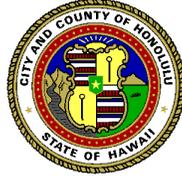


ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2014-5**

**I. SUMMARY**

The Honolulu Ethics Commission found that a City supervisor misused a City cellular phone for personal use. The larger underlying issue is that this case arose out of allegations of nepotism and preferential treatment that could have been mitigated if the Department had implemented the Commission's instructions from a prior investigation of the same situation. The Commission reminds all City agencies that they should avoid having one spouse directly supervise the other.

**II. FACTUAL BACKGROUND**

On or about [date], Ethics Commission staff received a complaint that [Employee A], Supervisor, [] Section, [] Division, [] Department, gives preferential treatment to his/her subordinate and [spouse], [Employee B]. Specifically the complaint alleged that: (1) Employee B is given more overtime ("OT") than anyone else in the section; (2) Employee B is never held accountable for missing section meetings; and (3) Employee B is the only one in the section that has been issued a departmental cellular phone and Employee A allows Employee B to use it for personal use.

Employee B is a [position description]. Employee A has worked for Department since [year]. Employee A and B were married in [year]. At that time, Employee B was a contract hire with the Department and was not under Employee A's supervision. Since [year], Employee B was promoted as [position]. Employee B's job duties include, but are not limited to: [description of job duties].

Employee A has been Employee B's direct supervisor since [year]. [Further description of Employee A's position in the Department].

**A. PRIOR ETHICS COMMISSION INVESTIGATION**

An earlier investigation into similar allegations of preferential treatment by Employee A in giving Employee B excess OT (EC No. []) resulted in insufficient evidence for any ethics violations based on preferential treatment. At that time, the organizational make-up of [] Division required Employee A to supervise Employee B because there was no other supervisor in that division. The Ethics Commission staff made a written recommendation to Department administration to implement additional monitoring to prevent actual and perceived preferential

treatment. Department administration at that time only verbally informed the Division Head to monitor workloads and ensure workloads were equitable.

The current Division Head was unaware of staff's prior monitoring recommendations between Employee A and Employee B. As such, the current Division Head had not taken any preventative measures.

## **B. OVERTIME**

Staff received confirmation that, for calendar year 2013, Employee B received more OT by [number] hours than any other supervisor at Employee B's level in the [] Division. However, staff also received information from several witnesses that there had been a problem with the [] Division staff not wanting to return "on call" requests for help after hours, which would have allowed the other staff members OT.

## **C. MISSING MEETINGS**

Approximately eight witnesses all confirmed that Employee B did not regularly attend mandatory weekly staff meetings, and did not appear to face any consequences for his/her absences. Employee B admitted that he/she did not attend the weekly meetings, although he/she should and agreed that he/she would start attending meetings in the future. Because there were no meeting minutes or attendance sheets, the Commission has been unable to verify the number of meetings in which Employee B was absent.

## **D. [] CELLULAR PHONE ISSUANCE AND PERSONAL USE**

On or about [year], Employee B was authorized to use and was issued a [] cellular phone ([] "Phone") to [job duties]. Since that time, Employee A reissued and replaced the [] Phone for Employee B to continue using it to [job duties].

Staff verified that Employee B is the only [] Division employee other than Employee A to be issued a [] cellular phone. Staff obtained AT&T invoices from December 10, 2012-February 9, 2014 for the [] Phone. Employee B admitted that he/she does use the [] Phone for personal use and was cooperative in identifying calls forwarded to this [] Phone that were personal. Employee B stated that it was his/her understanding that the city phone had a "block" account payment so that it would not create an additional cost to the city if he/she used it for his/her own personal use. Employee B was willing to reimburse the cost of the personal use of the [] Phone which was \$97.40 for the time that was analyzed.

Department's policy on Department issued cellular phones requires that the phones only be used for authorized [] purposes. [citation] ("Policy"). Employee B was held accountable to this Policy and was aware of this Policy at all relevant times.

Further, the [] Policy states that employees shall reimburse the department for all unauthorized calls made and received on department-issued mobile telephones. Reimbursement

shall be made in accordance with the current rates listed in the city telephone contract or price schedule.

#### **E. [ ] DEPARTMENT [ ] DIVISION REORGANIZATION**

EC Staff learned that the [ ] Division was now undergoing a reorganization [ ]. Under the reorganization it was possible that Employee B could be moved so that he/she would no longer be under Employee A's supervision. Employee A and [ ] Department Administration were amenable to moving Employee B from Employee A's direct supervision.

### **III. PROCEDURAL HISTORY**

In light of the current [ ] Division reorganization, [other factors], Commission staff determined that it would not be in the best interest of the public to pursue allegations of preferential treatment.

As such, on May 30, 2014, staff brought this case before the Ethics Commission to determine if there was sufficient evidence to show probable cause only for the misuse of the [ ] Phone. The EC unanimously found that there was probable cause of an ethics violation under Revised Charter of Honolulu ("RCH") Sec. 11-104. The Notice of Alleged Violation ("Notice") was served on Employee B.

On June 12, 2014, Complainant issued an amended Notice to clarify certain facts. After good faith negotiation, the parties came to an agreement that Employee B reimburse the city the amount of \$97.90 for the cost of his/her personal phone calls on the [ ] Phone in exchange for Complainant's recommendation of dismissal of the case and a formal advisory opinion issued by the EC.

On June 26, 2014, Employee B and staff in their capacity as Complainant in this matter appeared before the EC requesting approval of the settlement agreement. The EC unanimously approved the Settlement Agreement.

### **IV. ANALYSIS AND DISCUSSION**

Employee B admitted to violating the Revised Charter of Honolulu ("RCH") Sec. 11-104 for using the [ ] Phone for personal use. The Commission recognizes that there is a "reasonable personal use" exception to the general prohibition against using city resources for non-city purposes. The reasonable personal use exception allows personnel to use a city resource for personal convenience that is: "(1) for a brief time; (2) does not interfere with the productivity of the employee; (3) does not create an additional cost to the city; and (4) is not for business financial or commercial purposes." Guidelines on the Use of City Resources (Oct. 9, 2007) ("Guidelines").

Employee B's use of the [ ] Phone for personal use does not fall within the "reasonable personal use exception" because there was an additional cost to the city of approximately \$100.

While Employee B clearly violated Revised Charter of Honolulu Section 11-104 when he/she misused the [] Phone for personal calls, the more troubling issue that the Commission wanted to highlight in this opinion is the perception of preferential treatment when one spouse directly supervises the other. The Commission also wants to take this opportunity to provide recommendations to assist city officers and employees in eliminating this type of situation city-wide.

Interviews with witnesses in this case generally resulted in the same sentiment: that having one spouse supervise the other was “inappropriate”, “unhealthy”, and created a “fear of retaliation” for others to bring issues about Employee B to Employee A. In addition to the complainant, many witnesses also perceived that Employee A gave Employee B preferential treatment including: more resources and support than any other supervisor, more flexible hours, more opportunities for OT, leniency in regard to dress code, leniency in not attending staff meetings, issuance of a [] cellular phone, leniency in using the [] Phone for personal calls, bolstered support of project evaluations and work performance, and Employee B’s subordinates receiving opportunities for internal promotions not available to others.

This case has shown that situations where spouses, or those with close personal relationships, who supervise each other create havoc on the morale and efficiency of the Division. There is no doubt that there was *perceived* preferential treatment in this case, which can be just as damaging as actual preferential treatment. In addition, avoidance of this type of situation can protect spouses from being unfair targets of misplaced allegations of preferential treatment. The Ethics Commission has consistently recommended that this type of supervisor/subordinate situation be avoided for these very reasons.

RCH Section 11-104 prohibits a city officer or employee from using his or her official position to secure or grant special treatment or consideration beyond that which is available to all persons. This law is intended to prevent favoritism by government personnel when they make decisions. Nepotism is a subset of favoritism; it is favoritism towards relatives.<sup>1</sup>

Nepotism erodes public trust in government institutions, their integrity and operations. It creates reasonable concerns that the decisions of government are not based on merit and objectivity, but on family relations. *See, e.g., State Ethics Commission v. Antonetti*, 365 Md. 428, 448-452, 780 A.2d 1166-1169 (Md. 2000) (administrator misused his office in violation of fair and equal treatment policy, conflict of interest standards and anti-nepotism law by hiring his wife and son as temporary employees in his agency) and *In the Matter of Kane*, 50 N.Y.2d 362-363, 428 N.Y.S.2d 941, 942-943 (N.Y. 1980) (judge who appointed son as referee and appointed son’s law partner to lucrative receiverships violated judicial canon prohibiting nepotism). The adage “blood is thicker than water” applies in the government context. It expresses why a decision by a public officer is suspect when it affects the financial interests of the officer’s family member.

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<sup>1</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1518 (3rd ed. unabridged 1993). BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990) at 1039 defines nepotism as the bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship rather than merit.

Furthermore, nepotism often creates management problems in job assignments and promotions, reduced work productivity and the administration of discipline. *Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W.2d 687, 691 (Ia. 1993). Anti-nepotism laws are aimed at avoiding preferential treatment and inefficiency in public office by preventing public officials from favoring their relatives. *Id.* RCH Section 6-1112.6 sets out the city's anti-nepotism law.<sup>2</sup>

Honolulu Ethics Commission Advisory Opinion No. 2005-2.

## V. CONCLUSION AND RECOMMENDATIONS

In light of the foregoing, the Commission determines that:

- This opinion shall be published without identifying the subject of the complaint or his/her division and department as required under Hawaii Revised Statutes Sec. 92F-13(1) and Office of Information Practices Op. Ltr. Nos. 10-3 and 96-2<sup>3</sup>;

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<sup>2</sup> Section 6-1112. Prohibitions --

6. Restrictions on Appointment and Promotion of Relatives.

(a) No public officer shall advocate one of his or her relatives for appointment or promotion to a position in the same agency or in an agency over which he or she exercises jurisdiction or control.

(b) No public officer shall appoint or promote within the agency to which he or she has been assigned or within an agency over which such officer exercises jurisdiction or control:

(1) one of his or her relatives; or

(2) one of the relatives of either a second public officer of his or her agency or a second public officer who exercises jurisdiction over his or her agency, if the second public officer has advocated the appointment or promotion of that officer's relative.

(c) This subsection shall not prohibit a public officer from appointing or promoting a relative to a position if the relative is on the applicable eligible list submitted by the director of human resources in accordance with the civil service charter provisions, laws, and rules.

(d) As used in this paragraph:

(1) A public officer is deemed to "advocate the appointment or promotion of a relative" if the public officer recommends or refers the officer's relative for appointment or promotion by another officer standing lower in the chain of command. "Chain of command" means the line of supervisory personnel that runs through the involved public officers to the head of the relevant agency.

(2) "Agency" means the same as defined under Section 13-101 of this charter, the council, and any council office.

(3) "Appointment" means the selection of a person to fill a position or the hiring of a person to provide a personal service.

(4) "Public officer" means an employee or officer as defined under Section 13-101 of this charter.

(5) "Relative" of a public officer means a person who is related to the officer as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

<sup>3</sup> "OIP finds that, in most cases, the identities of the Subjects would fall within the scope of the UIPA's exception to required disclosure that is based upon 'a clearly unwarranted invasion of personal privacy.' HRS Sec. 92F-13(1) (1993). Thus, the UIPA would generally make these person's identities confidential."

- The EC staff shall work with [] Department, as it reorganizes the [] Division and adds other supervisors, to create and implement a written plan that would allow Employee B to be in a different section thereby eliminating spousal supervision;
- The [] Division should develop and implement a policy for even distribution of OT among the [] Division staff and supervisors;
- An independent review of OT for [] Division staff and supervisors should be implemented on a semi-annual basis; and
- Each [] Division employee participates and successfully completes ethics training that covers the City ethics laws by June 30, 2014.

APPROVED AS TO FORM  
AND LEGALITY:

/s/ Charles W. Tutto  
CHARLES W. TOTTO  
Executive Director and Legal Counsel

/s/ Katy Chen  
KATY CHEN, Vice Chair  
Honolulu Ethics Commission

Dated: Honolulu, Hawaii, June 26, 2014