, while grammatical and typographical corrections may not seem substantial, a small missing word like “is,” as discussed earlier, can make a big difference in meaning. She suggested that since they will need to amend their rules to implement the procedures to impose administrative fines, they make the grammatical and typographical corrections at that time, with proper notice and hearing. In brief, if a change is not substantial it could be made without notice and hearing. However, out of an abundance of caution, her counsel would be to have the notice and hearing.

She said that if a Board did make changes without acting in accordance with Section 91-3, HRS, and it became questionable as to whether those changes were substantive, the rules would become invalid. So it would be better practice to follow HRS 91-3.

- c. *Report from counsel on the status of Council Bill 209, relating to the imposition of administrative fines for violations of the County Code of Ethics (includes Communication 2008-42, an email from Lincoln Ashida, Corporation Counsel).*

Ms. Schoen reported that Bill 209 was also on today’s Council agenda, with a motion pending to approve Draft 3 of the bill. The hang-up appears to involve whether civil servants could have fines imposed upon them, or whether that would be double jeopardy, as civil servants come under labor union contracts.

Ms. Lum asked what a civil servant is, and Ms. Schoen replied that it is a person hired in accordance with civil service rules. She explained that not all employees are civil servants.

Some are at-will employees, who can be terminated at any time. She referred the question to Diane Noda, who represents the County's Human Resources Department.

Ms. Noda said the majority of the County's employees are civil servants hired in accordance with the civil service laws for the state. There are a few exceptions, however.

Ms. Lum said it would be a double standard if civil service employees could not be fined, but non-civil service employees could.

Mr. Dill suggested they wait and see what the Council ended up doing.

The Chair asked if the final reading was today, and Ms. Schoen set it was set for final reading. However, since the Council was working on Draft 3 and there were proposed amendments, she could not predict what would happen. It could get postponed again.

Mr. Dill suggested that depending on the outcome of the hearing, they could take a look at the final or almost final form.

Ms. Schoen said she could email them what the Council looked at today.

The Chair pointed out that Mr. Ashida's Communication No. 2008-42 gave an update on the union's opposition to the bill and how the Council is writing into the bill a requirement that the Board adopt rules prior to the assessment of any fine.

Ms. Lum questioned whether "any County officer," as written in Mr. Ashida's draft sent to the union, would include all employees. She looked up the definition of "officer" in the Code and noted that it does not include County employees. She and Ms. Malanka indicated they would prefer that the bill include County employees.

The Chair said his understanding is that there are specific rules which govern civil service employees, and if one should violate the Code, they could be disciplined through their own department. He felt satisfied with the current bill. The Chair explained that he initiated the bill and when he did so, his intention was to include the officers and not focus on the employees, who are covered by their own unions and face their own disciplinary procedure.

Ms. Lum said it felt like a double standard to her.

Mr. Dill said that he could foresee a problem if all employees were included. If a civil servant with an allegation of wrongdoing against him were brought before the Board, much time would be spent in deciding whether the Board was the right venue to hear the case. In addition, anyone representing a civil servant would tell the Board they have no right to hear the case. Since civil servants come under union contracts, the Board could be meddling in something not in its domain.

The Chair said he had not seen a civil servant come before the Board for a violation, but he did see their supervisors come before the Board, and Mr. Dill said that is as it should be.

Ms. Lum said someone could still file a petition regarding a civil servant employee, and if the Board determined there was a violation, they could issue an informal advisory opinion and give it to the supervisor to handle. She said she understood the issue now and thanked the others for the clarification.

The Chair said to leave the matter on the agenda for the next meeting, under Unfinished Business.

d. Ongoing discussion on the Sunshine Law.

Ms. Schoen said she had no tidbit to share this month, and no one had any questions regarding the Sunshine Law.

Motion and vote: Ms. Malanka moved to enter into Executive Session. Ms. Lum seconded the motion, and all members voted aye.

Executive Session was entered at 10:41 a.m. (Mr. Dill had to leave at 11:00 a.m., during Executive Session.)

Regular Session was reentered at 11:16 a.m.

7. EXECUTIVE SESSION (separate minutes prepared)

- a. Review of Confidential Financial Disclosure Forms filed pursuant to Section 2-91.1(d), Hawai'i County Code, by County board and commission members, where personal matters will be reviewed.*

Once back in Regular Session, the Chair stated that the Board reviewed the 39 disclosures on the agenda, and several were not approved, as follows:

Donovan Akau	Item 1 incomplete
Susan Gagorik	Item 1 incomplete
Jonathan Holmes	Item 5 incomplete (tax map key missing)
Mark Jacobsen	Item 1 incomplete
Kelvin Kelii	Item 2 incomplete (needs first box filled out)
Bernard Konanui	No response to email requesting clarification
Francis Kuailani, Sr.	Item 6 incomplete
Karen Maedo	Incomplete, and email response not satisfactory
Robert Meierdiercks	Item 3 incomplete (2 nd item in box 3, nature of interest)
Thomas Murray	Item 1 incomplete
Stanley Nakamura	Incomplete Items 2, 3, 7, 8, and 9 (and not marked "none")
Joseph Nakao	Item 1 incomplete
Sara Narimatsu	P. 2 missing (with Items 2 and 3)
Merton Ogata	Needs to list security given for bank loan
Shelly Ogata	Clarify Item 1, re County rental income
Dana Okano	Item 2 incomplete (needs security given on loan)
Richard Omija, Jr.	Item 5 incomplete (second box not filled in)

Motion and vote: Ms. Nicholson moved to return the above forms for completion and to file away all the others which were reviewed. Ms. Lum seconded the motion, and all members voted aye.

8. ANNOUNCEMENTS

a. The Corporation Counsel is presenting "Sunshine Law" training for County personnel and board and commission members on April 17, 2008, in Kona and on May 1, 2008, in Hilo.

The Chair made the above announcement.

b. The Corporation Counsel is presenting "Government Records Law Training" for County personnel and board and commission members on April 30, 2008, in Kona and on May 15, 2008, in Hilo.

The Chair made the above announcement.

c. The next monthly meeting of the Board of Ethics.

Ms. Lum noted that she and the Chair could not be present for the regularly scheduled meeting of May 14, 2008. They discussed an alternate meeting date in May, and all but the Chair could meet on May 21, 2008. Ms. Schoen said she needed to check if Councilmember Jacobson would be available on that date. The Chair reminded them that another possible meeting date was June 10, 2008, the Tuesday before the next regular meeting date, which fell on a holiday.

Ms. Schoen said she would need to get back to everyone on when the next meeting would be, so to leave it "to be announced" for now.

The Chair stated that he had an announcement to make. He said that today's meeting was his final day to serve on the Board of Ethics and that he had sent a letter to Mayor Kim, making his resignation effective at the end of this meeting. He thanked everyone and suggested they place the election of a chair on the next agenda.

Ms. Lum said she was very disappointed the Chair was resigning, and he explained that since he is running for a seat on the County Council, serving on the Board would place him in a difficult situation.

Ms. Schoen said that the State Constitution actually prohibits members of ethics commissions from participating in political management or campaigns.

The Chair said the newspaper reported that he pulled papers, but he has not filed them yet, as he wanted to resign from the Board first.

Motion: Ms. Lum moved to adjourn, with great thanks to Mr. Joseph for all his work and his standards. She said he has been an inspiration to them all, with his management and handling of the work. He has brought the Board to a high level, and it is with regret that they accept his resignation.

Mr. Joseph said he wanted to disclose that when he writes sports stories for the newspaper, he is compensated. However, he has done his "Running With the Big Dog" column as a community service and has never billed the newspaper for it. He would like them to continue printing that column, but because he is running for office they may not continue it.

Second and vote: Ms. Malanka seconded the motion to adjourn, and all members present voted aye.

The meeting adjourned at 11:32 a.m.

Respectfully submitted:

Mary E Crosson

Mary E Crosson, Secretary