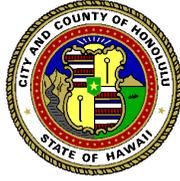


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR

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ADVISORY OPINION NO. 2016-1

I. SUMMARY

Beginning in the fall of 2013, the Hawaii Firefighters Association (“HFFA” or Firefighter’s union) and the Honolulu Fire Department (“HFD”) administration have been in several labor disputes which culminated in the HFFA board voting “no confidence” unanimously in the current Fire Chief, Manuel Neves, in March 2014. HFFA and HFD administration continue to be in conflict.

Against this background, Mayor Kirk Caldwell appointed Max Hannemann as a Fire Commissioner. Mr. Hannemann is currently going through the required process of being confirmed to this appointment by City Council. Given Mr. Hannemann’s former employment with HFFA and his former position as President of the Hawaii Professional Firefighters Foundation, Councilmember Ron Menor, Chair of the Public Health Safety Welfare Committee requested that the Ethics Commission provide a formal Advisory Opinion as to whether there would be a conflict of interest that would prohibit Mr. Hannemann from serving on the Fire Commission.

After hearing public testimony and for the reasons stated below, the Commission advises that Mr. Hannemann would not have a conflict of interest if he were to become a Fire Commissioner such that a reasonable person would question his impartiality in conducting his official city duties because his former employment with HFFA and his former position as President of the Foundation are too remote to create an actual conflict of interest or an appearance of a conflict of interest. Mr. Hannemann has no financial interests and no business activities with HFFA and/or the Foundation. Further, he has no close personal or social relationships with HFFA officers, HFFA board members, and Foundation officers and board members.

This is a matter of first impression. The recommendation and conclusions of this Advisory Opinion are limited to the specific facts of this matter.

II. BACKGROUND

A. Honolulu Fire Commission

The Honolulu Fire Commission consists of five members that are appointed by the Mayor and confirmed by City Council. Revised Charter of Honolulu (“RCH”) Sec. 6-1005. The Fire Commission performs the following functions including, but not limited to the following:

- Reviews the annual budget prepared by the Fire Chief and makes recommendations thereon to the mayor and council;
- Reviews the departments operations, for the purpose of recommending improvements to the fire chief;
- Evaluates at least annually the performance of the fire chief and submits a report to the mayor and council;
- Reviews personnel actions within the department for conformance with the policies of the Department per the Charter;
- Hears complaints of citizens concerning the department or its personnel and, if deemed necessary, makes recommendations to the fire chief on appropriate corrective actions.

RCH Sec. 6-1006. On or about January 12, 2016, Max Hannemann was appointed by Mayor Kirk Caldwell to the Honolulu Fire Commission to replace Vice-Chair Quentin K. Kawanakoa whose term expired on 12/31/2015.

The remaining members of the Fire Commission are the following individuals:

- James S. Wataru, Chair
- Mary Jean L. Castillo, Member
- Arnold K.H. Wong, Member
- Dr. Joseph W. C. Young, Member

B. Max Hannemann

Mr. Hannemann was a graduate of Kahuku High School (1991), Brigham Young University – Hawaii Campus (1999) and William S. Richardson School of Law (2003). From 2004-2010, Mr. Hannemann was an attorney with King Nakamura and Chun-Hoon practicing labor law. He represented both union members and staff of International Longshore and Warehouse Union (“ILWU”) in numerous grievances, arbitrations and settlements.

In 2010, Mr. Hannemann was interviewed and selected as the in-house counsel/Labor Resource Assistant for Hawaii Firefighters Association (“HFFA”), by HFFA President Robert “Bobby” Lee. Mr. Hannemann met Mr. Lee for the first time during that job interview. HFFA is the exclusive collective bargaining representative for all state, city, and county fire fighters in Hawaii. Mr. Hannemann’s employment with HFFA was from September 16, 2010-June 2013.

C. Hawaii Firefighters Association

The HFFA is the exclusive collective bargaining representative for all City, State and County firefighters in Hawaii. Its primary role is to negotiate and administer the collective bargaining agreement governing the terms and conditions of fire fighter employment. The union handles grievances and performs labor-related and legislative activities in the interest of its members.

From September 16, 2010 through approximately June 2013, Mr. Hannemann advised HFFA on labor related issues between the HFFA and state and county employers including grievances, policies and procedures, and labor-management relations. He also negotiated collective bargaining agreements (“CBAs”) and numerous Memorandums of Agreement (“MOAs”) between the Honolulu Fire Department (“HFD”) and other state and county employers on the one hand and HFFA on the other.

Mr. Hannemann participated in the following matters and cases while employed at HFFA:

- Negotiated Bargaining Unit 11 Collective Bargaining Agreement (“CBA”) (expired in 2011) Arbitration. Arbitration hearings held on March 11-15, 2013, Kona, Hawaii. Panel issued final award on Nov. 30, 2013 resulted in 2011-2017 CBA.
- Class Grievance filed (Jun. 22, 2011) after discovering overtime (“OT”) pay for training and appropriate time off while changing work schedules was in question. (Settled 1/27/2014.)
- Case No. CE-11-815 Prohibited Practices Complaint (“PPC”) (filed Nov. 27, 2012) for alleged unilateral changes to CBA re Vacation Black out (Settled May 15, 2013).

Mr. Hannemann did not participate in any grievances and prohibited practice complaints against the City, HFD, or others after he left HFFA in June of 2013. Specifically, he did not participate in the following prohibited practice complaints against the Fire Chief Manuel Neves (HFD Chief from Jan. 24, 2013-present) and the Honolulu Fire Department with the Hawaii Labor Relations Board:

- Case No. CE-11-845 (filed Aug. 27, 2014) re CBA Sec. 6 Informational and Educational Meetings
- Case No. CE-11-846 (filed Sep. 5, 2014) re Intergovernmental Movements
- Case No. CE-11-848 (filed Sep. 17, 2014) re Conditions of Employment for Fire Fighter Recruits

Further, Mr. Hannemann also did not participate in the Battalion Chief “Rank for Rank” Lawsuit which began in 2004 and is still ongoing as the Battalion Chiefs were not HFFA union members and the suit was against the City.

Mr. Hannemann did not and does not socialize with Mr. Lee or any of the other board and executive officers of the HFFA except for attending Mr. Lee’s annual Christmas party while he worked at HFFA. Further, Mr. Hannemann was never a firefighter and was never invited to any

of the active or retired firefighter events such as the golf or fishing tournaments.

In June 2013, Mr. Hannemann left HFFA to join Hawaiian Electric Company (“HECO”) as the director of Labor Relations.

On or about March 11, 2014, HFFA Executive Board unanimously approved a vote of “no confidence” in the HFD Chief for the first time in 50 years during the Commission’s evaluation process of Chief Neves. Mr. Hannemann was unaware of the Board’s decision until interviewed by Ethics Commission staff in February 2016 and was not involved in this matter. HFFA Board of Director meeting minutes do not reflect Mr. Hannemann’s presence during the vote.

D. Hawaii Professional Firefighters Foundation

On or about September 15, 2013, HFFA President Robert “Bobby Lee” and Vice President/Treasurer, Terry Cano (now retired), along with HFFA Administrative Manager, Thomas Okimoto incorporated the Hawaii Professional Firefighters Foundation (“the Foundation”) as a non-profit 501(c)(3) organization. The registered address of the Foundation is the same as the HFFA, 1018 Palm Drive, Honolulu, Hawaii.

HFFA’s officers and executive board created the Foundation to allow for donations and involvement with civic, charitable, and community events that the HFFA was restricted from doing. The Foundation was incorporated in order to cultivate fellowship among the HFFA members; promote fire prevention and education and promote social welfare through collaborative and financial support.

Five years earlier (2008), HFFA had also assisted in creating the Honolulu Firefighters Foundation (“Honolulu Foundation”). Similarly the Honolulu Foundation was established in order to fund programs to support the HFD firefighters. HFFA officers and directors assisted by funding the incorporation costs of the Honolulu Foundation and temporarily assisted in the administration of the Honolulu Foundation until its own Board was self-sufficient a few years later. Victor Kimura, Vice President of Kyo-Ya Management Company, Ltd., was asked to be President of the Honolulu Foundation because he was not affiliated with HFFA, and because of his strong ties with the business community and leadership abilities.

Sometime in 2014, Mr. Hannemann was asked by HFFA to be on the Board of Directors of the Foundation for the same reasons as Mr. Kimura. Mr. Hannemann was then elected by the Board of Directors to be the President of the Foundation. Mr. Hannemann was not compensated as President of the Foundation. Being the President required a lot of work, as he had to raise money for the HFFA via fundraisers such as its first annual fundraiser and dinner concert on August 12, 2015 at The Willows restaurant (“A fundraiser dinner and concert for the Foundation, a non-profit organization created by HFFA whose mission is to support County and State firefighters and the communities statewide.”

Mr. Hannemann does not socialize with any of the Foundation Directors and only sees them for Foundation business.

E. Resolution No. 16-14 regarding the Appointment of Max Hannemann to the Fire Commission and Informal Advice from Ethics Staff

On or about January 13, 2016, Council Chair Ernie Martin introduced Resolution No. 16-14 (“Reso. 16-14”) regarding council confirmation of Mr. Hannemann to the Fire Commission.

On or about January 27, 2016, Reso. 16-14 was heard at a public hearing before full council. On or about January 27, 2016, Mr. Hannemann emailed the Honolulu Ethics Commission staff requesting an opinion if there was a conflict of interest with him being on the Fire Commission and also President of the Foundation. Ethics Commission staff responded on February 8, that there would most likely be a conflict.

On or about February 9, 2016, Reso. 16-14 was heard before the Public Safety Welfare Committee led by Committee Chair Ron Menor and Vice-Chair Brandon Elefante. Mr. Hannemann testified as to his willingness to serve on the Commission and his objectivity. Fire Chief Neves also testified in support of Mr. Hannemann’s nomination to the Commission.

Due to concerns about Mr. Hannemann’s presidency on the Foundation, Chair Menor deferred hearing Reso 16-14 until the next Committee meeting on March 1, 2016. After the hearing, Mr. Hannemann asked Commission staff if he could remain on the Board of Directors for the Foundation and also be on the Fire Commission. Ethics Commission staff responded that it would most likely still be a conflict of interest or create an appearance of a conflict of interest.

On February 16, 2016, Ethics Commission staff sent Mr. Hannemann a follow up email relating to a possible apparent conflict of interest given his prior employment with HFFA, and his presidency of the Foundation. Commission staff recommended that Mr. Hannemann obtain a formal Advisory Opinion from the Ethics Commission to resolve this issue. Mr. Hannemann submitted his resignation as President of the Foundation.¹

III. ISSUE AND SHORT ANSWER

Would Mr. Hannemann have a conflict of interest given the above facts if he were to become a Fire Commissioner such that a reasonable person would question his impartiality in conducting his official city duties?

No, because his former employment with HFFA and his former position as President of the Foundation are too remote to create an actual conflict of interest or an appearance of a

¹ Since Mr. Hannemann has resigned as President of the Foundation, this memo will not analyze whether being President of the Foundation would have caused an actual conflict of interest or an appearance of a conflict of interest.

conflict of interest. Mr. Hannemann has no financial interests and no business activities with HFFA. Further, he has no personal relationships with HFFA officers, HFFA board members, and Foundation officers and board members.

IV. ANALYSIS

A. Actual Conflict of Interest

The city's ethics laws prohibit city officers from participating in any business activity or having any financial interest that may tend to impair their judgment in carrying out their official city duties. Revised Charter of Honolulu ("RCH") Sec. 11-102.1(c). Mr. Hannemann no longer works for HFFA, has no financial interest in HFFA, and has resigned as President of the Foundation. Further, Mr. Hannemann has no close personal relationship with HFFA officers and board members. As such, Mr. Hannemann would not be in violation of this section of the city's ethics laws if he were to be appointed as Fire Commissioner.

In addition to prohibiting any incompatible business activity or having any financial interest that is in conflict with city duties, city officers and employees are also prohibited from participating in any official action if they had previously been engaged as legal counsel in a matter directly related to such action. ("ROH") Sec. 3-8.2(a).

The 2011-2017 Collective Bargaining Agreement arbitration was concluded in November 2013, and the class grievance and prohibited practices complaint were both settled in January 2014 and May 2013 respectively. As such, there are no outstanding matters such as personnel actions including grievances or complaints in which Mr. Hannemann has participated in as legal counsel for HFFA that would come before him as a Fire Commissioner. Further, his other duties as a Fire Commissioner do not appear to directly relate to any matter he dealt with as legal counsel for HFFA such as HFD budget review, departmental operations, Fire Chief evaluation, and responding to citizen complaints. *See e.g.*, Advisory Opinion No. 293 (No conflict of interest when resort project issues was before Department Director when Director was former attorney that represented different owner client on same resort project.); Advisory Opinion No. 2007-1 (No conflict of interest when Councilmember Apo was legal counsel to Koolina Resort and Koolina Community Association and when there was no matter before him directly related to any issue he advised on as legal counsel to Koolina Resort or Association.)

B. Appearance of Conflict of Interest

Although there appears to be no actual conflicts of interest that would prohibit Mr. Hannemann from fulfilling his duties as a Fire Commissioner, the Ethics Commission has followed precedent in a multitude of cases that prohibits even the appearance of a conflict of interest. *See e.g.*, Advisory Opinion No. 2001-2 ("Ethics issues not only involve actual conflicts of interest, but apparent ones as well...The appearance of a conflict arises when one may reasonably perceive that the officer's public duty may be interfered with or comprised by a personal or financial interest."); *Cf.* Advisory Opinion No. 2005-6.

The Ethics Commission's prior Advisory Opinions focus on whether a *current* relationship or interest creates an appearance of a conflict of interest. There are no formal Advisory Opinions that address whether *former* relationships or employment creates an appearance of a conflict of interest. As such, this is a matter of first impression for the Commission.

Ethics Commission staff has addressed a similar issue in regard to Revised Charter of Honolulu Sec. 11-102.2 which prohibits appointed city officers (cabinet members/department heads – not board or commission members) from participating in a matter they were directly involved in within the preceding 12 months before city employment unless the Ethics Commission granted the city officer a waiver of conflict of interest. *See e.g.*, EC No. 10-388 Email from C. Totto (Feb. 23, 2011) (Ethics Commission would most likely grant a waiver of a conflict of interest in regard to Sec. 11-102.2 for a Deputy Director who had no current financial or social relationship with former employer, did not have ultimate discretionary authority over contract projects with the former employer, and had been removed from dealing directly with issues regarding contract performance and modifications of former employer.)

The Hawaii Supreme Court case of *Sussell v. City and County of Honolulu Civil Service Commission*, 71 Haw. 101 (1989) has addressed a similar issue. In *Sussell*, the Hawaii Supreme Court held that the “appearance of impropriety” standard applies in deciding whether a civil service commissioner is disqualified from adjudicating a matter. In *Sussell*, the court held that two commissioners appointed by then-mayor Frank Fasi should have recused themselves from hearing a case regarding a city employee who claimed to have been demoted by Fasi. The circuit court found evidence of actual bias as to one commissioner, and an appearance of impropriety as to the other commissioner due to the commissioner having known Fasi for many years, contributed to Fasi's and the managing director's fundraisers, and was the president and majority shareholder of the non-profit corporation which was under the exclusive contract to provide bus service to the City. *Id.*

Here, Mr. Hannemann's interest is more remote than that of the Deputy Director referenced in the informal advisory opinion and the civil service commissioner in *Sussell*. Mr. Hannemann had not been an employee of HFFA since June 2013; he has no financial interests in HFFA or the Foundation; he has no close personal social relationships with any officers or board members from HFFA or the Foundation; and no matters related to the Foundation would come before him as a Fire Commissioner.

V. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing the Ethics Commission advises the following:

1. Mr. Hannemann would not have any actual conflict of interest that would be incompatible with his duties as Fire Commissioner.

2. Mr. Hannemann's former employment with HFFA and former position as President of the Foundation are too remote to create an appearance of a conflict of interest that would be incompatible with his duties as a Fire Commissioner.

3. Should any matter arise in which Mr. Hannemann was directly involved as legal counsel for HFFA, Mr. Hannemann must immediately remove and physically absent himself from any participation in obtaining information, discussion or decision making. Mr. Hannemann must also disclose the conflict of interest to the Fire Commission, his appointing authority, and the Ethics Commission.

4. Should Mr. Hannemann have any question about whether a situation might create a conflict with the public interest, he should err on the side of caution and disclose the matter to the Fire Commissioners, his appointing authority and the Ethics Commission. The Commission will be able to advise him as to whether a conflict may occur or exists and offer suggestions to resolve the conflict.

_____/s/_____
VICTORIA S. MARKS, Chair
Honolulu Ethics Commission

DATED: March __11__, 2016

APPROVED AS TO FORM AND LEGALITY:

_____/s/_____
LAURIE A. WONG-NOWINSKI
Associate Legal Counsel
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DATED: March _11_, 2016