

HAWAI‘I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION¹

Thursday, November 19, 2009

10:05 a.m. – 11:08 a.m.

333 Kīlauea Avenue, 2nd Floor
(County Council Chambers – Hilo)
Hilo, Hawai‘i 96720

(and via videoconference at the Kona Council Office,
75-5706 Hanama Place, Suite 109
Kailua-Kona, Hawai‘i 96740

Present: John E. K. Dill, Chair
Marilyn Nicholson, Member
Diane Gentry, Member
Renee N. C. Schoen, Deputy Corporation Counsel
Adrienne Heely, Maui Deputy Corporation Counsel
Mary E. Crosson, Secretary for the Board
Cathy Hall, Supervising Legal Clerk

Also present during portions: Del Pranke, Kevin Dayton, Levi Hookano, Kenneth Goodenow, Lincoln Ashida, Brooks Bancroft, Kevin Dayton, Jason Armstrong, Nancy Cook-Lauer, and others; and Karen Eoff (via videoconference at Kona)

1. CALL TO ORDER

10:05 a.m. The Chair called the meeting to order and asked Karen Eoff, who was present via videoconference at the Kona Council Office, if there were any members of the public to testify from Kona. There were none.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

Del Pranke and Brian DeLima had signed up to testify.

Mr. Pranke testified that a conflict of interest exists in having the Corporation Counsel represent County employees or officers before the Board of Ethics, as well as in other venues. He said it was also a conflict for the Board members to review the Mayor’s proposed changes to the Ethics Code, since the advice they receive is from the Corporation Counsel, who was selected by the Mayor. Mr. Pranke further stated that it was unfair in that taxpayers do not get free representation by counsel. He said he applied to the Charter Commission to review this matter. In addition, he said the Board of Ethics is incorrectly named a “board” when it should in fact be called a “commission.” He said the Board of Ethics is supposed to be independent of any branch of government so that it can make decisions in an unbiased manner, and that the Board

¹ Minutes in italics are verbatim. Blanks indicate inaudible or indecipherable speech.

was not to be used by the Mayor to further his political end. He further stated his objection to the use of a deputy corporation counsel from Maui to represent Mr. Ashida in his petition today.

The Chair told Mr. Pranke that his time was up and that he had signed up to talk about item 6 on the agenda.

Mr. Pranke said item 6 is about using the Corporation Counsel to deal with the Board's business. He said it would be a conflict of interest for the Board to consider changes to the Code while receiving advice from the Corporation Counsel, who is appointed by the Mayor. He said he wanted to make sure the Board members understood that. He said it would also be a violation of the Code for the Board to receive advice from the Corporation Counsel regarding his petition about Mr. Ashida. Mr. Pranke stated that he wanted the Board to understand that he would not lay down and roll over about the Corporation Counsel giving advice regarding his petition about Mr. Ashida.

The Chair said that matter could be discussed when they came to Mr. Pranke's petition regarding Mr. Ashida (Petition 2009-10), and thanked Mr. Pranke.

Mr. DeLima stated that he was there representing Kama'aina Pumping, Inc., regarding the Mayor's proposed changes to the Ethics Code. He said that at the prior meeting he spoke about special-duty police officers. He learned that their special-duty pay does not go towards retirement, and that it is separate and apart from their regular pay. The County contracts with them independently and makes a percentage of each hour paid. One of the purposes is to avoid moonlighting by officers. The issue at the heart of it all is self-dealing, which the existing law avoids. The Mayor's proposals, if adopted, could allow people to manipulate their ownership status of a company. There is also ambiguity in what the term "controlling interest" means. He said the best course of action is to keep the current Code but to be more vigilant in ensuring that the law is complied with. He hoped the Board's recommendation would be to enforce the existing law, which would take care of the concerns that have been raised and not create more problems.

The Chair stated that the Board was still in the information gathering stage and would be accepting written input from the public until December 4, 2009.

3. APPROVAL OF MINUTES

Minutes of the October 14, 2009, Regular Session.

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

4. COMMUNICATIONS

- a. Communication No. 2009-81: Email to the Board dated 10/16/09, "urging the Board of Ethics to reconsider the decision rendered on Petition 2009-7."**

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

- b. **Communication No. 2009-83: Letter to the Board dated 10/9/09, clarifying that the writer does not believe members of the Ethics Board are in “Safarik’s camp as reported in the Hawai‘i Tribune-Herald,” and regarding Board member Diane Gentry.**

Ms. Gentry commented that the letter is not her statement and asked when it was received. The secretary informed her it was received on October 22, 2009. Ms. Gentry noted that the letter was untimely, as it was received after the Board’s October 14, 2009, hearing regarding Ms. Naeole. She said that at that hearing, there was no objection made by Ms. Naeole, Ms. Naeole’s attorney, the petitioners, or any Board member to her participation in the matter. Ms. Gentry said the last comment of the letter seemed to bear ill will towards her as an individual, but that she would move to close the matter.

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

- c. **Communication No. 2009-84: *The High Road* publication by the Hawai‘i State Ethics Commission, October 2009.**

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

- d. **Communication No. 2009-87: Memo to Honolulu Mayor Hannemann from Charles Totto of the Honolulu Ethics Commission dated 10/27/09 regarding Hawai‘i Council of Mayors, Legislation (S.B. No. 531 and H.B. No. 626, Clarifying County Ethics Agencies’ Process for Imposing Civil Fines).**

The Board asked Ms. Schoen if they needed to take any action on this communication. Ms. Schoen said it was provided for informational purposes and that the Board has already submitted testimony in support of the legislation. She said that Mr. Totto has also informed her that Mayor Hannemann and the Hawai‘i Council of Mayors will be supporting the legislation.

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

- e. ***Draft Informal Advisory Opinion* regarding Petition No. 2009-9 (heard at the Board’s October 14, 2009, meeting, and regarding the pen-throwing incident at the June 2, 2008, Council meeting).**

Motion and vote: Ms. Gentry moved to accept the opinion as drafted, Ms. Nicholson seconded the motion, and all members present voted aye.

5. NEW BUSINESS

- a. **Petition No. 2009-10: Petitioner alleges that a County officer or employee violated Section 2-83(a)(3) of the Code of Ethics (regarding fair treatment) by treating a council person “in an unfair and biased manner, based on the fact that she opposed his opinion.”**

CHAIR: For this petition, we'll be represented by Ms. Adrienne Heely from Maui Corp Counsel. Thank you for joining us.

HEELY: Good morning, Mr. Chair and members of the Board. Happy to be here again to assist you.

CHAIR: Good to see you. And this is the way we're going to handle it. I'll ask the Board if they need further information regarding this in order to make a decision. If they do, we'll allow which side, whatever side that needs to provide that information, come up and provide that testimony or answer some questions. Then, once the information is gathered, the Board will go into deliberations and come up with a decision, if they're ready to do so. So with that being said, have we, all of you—the three of us—received the information and the response to petitioner from Mr. Ashida? Did you get a chance to review that?

NICHOLSON: Um hmm.

CHAIR: Do you need further information to render an opinion on this, make a decision on it, or even to accept it at all?

(Both Ms. Nicholson and Ms. Gentry shook their heads.)

CHAIR: No? Okay. I've had the chance to look over this a few times, and my opinion is that it just doesn't qualify for us to even make a decision on. My recommendation is that we reject this petition number 2009-10 from Mr. Pranke regarding Mr. Lincoln Ashida. I don't think there was any willful malice that was done, and I think—

PRANKE: --Have you looked at the video?

CHAIR: Hold on. I saw your response. I don't think I need to look—

PRANKE: --You're trying to squeeze me out. I brought the evidence.

CHAIR: That's great. I don't need to see it, personally.

PRANKE: Okay, fine. You've made your decision—

CHAIR: --Board members? Hold on—

PRANKE: --based on—

CHAIR: --Excuse me—

PRANKE: --lack of evidence—

CHAIR: I said that if we need information from you, we'd ask you.

PRANKE: I understand what you said.

CHAIR: All right.

PRANKE: But you've changed the rules in the middle of the game. This is not how it's been done before.

CHAIR: Well, that's the thing, is if we need more information, we ask for it. Okay, Ms. Nicholson, do you need any more information?

NICHOLSON: No. No, I'm fine.

CHAIR: Did you see the video? Ms. Gentry?

GENTRY: I didn't see the video.

CHAIR: Okay. All right. Do we have a motion to reject this or to find that there is no violation of the Ethics Code as specified?

NICHOLSON: I move that we find no violation of the Code of Ethics in relation to Petition 2009-10.

GENTRY: Second.

CHAIR: Okay, all in favor? Aye.

GENTRY: Aye.

NICHOLSON: Aye.

CHAIR: All right, moving on to Petition No. 2009-11

- b. Petition No. 2009-11: Petitioner alleges that a County officer or employee violated Section 2-83(a)(3) of the Code of Ethics (regarding fair treatment) by violating his “constitutional right to petition the government by abridging my ability to speak at a public meeting [while allowing] others to speak even on items not on the agenda.”**

CHAIR: This again has to do with the Council. I've had a chance to take a look at the Petitioner's summary of events and also the response by Chair Yoshimoto. Again, I think

it's just the chairman trying to run a council meeting the best that he can. I don't think there's any malice aforethought that took place--

PRANKE: --Malice aforethought is not part of the rules--

CHAIR: --but I don't really think this constitutes much of anything. But Board members, do you have further questions or do you need more information than what has been provided?

NICHOLSON: I move we find no violation of the Code of Ethics in regard to Petition No. 2009-11.

GENTRY: Second.

CHAIR: Okay, all in favor? Aye.

NICOLSON: Aye.

GENTRY: Aye.

CHAIR: Moving on to Petition No. 2009-13.

c. Petition No. 2009-13: Petitioner is seeking an opinion from the Board on whether her employment with the County of Hawai'i is in conflict with her serving on the State Elections Commission.

Petitioner is seeking an opinion from the Board on whether her employment with the County of Hawai'i is in conflict with her serving on the State Elections Commission. A couple of things. I don't think there's any conflict at all. It's a short term that's set to expire on June 30, 2010, of next year. I don't think that her position in the Planning Department would raise too many red flags or there'd be any issues regarding elections in her duties at the Planning Department. Board members, do you need more information, or do you have any questions?

GENTRY: No, but it was astute of her to get an advisory opinion.

CHAIR: Okay.

NICHOLSON: I move that we find no conflict of interest on Petition No. 2009-13.

GENTRY: Second.

CHAIR: Okay, all in favor? Aye.

NICHOLSON: Aye.

GENTRY: Aye.

d. **Counsel's Report Regarding Matters and/or Inquiries Received by the Board, including:**

- (1) ***Gift Disclosure Statement* received from Gary Sirman of the Workforce Investment Board, reporting that no gifts were received.**
- (2) **Petition 2009-5 regarding the temporary hire of a retired employee.**

Ms. Schoen explained that she had sent a letter to the petitioner for Petition 2009-5, and had provided copies to the Board members, in which she explained why the Board would not hear the petition and giving the petitioner an opportunity to petition the Board should he disagree with her assessment.

The Chair noted the petition was moot, as the respondent was no longer employed by the County or on contract with the County. In addition, the letter allowed for the petitioner to respond if he disagrees with the findings of the letter.

Ms. Schoen said that Section 2-91.2 of the Code makes it clear that the County is not prohibited from hiring former officers or employees on a temporary contract basis to perform their duties.

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

6. UNFINISHED BUSINESS

a. Discussion on Mayor Kenoi's proposed amendments to the Ethics Code.

The Chair stated that they were hoping to have more public input at this meeting, but that they were accepting written testimony until December 4, 2009. He said the Board was in an information-gathering stage at this time.

Ms. Nicholson asked whether there was a way to encourage more public comments, and Ms. Schoen explained that public notices were posted in both island newspapers. The notices also stated that the Board would be accepting written, faxed, or emailed testimony until December 4, 2009. At this point, no written testimony was received. She said the Board could decide to run another notice in the papers, but given the lack of response for this meeting, it may not be necessary.

The Chair said he wanted to wait until December 4 was past, which would be before the Board's next meeting, and then discuss any written or verbal testimony received. They did receive some public input at a prior meeting. At the next meeting, the Board could discuss the proposals and responses in detail. He would like the Board to provide the Mayor a response by early next year, and their February meeting may be the date to finalize their response. The Chair asked Kevin Dayton, who was present, if he had any update from the Mayor. Mr. Dayton said he had no update and that the timeline sounded fine. The Chair said to pass the timeline on to the Mayor and if it was not acceptable to him, the Board could try to finalize its response sooner.

Ms. Nicholson commented that since they would be looking at and responding to the Mayor's proposals, it may be a good time to look at any other changes to the Ethics Code they might want to recommend. They have the opportunity now to suggest changes to the Code on areas that have been problematic, and the Chair and Ms. Gentry agreed. The Chair suggested they focus on the Mayor's proposals first, and then move on to other areas of the Code.

Ms. Schoen suggested that if any of them had any thoughts on changes to the Code, to send her or the secretary an email, and they could have it agendaized for the next meeting. The agenda could be broadened to include not only the Mayor's proposals but their own proposals. For example, the Board at an earlier meeting had discussed shortening the time period in which petitions can be filed from six years to something less.

Ms. Gentry said that some of their terms end soon, so the Mayor may need to start considering who else can serve on the Board.

The Chair said that Section 2-83(a)(3), which deals with treating people in a courteous, fair, and impartial manner, has been difficult to work with. Ms. Nicholson said it would be helpful to see how other counties worded the equivalent sections, and Ms. Schoen said that the County of Hawai'i is the only county that has that language. The Chair said that section needs to be more specific.

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

10:40 a.m.: The Board announced a short recess prior to beginning Executive Session.

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11:05 a.m.: The Board returned to Regular Session.

7. VOTING ON EXECUTIVE SESSION MATTERS

a. Approval of the minutes of the October 14, 2009, Executive Session.

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

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

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

c. Draft letter from the Board to the Petitioner in Petition No. 2009-12, wherein the Petitioner alleges that the Board violated Section 2-83 (fair treatment) of

the Ethics Code by violating the Sunshine Law and its Rules of Practice and Procedure.

Motion and vote: Ms. Nicholson moved to approve the draft letter with one change, amending the word “should” to “may” in the third paragraph, as discussed in Executive Session. Ms. Gentry seconded the motion, and all members present voted aye.

8. ANNOUNCEMENTS

The Chair announced that the next monthly meeting of the Board of Ethics is scheduled for December 9, 2009, at 10:00 a.m. at the conference room at the Department of Liquor Control at 101 Aupuni Street, Suite 230, Hilo, Hawai‘i 96720.

9. ADJOURNMENT

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

11:08 a.m.: The meeting adjourned.

Respectfully submitted:



Mary E. Crosson, Secretary