

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION

Wednesday, December 9, 2009

10:00 a.m. – 12:35 p.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

Also present at times: Joan Castberg, Nancy Cook-Lauer, Barbara Lively, and an unknown female.

1. CALL TO ORDER

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

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

There were no public statements.

3. APPROVAL OF MINUTES

Minutes of the November 19, 2009, Regular Session.

Ms. Gentry requested that the minutes be corrected or clarified on page 3, regarding Communication No. 2009-83. One reason she had asked when Ms. Naeole's letter was received was because it was untimely, which she wanted on the record. She also wanted the minutes to reflect that she had stated that at the October 14, 2009, meeting, there was no objection made by Ms. Naeole, Ms. Naeole's attorney, the petitioners, or any Board member to her participation in that meeting.

Motion and vote: Ms. Nicholson moved to approve the minutes with the corrections/clarifications requested by Ms. Gentry, who seconded the motion. Ms. Nicholson, Ms. Gentry, and the Chair voted aye. Ms. Lum and Mr. Martin abstained, as they were not present at the November 19, 2009, meeting.

4. COMMUNICATIONS

- a. **Communication No. 2009-91: Memo from the County Clerk attaching Resolution No. 249-09, which declares the County of Hawai'i's "commitment to sustainability principles by setting a path toward implementation of the policies developed by the Mayor's Green Team."**

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

- b. ***Draft Informal Advisory Opinion* regarding Petition No. 2009-10 (heard at the Board's November 19, 2009, meeting and alleging 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").**

Motion and vote: Ms. Gentry moved to adopt the draft, and Ms. Nicholson seconded the motion. They, Mr. Martin, and the Chair voted aye. Ms. Lum abstained.

- c. ***Draft Informal Advisory Opinion* regarding Petition No. 2009-11 (heard at the Board's November 19, 2009, meeting and alleging 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").**

Motion and vote: Ms. Gentry moved to adopt the draft, and Ms. Nicholson seconded the motion. They, Mr. Martin, and the Chair voted aye. Ms. Lum abstained.

- d. ***Draft Informal Advisory Opinion* regarding Petition No. 2009-13 (heard at the Board's November 19, 2009, meeting, wherein Petitioner sought 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.)**

Ms. Schoen informed the Board that although it was not discussed at the meeting on November 19, 2009, she had added a paragraph to the draft opinion suggesting that the Petitioner, should she find herself in a situation where her interests may conflict, come back and seek an opinion from the Board. She felt the Board may wish to caution all employees or officers who seek opinions that conflicts could arise if situations change. She asked whether the Board would want that as standard language in such opinions, and they did.

Motion and vote: Ms. Gentry moved to adopt the draft opinion, and Ms. Nicholson seconded the motion. They, Mr. Martin, and the Chair voted aye. Ms. Lum abstained.

- e. **Communication No. 2009-95: Letter from the Board to the Petitioner in Petition No. 2009-12, rejecting the petition on jurisdictional grounds and**

pursuant to Section 2-86 of the Hawai‘i County Code, wherein Petitioner alleged “willful violations of Hawai‘i’s Sunshine Law.”

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

5. NEW BUSINESS

There was no new business.

6. UNFINISHED BUSINESS

a. Further discussion on Mayor Kenoi’s proposed amendments to the Ethics Code, and consideration of any other proposed amendments to the Ethics Code.

The Board members spent some moments reviewing the public testimony that had been received, which was all in the form of emails.

The Chair said to bear in mind that the Mayor is asking for the Board’s input on the proposals, so they would essentially be drafting a response to the Mayor stating the Board’s opinion.

Ms. Nicholson said they had actually decided to draft two communications—one to the Mayor regarding his proposed changes, and the other to the Council with the Board’s own proposed changes to the Ethics Code.

Ms. Schoen pointed out that the Board does have the power to propose changes to the Code.

The Board discussed whether they should include the public testimony emails in the response to the Mayor, and they decided to make that decision down the road.

Ms. Nicholson said she was confused about the Mayor’s proposals in Sections 2-83 and 2-85, as they seemed somewhat redundant. His Proposal 1 seemed to insert contracting language into *Fair Treatment* rather than into *Contracts*. She asked if there was an intersection between the two.

Ms. Schoen said she was guessing, but the idea seemed that any type of contract for goods or services with an officer or employee would have the appearance of unfair treatment, so the proposed language was inserted into the *Fair Treatment* section because it deals with officers’ and employees’ discharge of duties in dealing with the public and others. The Board could recommend where that language should go, but there are indeed intersections.

Ms. Gentry noted that to arbitrarily eliminate vendors on the basis of being married to a County official or employee would be unfair treatment, as they should be entitled to conduct their business.

Ms. Nicholson suggested they deal with the *Contracts* section first before moving to *Fair Treatment*. The Mayor's proposal in *Contracts* eliminated everything but the last paragraph.

Ms. Lum asked whether this section was the only place that dealt with sealed bids in the Code, and Ms. Schoen said yes. However, all government purchases for goods and services must follow the State Procurement Code, which typically deals with contracts over \$25,000. There are other procedures to follow for contracts less than that.

Ms. Schoen said that under the current Code, a contract is allowed if it is for below \$10,000 and the officer/employee does not have a controlling interest. However, there are other Code provisions to consider. For example, if an officer/employee has a contract with the County, he cannot exercise official action regarding that contract. This is in the Code's *Conflicts of Interests* section. The Board cannot look at provisions on a piecemeal basis, because other provisions would apply.

Ms. Nicholson asked if there was a sealed bid requirement for a project costing under \$10,000, and Ms. Schoen said no, not under the Procurement Code. However, the purchasing department would still need to go through the competitive bidding process.

Ms. Nicholson said it looked, in getting to the heart of the matter, like the Mayor is proposing that no County employees, their spouses, or family members be eligible to bid on any County contracts. The Board members all agreed this was worrisome.

Ms. Gentry said it would not be fair treatment to prohibit the spouse of a County employee from contracting with the County on a matter totally separate from the other spouse's County job, and the others agreed.

Ms. Nicholson said the Mayor seemed to be bothered by the public perception, and this perception was also reflected in the emailed testimony received. She liked what a previous testifier (Mr. DeLima) had said at an earlier meeting: the Code is good but needs to be beefed up. She would rather support that than totally bar someone with useful expertise from contracting with the County.

The Board discussed the recent newspaper article about Kama'aina Pumping, which was again the lowest bidder and won a County contract via the sealed bid process. They did not understand why people would cry foul when the bidding was sealed and everyone treated the same. If, however, the low bidder had information that other bidders did not, then a law violation had occurred.

Ms. Schoen pointed out that the current Section 2-85(3) provides for posting a notice of intent to award a contract. In such a case, the Board would review the notice, look at the officer/employee's position and what the contract is about, whether the officer/employee would

be exercising any control or authority over the contract, and whether the contract was awarded through the procurement process.

The Board questioned what “controlling interest” meant, as it was not clear. Ms. Schoen said the Code defined it as “an interest in a business or other undertaking which is sufficient in fact to control, whether the interest be greater or less than fifty percent.”

Ms. Schoen pointed out that another term used but not defined is “substantial financial interest.”

Ms. Gentry asked how it would be defined in Court, and Ms. Schoen said the Court would look at how the Code defines controlling interest, and would probably look at the State statutes and opinions to determine what it meant.

Ms. Nicholson said the *Contracts* section is missing the relationship between a County officer/employee and the nature of the contract.

Ms. Gentry asked how the State defines “substantial controlling interest,” and Ms. Schoen said she believed it was not defined in the Hawai‘i Revised Statutes. However, she had found an Ethics Commission opinion which says that an employment interest, an officership, and membership on the board of directors of a private organization by an employee, spouse, or dependent child are substantial financial interests.

Ms. Gentry asked if there was language about enforcement, as the Code says what is prohibited but not how it is enforced. Ms. Schoen said if a contract were entered into in violation of the *Contracts* provisions, it would be voidable on behalf of the County under Section 2-85.1 (*Contracts Voidable*).

Ms. Gentry noted that a contract could be performed before it was discovered that a violation had occurred. Somebody would need to make a complaint or bring it forth. Ms. Schoen said the Corporation Counsel has the authority to enforce the *Contracts Voidable* provision.

Ms. Schoen reported that in terms of beefing up contracts provisions, the State now has a procedure in which certifications are attached to contracts. On the certification form, the provider essentially makes certifications which track the ethics provisions. The certification needs to be signed before the contract is entered into. She passed out the “Provider’s Standards of Conduct Declaration” (the certification form) to the Board and explained that using the form is proactive insurance that the contractor has looked at the ethics provisions and certified compliance with them.

The Chair said he had reservations about deleting the majority of the *Contracts* section, as proposed by the Mayor.

Ms. Nicholson said the Mayor’s suggestions are too restrictive, but that there are problems with the current system. A balance needs to be found between making the Code not

quite as restrictive as the Mayor's proposals, yet addressing real concerns and issues. She personally would rather not gut the whole *Contracts* section, but instead sharpen it up.

Ms. Schoen said they could propose that any and all contracts entered into with an officer or employee, or their spouse or dependent children, must be approved by the Board or have any conflict waived. Ms. Nicholson said the contracts which are to come before the Board could be delineated and that her preference is to eliminate gray areas in the Code.

Ms. Schoen said that if the Board likes the certification form that the State is now using, it could recommend that the County use a similar form.

The Board discussed whether the new language in the Mayor's first proposal would bar an officer/employee's spouse or dependent child from contracting with the County. The term "controlling interest" was confusing. Ms. Schoen said they could ask the Mayor what he means.

The Chair called for a recess.

11:06 a.m.: The Board recessed.

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11:18 a.m.: The Chair called the meeting back to order.

Ms. Lum wondered whether the Mayor's proposed language for the *Contracts* section, the new (a), could be modified and used in place of the Mayor's proposed language for *Fair Treatment*, Section 2-83(c).

Ms. Gentry suggested less restrictive language which would allow an officer/employee to contract with the County, but not if the contract was with his own department. And if the officer/employee had a controlling interest in the company, it could be mandatory to get a decision from the Board. Ms. Nicholson said that if a sealed bid was involved, it would not make sense to do it this way.

Ms. Nicholson said she just noticed that in the Mayor's proposed *Contracts* section, the language regarding contracts to procure or dispose of goods or services was deleted. She wondered what the intent was in totally removing it.

Ms. Lum noted that on the "Provider's Standards of Conduct Declaration" the State is using, there was no area to check off whether the contractor is a State employee or performs similar services as a State employee.

Ms. Nicholson asked whether the State allows employees to bid on contracts, and Ms. Schoen said yes, and that the County's Ethics Code provisions basically follows the State's. The State Ethics Commission has issued opinions on cases involving employees who questioned whether there would be conflicts if they contracted with the State to perform certain services. The opinions are fact-specific. One school of thought in drafting ethics legislation is to be very specific in defining conduct to be prohibited. Another school of thought is to be as general as

possible so that if an ethics agency reviews an issue, it will have discretion to make determinations on a case-by-case basis. Maui County's ethics provisions are very general, and its charter is much like that of Hawai'i County. Its code, however, is not very specific, which leaves room for the ethics board to make determinations based on the specific conduct involved. Ethical matters will often turn on one little fact.

The Board members agreed they liked the "Provider's Standards of Conduct Declaration."

Ms. Nicholson said the current *Contracts* section specifies that the County cannot enter into a contract with a business in which a County officer/employee has a controlling interest, but it does not include spouse or children of the County officer/employee, which is good.

Ms. Gentry suggested that language be included stating that if the contractor or County questions whether there could be a conflict of interest, an advisory opinion be gotten ahead of time from the Board. Ms. Nicholson pointed out that it wouldn't work for sealed bids. Most people making sealed bids do not want to advertise that they are planning to bid.

Ms. Nicholson said she felt that the *Contracts* section should be basically kept as is, but they should consider adding language to address the officer/employee's relationship to what he's bidding on, as there should not be a direct relationship.

The Board discussed how an officer/employee who has a controlling interest in a company should be barred from contracting with the County if the contract is with the employing department, as the relationship is too close. This situation is what the emailed public testimony was about and can definitely have the appearance of a conflict of interest. However, it is difficult to define or delineate what makes a relationship too close, and whether it would include spouses, dependent children, and departments.

Ms. Nicholson questioned whether an officer/employee's spouse or dependent children should also be barred from contracting with the County if it falls within the same department. Such language is not in the current *Contracts* section. Ms. Schoen pointed out that dependants and spouses are specifically mentioned in the *Definitions* section, where "financial interest" includes the individual, the spouse, and dependent children; and in the *Conflicts of Interests* section, where it states that no officer/employee shall take official action directly affecting, in subparagraph (3), a business or undertaking in which a close relative or household member has a substantial financial interest.

Ms. Nicholson noted that if an officer/employee is barred from bidding on a contract in his own department, financial interest is not even addressed. Ms. Gentry said having a controlling interest could also bar the contract.

Ms. Nicholson wanted to find words for Section 2-85(a) to say that a contract shall not be entered into if the contractor is employed by the department which is seeking the services. However, the spouse or dependent children could do so, which would again cause the perception of conflict. She suggested that Ms. Schoen do the wordsmithing.

Ms. Lum said that the *Contracts* section needs language which would add the concepts that contracts are prohibited with a company in which a County officer/employee has a controlling interest, and with a County officer/employee who is employed by the department the contract is with. She was unsure if the latter prohibition should be with the entire department or the employing division.

Ms. Lum asked the Board members whether they wanted to limit the County's ability to contract with an officer/employee within his own department, or only if the contract would be related to his current employment. She said that there are times when the County should be able to contract with an officer/employee without it being a conflict.

The members discussed whether an officer/employee should be able to contract with his department, but not if it were within his division of employment. Ms. Nicholson said the public perception of conflict would still be there. She said if an officer/employee contracts with the County, regardless of what department he is employed in, the public perception will still be that he was awarded the contract because he works for the County.

Mr. Martin said it bothers him when rules are too restrictive. He saw the issue as being about public perception and questioned how to do things in a way that speaks to the public but also gives people freedom.

Ms. Schoen asked what the Board thought about leaving Section 2-85(a) as is, but adding a new section stating that a County agency shall not enter into any contract with an officer or employee unless certain criteria is spelled out and met.

Ms. Lum said that should be the first section, so if the criteria is met, they can proceed to the next section.

Ms. Nicholson asked whether the Board had ever received a "notice of intent" as listed in 2-85(3), as she had not seen one come before her. If it served a good purpose, it should be kept in the language. Ms. Schoen said she had not received a "notice of intent" for the Board's review in the past two years, since she'd been counsel.

Ms. Schoen explained that there is a small time period between a bid opening and award. The time periods in contracting come hard and fast, and bidders need to watch closely or they will miss their opportunity to bid.

Ms. Nicholson said that if 2-85(3) were deleted, then using the standards of conduct declaration that Honolulu uses could be a safeguard, since it seemed impractical for the Board to intercede in the small time frame before a contract is awarded.

Ms. Schoen said the Board could recommend to the Corporation Counsel that the County use the declaration, as the Corporation Counsel approves all contracts and developed a contracts checklist. Ms. Nicholson said she would want the County Council to know that the declaration is being recommended by the Board to aid in tightening up the contracts process.

To clarify, Ms. Lum asked if they were thinking of adding a section to 2-85, *Contracts*, which would allow employees to continue bidding on contracts, but bar them if the contracts would involve their own department or relate to their employment. Ms. Nicholson said yes.

The Board discussed whether 2-85(a)(3) should be kept or eliminated. Ms. Nicholson said it would provide an ethical review in theory, but that it is unworkable and not practical. However, they should somehow preserve the spirit of it.

Ms. Schoen asked the Board to let her know what they wanted so she could draft proposed language, research other jurisdictions, and provide options.

Ms. Gentry suggested they enter Executive Session to complete that part of the agenda, and then return to finish discussing the Mayor's proposals.

Motion and vote: Ms. Gentry moved to suspend discussion on the Mayor's proposed amendments to the Ethics Code, enter into Executive Session, and return to Unfinished Business after that. Ms. Nicholson seconded the motion, and all members voted aye.

12:12 p.m.: The Board left Regular Session.

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12:20 p.m.: The Board returned to Regular Session.

7. VOTING ON EXECUTIVE SESSION MATTERS

a. Approval of the minutes of the November 19, 2009, Executive Session.

Motion and vote: Ms. Gentry moved to approve the minutes, Ms. Nicholson seconded the motion, and they and the Chair voted aye. Ms. Lum and Mr. Martin abstained.

b. Communication No. 2009-94: Letter from the Office of Information Practices to the Board dated November 18, 2009, requesting explanation as to whether the Board's agenda for its November 19, 2009, meeting violated Chapter 92 of the Hawai'i Revised Statutes, and Communication No. 2009-96: letter from Deputy Corporation Counsel Renee Schoen to the Office of Information Practices regarding Communication No. 2009-94.

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

The Board then returned to agenda item 6a, the Mayor's ethics proposals.

6. UNFINISHED BUSINESS (continued)

a. Further discussion on Mayor Kenoi's proposed amendments to the Ethics Code, and consideration of any other proposed amendments to the Ethics Code.

Ms. Lum said that if they impose the restrictions as discussed earlier in Section 2-85, then Section 2-83 would stay basically the same, and the Mayor's proposed 2-83(c) would not be included. Contracting restrictions would be under *Contracts* rather than under *Fair Treatment*.

Ms. Nicholson suggested they continue discussing the Mayor's proposals before proceeding to their own proposals regarding the Ethics Code, since they wanted to provide a response to the Mayor by February.

Ms. Schoen asked if she understood correctly that the Board wanted to allow employees to continue to contract with the County, but have controls in place regarding contracts that may be awarded within the department or as they would relate to employment, duties, or job descriptions. The Board members agreed.

Ms. Schoen asked for clarification of what the Board wanted in Section 2-85, as they mentioned both prohibiting bidding and prohibiting contracting, which are two different things.

Ms. Gentry said they also wanted to mention somewhere that the spouse and children of an officer/employee should be able to contract with the County if it would not have any conflict with the officer/employee's employment. Spouse and children also have the right to make bids and be awarded contracts.

There was discussion on whether prohibiting employees from bidding should be in the *Conflicts of Interests* section or *Contracts* section of the Code. Ms. Schoen said it was related to both sections but ultimately was part of *Conflicts of Interests*.

Ms. Schoen said she would work on language and get it to the Board members the week before their next meeting, through email or regular mail. If they had comments or suggestions, they were to send them only to her, and not to each other. She said she would try to find time to look at how other jurisdictions handle issues as well. Counties in Hawai'i do not have similar language.

Ms. Schoen said she would also research the Board's concerns about interfering with the ability to contract. There is a balancing act between being too permissible and too prohibitive. The government needs to articulate the policy and provide legitimate reasons for prohibiting a contract.

As several members had to leave, they continued the discussion to the January meeting.

8. ANNOUNCEMENTS

The Chair announced the next meeting as being scheduled for January 13, 2010, at a location to be determined.

9. ADJOURNMENT

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

12:35 p.m.: The meeting adjourned.

Respectfully submitted:

Mary E Crosson

Mary E. Crosson, Secretary