

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION

Wednesday, November 12, 2008 - 10:00 a.m.
101 Aupuni Street, Suite 230
Hilo, Hawai'i 96720

Present: John E. K. Dill, Chair
Ann Lum, Vice Chair
Marilyn Nicholson, Member
Diane Gentry, Member
Arthur Martin, Member
Renee N. C. Schoen, Deputy Corporation Counsel
Mary E. Crosson, Secretary for the Board

1. CALL TO ORDER

The Chair called the meeting to order at 10:00 a.m., welcomed Arthur Martin as the newest member of the Board, and introduced the other members.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

No one from the public was present.

3. APPROVAL OF MINUTES

Minutes of the October 8, 2008, Regular Session.

Motion and vote: Ms. Gentry moved to accept and file the minutes, Ms. Nicholson seconded the motion, and all members voted aye.

Minutes of the October 8, 2008, Executive Session.

Motion and vote: Ms. Nicholson moved to accept and file the minutes, Ms. Lum seconded the motion, and all members voted aye.

4. COMMUNICATIONS

- a. Communication No. 2008-___: *Informal Advisory Opinion for Petition No. 2008-9, regarding Fire Inspector Bobby Perreira.*

The Chair noted that paragraph 11 of the proposed Findings of Fact needed a correction. The Fire Chief testified that he *had* received comments regarding Mr. Perreira's professionalism, and they were all positive. The draft read that the Chief had not received any comments, concerns, or complaints about Mr. Perreira.

Ms. Lum noted that on page 3, on the second line from the bottom, "Evidence" should not be capitalized.

Ms. Schoen said another correction needed was for the spelling of Uncle Mikey's, was spelled incorrectly as Uncle Mickey's in several places.

Motion and vote: Ms. Lum moved to accept the changes, Ms. Gentry seconded the motion, and all members voted aye.

- b. *Communication No. 2008-101: The High Road publication of the Hawai'i State Ethics Commission, October 2008.*

Motion and vote: Ms. Lum moved to accept and file the publication, with a comment that it contained a good test (regarding campaign activities and the State Ethics Code) for people to take the next time there is an election. Ms. Schoen said that Lincoln Ashida, the Corporation Counsel, is good about sending out campaign restriction reminders each year. Ms. Nicholson seconded the motion, and all members voted aye.

5. NEW BUSINESS

There was no new business. The Chair reminded everyone that their primary purpose for the meeting today was to discuss potential changes to the Board's rules.

6. UNFINISHED BUSINESS

- a. *Discussion on amending the Board's Rules of Practice and Procedure regarding the imposition of administrative fines pursuant to Ordinance 08-57.*

Ms. Schoen handed out an "ethics inquiry procedure" form she had drafted, in which she went through the Board's rules and tried to clearly set out the sequence of events which take place when a petition is filed. She had not yet reached the end stage, when a fine could be imposed after the issuance of a formal opinion.

Ms. Schoen explained to new member Arthur Martin that the Board was trying to come up with a rule which would articulate the procedure by which it could impose an administrative fine. Earlier this year, the Council authorized the Board to impose an administrative fine upon a violation of the Ethics Code, but required the Board to set out rules so that the procedural due process requirements would be met. The due process requirements, set out by Hawai'i statute,

mandate that certain steps be taken, including giving formal notice to a respondent about the petition and hearing, and ensuring a respondent knows he has the right to confront and cross-examine witnesses, present evidence, and have an attorney present.

Ms. Schoen further explained that the Board typically conducts hearings in an informal manner, and that in the past few years no request for a formal advisory opinion had been received. Most petitions are filed by employees or officers on their own behalf, in which they seek the Board's opinion as to whether there would be a conflict of interest with their outside employment, a contract they may have with another agency, or various other scenarios.

The Board has existing rules that would apply to a formal hearing, however, and she had tried to figure out the best place to insert the rule on administrative fines. She wanted it clearly laid out for the members, since they had many questions about the informal and formal hearing process. A formal hearing would require that a respondent be afforded due process protections. For example, if the Board were to have found Mr. Perreira in violation of the Ethics Code at last month's hearing, no fine could have been imposed. This is because the proceeding held was informal and not conducted in a contested manner, and Mr. Perreira had not received notice by registered or certified mail. If, however, the Board decided during the hearing that the proceeding should be formal, a motion could have been made to convert the proceeding to a formal hearing. If the motion passed, the formal hearing would need to be held at a future date. Rule 6.1.b of the Board's rules deals with a formal hearing initiated by the Board.

The Chair brought up another scenario: Earlier this year the Board reviewed whether a councilmember's use of his photograph on his letterhead violated the Ethics Code. If the Board had found that doing so violated the Ethics Code, it would have issued an informal advisory opinion to that effect. If the councilmember continued using his photograph, the Chair asked whether the Board could bring him back in for a formal hearing. Ms. Schoen said yes, the Board itself could initiate a formal proceeding.

Ms. Gentry said that the Board of Appeals conducts formal hearings in a contested manner on every petition that comes before it. Once a decision is made, the matter either goes to the next level or dies. Ms. Schoen explained, however, that informal hearings are provided for in the County Code and the Board's rules, although the procedure to conduct the hearings is not laid out.

Ms. Nicholson asked for clarification on whether the Board would be locked into first having an informal hearing on a petition, or could opt to go directly to a formal hearing. Ms. Schoen said they would not be locked into having an informal hearing first. A respondent, upon receiving a petition, could request a formal investigation and hearing, and the Board would automatically move to the formal process. In another situation, the Board could inform a respondent that additional information is wanted. The respondent could come back with the additional information as well as an attorney, and the Board could decide that a formal hearing would be more appropriate. The parties would have to return on another date for the formal hearing. The rules also allow for Board-initiated formal hearings, so the Board could decide at the first hearing to continue the matter for a formal proceeding. This would require a motion, discussion, and majority vote during open session.

Ms. Lum said it would be more appropriate for the Board to make the informal/formal decision on a case-by-case basis, as each petition arose.

The Chair said a formal hearing should be conducted if the alleged ethical violation is serious. He asked whether both the petitioner and respondent have the option to request a formal hearing, and Ms. Schoen said only the respondent can.

The Chair asked whether a respondent would be afforded representation by the Corporation Counsel in a formal setting. Ms. Schoen explained that the Corporation Counsel makes case-by-case determinations as to whether it will represent an officer or employee, and it depends on whether the officer or employee was acting in the course and scope of his or her employment when the alleged conduct occurred. If representation gets denied and the officer or employee hires an attorney, goes through the hearing and is found not to be in violation, the Council would be requested to reimburse the respondent's legal fees.

Because of these various factors, the Board determined that its standard form letter to respondents should be changed, to explain the informal and formal hearing options and to have them designate a choice.

Ms. Nicholson asked what difference it would make for the Board if they opted for a formal rather than informal hearing. Ms. Schoen said there would not be much difference for the Board members, but the clerical staff would have more work to do in terms of providing formal notice and possibly issuing subpoenas. In addition, the respondent would need to be informed of the provisions of Rule 6.2b, which includes the right to be heard, to subpoena witnesses and to require the production of records, to be represented by an attorney, and to cross-examination. If subpoenas were requested, the Chair would need to sign off on them.

If the Board should decide during an informal hearing to pursue having a formal hearing, the staff would still need to inform the respondent of the Rule 6.2b provisions and would still need to send formal notice. To pursue a formal hearing would require a majority vote of the Board members.

In last month's hearing regarding Mr. Perreira, if the Board had wanted more information from him, such as documentation of his work schedule, they could have requested it of him and continued the hearing as an informal or formal proceeding to the next meeting.

The Chair asked whether the Board would be required to move a petition to a formal hearing and subpoena documents if a respondent refused to provide them. Ms. Schoen said no, that the Board has enough power through the chair to ask someone to come in and testify and give evidence. For example, if the Board wanted the fire chief to appear and verify information, they could ask him to do so and he would most likely comply.

The Chair asked whether a separate hearing would need to be held if the Board wanted to issue a fine. Ms. Schoen said no, that the issuing of a fine could be incorporated into the Board's

finding of a violation. A member could move to issue a fine at that meeting, and it could be discussed and voted upon.

The Chair asked what needed to be done to formalize the whole procedure, and Ms. Nicholson said they needed to see what the written rule would look like. She suggested the fine issue be a separate, stand-alone rule rather than a part of the formal opinion section. Ms. Schoen explained that they would need to publish the proposed rule changes in the newspaper and set a public hearing so interested people could give testimony. After the public hearing, the Board could adopt the proposed rules. Council approval would not be needed.

The Board members discussed whether the administrative fine rule should be a separate section, or whether it should be incorporated into the existing Rule 7. They decided to incorporate it into Rule 7 so that it would become an action after issuance of a formal opinion. Ms. Schoen suggested placing it after Rule 7.2, which deals with officers and employees. Ms. Lum asked if it could be called Rule 7.3, and Ms. Schoen said yes. The rule would need to state that an employee or officer as defined by the Code could also be subject to an administrative fine. The definition of employee/officer would need to be included, because the rule cannot apply to civil servants due to their union status.

The Chair requested that the final draft be included in their packets for the December meeting, so that the public meeting could possibly be held in January. Ms. Schoen said she will put the draft together and will also include grammatical corrections as well as updated references to the Charter and Code.

b. Ongoing discussion on the Sunshine Law.

There was nothing new to discuss here.

Motion and vote: Ms. Nicholson moved to enter Executive Session for review of confidential financial disclosures. Ms. Lum seconded the motion and all members voted aye.

Executive Session was entered into at 10:38 a.m., and the Board returned to Regular Session at 10:50 a.m. to vote on the confidential financial disclosures.

7. EXECUTIVE SESSION (separate minutes prepared)

Motion and vote: Ms. Gentry moved to accept and file confidential financial disclosures numbered 1, 2, 4, and 5 and to return number 3 for further information. Ms. Lum seconded the motion, and all members voted aye.

8. ANNOUNCEMENTS

The Chair announced that the next meeting was scheduled for December 10, 2008, at 10:00 a.m. at the same location (the Department of Liquor Control's conference room at 101 Aupuni Street, Suite 230, Hilo).

Ms. Schoen stated she had an announcement. The Board's former chair, Wayne Joseph, has filed a petition regarding Lincoln Ashida which is scheduled to be heard at the December 10, 2008, meeting. Because there is a potential conflict for her to represent the Board while Mr. Ashida is her boss, arrangements have been made for Adrienne Heely, a Maui County deputy corporation counsel, to represent the Board at that meeting.

The secretary was instructed to send the Board members by next week the documents on the petition for their review, as well as provide them with the link to a video of Mr. Joseph where he spoke at a campaign forum when he was running for the Puna District council seat, as his statements there related to the petition.

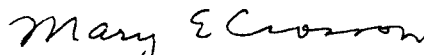
The Board members had questions about whether they could hear the petition, since some of them know both Mr. Joseph and Mr. Ashida. Ms. Schoen said she cannot advise them on the matter but that in general, any time a Board member has a relationship with someone who is before them, it should be disclosed. Also, if a Board member feels he or she cannot be fair and impartial, it should be disclosed. They would need to discuss this matter further with Adrienne Heely.

9. ADJOURNMENT

Motion and vote: Ms. Gentry moved to adjourn, Ms. Nicholson seconded the motion, and all members voted aye.

The meeting adjourned at 10:55 a.m.

Respectfully submitted:



Mary E. Crosson, Secretary