

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION

Wednesday, December 12, 2007 – 10:00 a.m.
325 Aupuni Street, Suite 230 (Conference Room)
Hilo, Hawai'i 96720

Present: Wayne Joseph, Chair
Ann Lum, Vice Chair
Tricia Malanka, Member
Marilyn Nicholson, Member
Lincoln S. T. Ashida, Corporation Counsel (counsel for the Board)
Mary E. Crosson (secretary for the Board)
Emarie Kawaauhau (secretary with the Corporation Counsel's Office)

Also Present: Levi Hookano (briefly)

1. **CALL TO ORDER**

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

2. **STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS**

The Chair called Levi Hookano, of the Legislative Auditor's Office, who was present at the Board's request to provide an update on the agenda items 6b and 6c.

6. **UNFINISHED BUSINESS**

- b. Report on status of Board's request for a time limit for incumbents who are seeking reelection in an election year on sending campaign literature using County funds.**
- c. Report on status of Board's request for authority from the Council to fine officials and employees who violate the Code of Ethics.**

Mr. Hookano reported that both of the proposed bills would soon be going to the Council for hearing. He completed his research on the issues and submitted memorandums to County Chair Hoffmann. The Legislative Research Branch was making minor revisions to the bills, and they would probably go before the Council in January.

The Chair asked about Council procedure and when public testimony could be given. Mr. Hookano said that the bills would first be reviewed at the committee level, the committee would make a recommendation to the Council, and then they would go through at least two more public readings. Oral or written testimony could be given.

The Board thanked Mr. Hookano, and he left the meeting at 10:03 a.m.

3. APPROVAL OF MINUTES

Motion and vote: Ms. Nicholson moved to approve the regular session minutes of November 14, 2007. Ms. Malanka seconded the motion, and all members present voted aye.

Motion and vote: Ms. Lum moved to accept and file the executive session minutes of November 14, 2007. Ms. Malanka seconded the motion, and all members present voted aye.

4. COMMUNICATIONS

Communication No. 2007-124: Hawai'i County Police Department's *Annual Report – Fiscal Year 2005-2006.*

Motion and vote: Ms. Lum moved to accept and file the report, Ms. Malanka seconded the motion, and all members present voted aye.

5. NEW BUSINESS

- a. Report and discussion on the possible entry of an informal advisory opinion based on Mr. Ashida's research into whether elected incumbents in the County are able to utilize County funds for mail-outs within six months of an election and whether doing so would constitute an advantage as defined by Section 2-83 of the Ethics Code.**

Mr. Ashida said he was surprised that Mr. Hookano had said the issue of the mail-outs was prepared to go to the Council, as he under the impression that just the administrative fine issue was ready. As he indicated in previous discussions with the Board, an amendment to the Code was not needed for the Board to opine that under its existing language on fair treatment, it may constitute a violation for an incumbent County official to do these mail-outs. He was pleased the Council will consider the matter, but is not certain it will be the will of the Council to pass the legislation.

Mr. Ashida said that regardless of what the Council decides, the Board could still issue an informal advisory opinion that based on the existing Code of Ethics, its collective belief is that these mail-outs constitute an unfair advantage.

The Chair said he agreed with the interpretation that incumbents have an unfair advantage in having these mail-outs.

Ms. Nicholson asked whether they could pull the issue back from the Council until the Board could discuss it more, but the Chair said that the Board had voted on submitting the issue to the Council about a year ago, before Ms. Nicholson was a member.

Ms. Nicholson asked what the impact would be if the Council did not adopt the bill. Mr. Ashida explained that if the Council failed to act on the matter or voted it down, it was still the Board's responsibility to interpret the Code of Ethics. The Council's opinion on the issue does not matter. However, the Council writes the Code of Ethics and could tinker with its existing language.

Ms. Lum pointed out that the Board's original letter to the Council on the matter recommended it adopt a rule setting a time limit on using a district allowance or other County funds for mailings and legislative summaries in an election year. Mr. Ashida said that letter was a recommendation to the Council to amend its rules of practice and procedure, in the form of a resolution. The problem with doing so is that there is no penalty should a councilmember violate a rule. The Council rules even have a provision which allows them to be suspended. The rules have no force or effect of law.

Mr. Ashida said that Mr. Hookano is working on submitting a bill to Council Chair Hoffmann which would actually amend the Code by ordinance to provide for the prohibition of the mail-outs. If the bill should pass, the prohibition of the mail-outs would be part of the Code of Ethics, not the Council's rules of practice and procedure.

Mr. Ashida explained that if the Council votes down amending the Code of Ethics regarding the mail-outs, the Board of Ethics could still issue an opinion that based on the existing Code of Ethics, as it is written and on a case-by-case basis, an incumbent who does the mail-outs may be violating the Code. Any time an ordinance is opened up for amendment, however, the Council is free to tinker with any part of the language. His opinion would be for the Board not to try to pull back the recommendation, but to let it proceed and see what the Council does with it. He said that no matter what happens at the Council level, he does not believe the Board's powers will be curtailed or limited in any way.

Mr. Ashida said that if the Board members collectively agree with his December 6, 2007, letter, it would be firing a warning shot that it does not approve of mail-outs in election years. The Board would not be saying they are illegal, but if the matter is brought up before the Board, it would be reviewed on a case-by-case basis.

Ms. Lum said she did not want to say that incumbents cannot ever have these mail-outs, and Mr. Ashida said that is why the Board would need to look at it on a case-by-case basis.

Ms. Lum said she did not want the Council to change the Code of Ethics, and the Chair said he did not believe that would happen, as it would be a political nightmare for the Council in the media.

Mr. Ashida said it is possible the Council will act favorably and agree. The bill could pass and be written into the Code. At that point, the Board's informal advisory opinion, if it chooses to issue one, would become moot, as it would not matter what the Board's opinion is if there is a law about it.

Ms. Nicholson wanted to know what the bill going to Council says. She would want it to include language that such mail-outs could be subject to review by the Board of Ethics, so that incumbents are reminded that the Board has concerns on the issue and the matter could come before it. Mr. Ashida said the document would not need to say that, as it is the Board's job to interpret the Code of Ethics. If the Board wanted to make a point, it could send a letter to incumbents expressing its concerns. It would not need to be written into the law that the Board would review it. If the Council wanted to take that away from the Board, it would require a Charter amendment.

The Chair commented that it has taken 16 months to get to this point. Since he was the initiator of the recommendation, he personally would like to see it go forward.

The Board members discussed Mr. Ashida's December 6, 2007, letter on the use of County funds for mail-outs, as well as Board member John Dill's December 10, 2007, letter on the subject.

The Chair said he liked the word "recommend," as suggested in Mr. Ashida's letter, as the Board would just be recommending that incumbents not use these mail-outs six months prior to an election.

Ms. Nicholson said she agreed with Mr. Dill's letter, which stated he did not want the words "irrespective of content" in the opinion. Ms. Malanka agreed.

Ms. Lum said she would be okay if they deleted "irrespective of content," as the recommendation would still be that incumbents not send the mail-outs. The Chair agreed to the removal of "irrespective of content."

Mr. Ashida reminded the Board that there was no motion on the floor.

Motion and vote: Ms. Lum moved for the Board to issue an informal advisory opinion stating that the mail-outs may constitute a violation of the Code of Ethics, and to use the wording in Mr. Ashida's letter except for the words "irrespective of content" from point No. 3. Ms. Nicholson seconded the motion. There was no further discussion, and all members present voted aye.

The Chair directed the meeting to agenda item "b" under New Business.

b. Election of Officers for 2008 (Chair and Vice Chair).

The Chair explained that he'd asked the secretary to add this item to the agenda, as it needs to be done at the end of each year.

Motion and vote: Ms. Lum moved to nominate Mr. Joseph as Chair, and Ms. Nicholson seconded the nomination. All members present voted aye.

Motion: Ms. Malanka moved to nominate Ms. Lum as Vice Chair. Ms. Nicholson seconded the nomination.

Motion: Ms. Lum moved to nominate Mr. Dill as Vice Chair. The Chair said she could not do that without Mr. Dill's permission or approval.

Discussion: Ms. Lum said she is comfortable being Vice Chair as long as Chair Joseph is present. She would not like to have to act as Chair if he were not there. The Chair said he had not missed a meeting in the past year.

Vote: All members voted aye on Ms. Lum's nomination as Vice Chair.

6. UNFINISHED BUSINESS

a. Report on status of *Ethics Guide for Hawai'i County Officers and Employees* booklet.

Mr. Ashida reported that the booklet has not yet been distributed. He emailed Council Chair Hoffmann again regarding whether the Machine Room could produce the booklet but has so far not received a response. Mike Ben, the director of the Human Resources Department, is prepared to distribute the booklet with the County newsletter as well as insert a blurb in the newsletter about it.

Mr. Ashida asked the Board members whether they wanted the newsletter to say that the Council is now considering authorizing the Board to impose administrative fines. Ms. Malanka and Ms. Nicholson were in favor of doing so, as they believed it may cause employees to actually read the booklet.

Mr. Ashida said that Mr. Ben fully endorses what the Board is doing and wants new County employees to sign off their receipt of the booklet. He was not sure on a procedure to get existing employees to sign for it, however.

Mr. Ashida said he will check with Council Chair Hoffmann on the status of the request to use the Machine Room for copying. Normally Mr. Hoffmann is very responsive. If the Machine Room is overwhelmed with work, it may be possible to use the Board's budget to outsource the printing of the booklet.

The Chair asked what happens to the Board's budget, and Mr. Ashida said it lapses back into the General Fund every year. He explained that the Board's secretary and recording equipment costs come from the Corporation Counsel budget and that the meeting places are free. The only expenses have been the Board members' mileage and lunch.

The Chair and Ms. Nicholson said they would like to pursue the Machine Room option at least until the end of the year, and Ms. Malanka agreed.

As Unfinished Business items "b" and "c" were already gone over with Levi Hookano, the Chair moved the agenda on to "d."

d. Further review and discussion on the *Rules of Practice and Procedure of the Board of Ethics*, including:

(1) Further discussion on updating or developing a special code of conduct for Board of Ethics members.

The Chair thanked Ms. Lum for meticulously going over the Board's rules and questioning some of them, and Ms. Lum asked if the Chair agreed that the current rules were quite well written, and he did. He wanted to address her written comments, however.

Regarding Rule 1.1, Ms. Lum asked if the year for the Charter was now 2000 and about the date for the County Code. Mr. Ashida said yes and that the Code should be referred to as County Code 1983 (2005 Edition).

The Board discussed Rule 1.4(6), about the word “officer” and who it includes. The Board members agreed on eliminating (A) through (E) and replacing it with the wording of County Code Section 2-82(8).

Ms. Lum brought up Rule 1.9, regarding the maintenance and custody of files and records. She questioned the disposition procedure of files, and the Chair said there are rules governing the disposition of files with the Corporation Counsel, and he would recommend retaining the language as is.

Regarding Rule 1.14(b), the hours of operation, Ms. Lum asked if they were still from 7:45 a.m. to 4:30 p.m., and was informed they were.

Also in Rule 1.14(b), Ms. Lum suggested they add “or other announced location” for the meeting location, and the Chair agreed.

Ms. Lum asked whether they should change the regular meeting location, which is listed as “the meeting room of the Hawai‘i County Council,” since they do not always meet there. Mr. Ashida recommended leaving it as is, because the Sunshine Law requires adequate notice of the date, time and place, and the current language is standard for all County boards and commissions. Each board needs a home base, and when they don’t meet at the home base, they are actually having a “special meeting.”

Rule 4.6, regarding acknowledging the receipt of a request, was the next rule Ms. Lum questioned. She wanted clarity on the phrase “shall be sent,” and whether that meant the date notice is mailed or the date it is received. She said the Board ran into a problem with the 2006 petition regarding Gary Safarik on the issue of receipt.

Ms. Malanka pointed out that Rule 6.2(c) said that notice of hearing was to be via registered or certified mail at least fifteen days before the hearing, and Ms. Lum pointed out that a party has 20 days after receipt to respond. The problem is that the Board does not know when a party receives the notice.

The Board members discussed the matter of the 20 days’ notice and whether a deadline should be written into the notice. They also noted that if something is sent via certified mail, a person could refuse to sign for it, and that items can also get lost in the mail, whether sent certified or not.

The Chair asked for Mr. Ashida’s opinion, and Mr. Ashida said he would not recommend changing the rule because of what happened with the Safarik petition, as those were unusual circumstances and notice has not been a problem in other cases. He explained that respondents need to be afforded due process and that with court pleadings, responses are due “x” number of days upon receipt, not from mailing. A certain amount of honor is presumed. He also said that respondents are officers and employees, so he knows how to find them and can always follow up with them.

Ms. Nicholson asked Mr. Ashida whether the Board could ask him to follow up on whether a respondent received a notice, and Mr. Ashida said yes. Ms. Lum said she would be happy with that.

Ms. Lum next moved to Rule 4.12, regarding the publication of advisory opinions, and asked whether the Board's opinions were published or just available. The Chair said he interprets the word "published" as written. Mr. Ashida said that to him, "published" means something that is accessible to the public.

Mr. Ashida said that his office's website is in the process of being updated, and he has asked that a portion be dedicated to the Board of Ethics, with a link to the actual opinions.

Ms. Lum next moved to Rule 8.1, regarding who is to file financial disclosures. There was a recent ordinance passed that updated the Code on who is to file disclosures, so the rule should be updated to follow the Code.

For Rule 8.3b, regarding where disclosure forms can be obtained, Ms. Lum wondered why the rules included information about public financial disclosures, since all disclosures reviewed by it were of the confidential type. In addition, the confidential disclosure forms are not available at the County Clerk's office.

Discussion was had on whether Rule 8.3a should be deleted and Rule 8.3b amended. It was decided to keep 8.3a and to amend 8.3b to explain that public financial disclosure forms could be obtained from the County Clerk's Office, and confidential financial disclosure forms could be obtained from the Office of the Corporation Counsel or the Board of Ethics website.

Ms. Lum directed the Board to Rule 1.5, regarding disqualification of Board members and asked whether anything needed to be changed. The Chair felt it was fine as is.

Both Ms. Lum and Ms. Nicholson asked Mr. Ashida about the terms "bias" and "prejudice" and whether they were stronger than a conflict of interest. Mr. Ashida said they were, as they involve a certain amount of emotional investment. A person could have a conflict of interest but not have an emotional investment.

Ms. Lum said they should leave Rule 1.5 as is, then.

Ms. Lum said she had questions about Rule 9 and the Board's responsibilities. The rule seems to mainly be about the Council and its members and when they should make disclosures. She asked what Rule 9 meant to the Board of Ethics.

The Chair agreed that it did not seem to concern them.

Mr. Ashida said there may have been a reason in the past why it was included, but it looked safe to remove it from the rules.

The members continued to discuss Rules 9.1 and 9.2 and why they were included in their rules. Mr. Ashida said it may be safer to just leave them in.

Mr. Ashida explained that once the Board decides on the changes it wants to its rules, the secretary will need to prepare a draft of the new rules, and a public hearing on the proposed amendments will need to be held. Because of the notice requirement for the public, it would need to go on the Board's February agenda.

Motion and vote: Ms. Lum moved to amend the Board's rules of practice and procedure as follows:

Rule	Change
1.1	- Change "Hawai'i County Code 1983" to "Hawai'i County Code 1983 (2005 Edition)." - Change "Charter of the County of Hawai'i 1980" to "Charter of the County of Hawai'i 2000."
1.4a(6)	Eliminate 1.4a(6)(A) - (E), which defines "officer," and replace it to read the same as County Code Section 2-82, starting from where it says " <i>Officer</i> " includes the following and lists (1) through (6).
8.1a(3)	Amend paragraph so it follows recent ordinance that excludes all advisory board and commission members from the requirement to file financial disclosures
8.3b	Amend paragraph to read: "Public disclosure forms can be obtained from the Office of the County Clerk, and confidential disclosure forms can be obtained from the Office of the Corporation Counsel during regular business hours or from the County's Board of Ethics website."

Ms. Nicholson seconded the motion. There was no further discussion, and all members present voted aye.

Mr. Ashida said the minutes should reflect that the rules have not been amended, but that the Board has voted to propose these rule changes for the purpose of having a public hearing on the matter. The law requires that the public receive 30 days' notice of proposed rule changes, so the Board could place these proposals on its February agenda. The law also requires that if anyone testifies or submits comments, the Board is obliged to respond to the comments in writing. At the meeting after the public hearing, the Board can actually vote on the proposed changes. The March 2008 meeting would be the earliest the Board could vote to adopt the changes.

e. Ongoing discussion on the Sunshine Law.

Mr. Ashida said he had nothing new to share on the Sunshine Law.

The Chair questioned whether a new board member who submits a financial disclosure late in the year still needs to file one in January like everybody else. Ms. Lum said the rule says

disclosures need to be submitted within 20 days of taking the oath of office and by January 31 of each year thereafter. Mr. Ashida also confirmed that the answer is yes.

Motion and vote: Ms. Malanka moved to enter Executive Session for agenda item 7. Ms. Nicholson seconded the motion, and all members present voted aye.

Executive Session was entered at 11:18 a.m.

Regular Session was re-entered at 11:28 a.m.

7. EXECUTIVE SESSION

Review of *Confidential Financial Disclosure Forms* filed pursuant to Section 2-91.1(d), Hawai'i County Code, where personal matters will be reviewed:

Takashi Domingo, member of the Planning Commission
Paulette Pavao, member of the Environmental Management Commission
Alvin Rho, member of the Planning Commission
Rene Siracusa, member of the Planning Commission

Motion and vote: Ms. Lum moved to accept and file the disclosures of Mr. Rho and Ms. Siracusa and to send back those of Mr. Domingo and Ms. Pavao for clarification. Ms. Nicholson seconded the motion, and all members present voted aye.

8. ANNOUNCEMENT

The Chair asked if there were any additional suggestions for the next agenda. There being none, he read the announcement that the next meeting of the Board is scheduled for January 9, 2008, at 10:00 a.m. at the Department of Liquor Control's conference room at 101 Aupuni Street, Suite 230, Hilo.

9. ADJOURNMENT

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

The meeting adjourned at 11:32 a.m.

Respectfully submitted:

Mary E Crosson

Mary E Crosson, Secretary