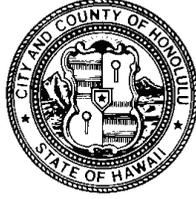


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211 • HONOLULU, HAWAII 96813-3091 • AREA CODE 808 • PHONE: 768-7786 • FAX: 768-7768 • Internet: www.honolulu.gov/ethics

KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR &
LEGAL COUNSEL

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

Date and Place: June 26, 2014
Standard Financial Plaza
Conference Room, Suite 211

Present: Katy Chen, Esq., Vice Chair
Michael A. Lilly, Esq., Commissioner
Stephen Silva, Commissioner
Jeffrey Burroughs, Ph.D., Commissioner
Charles W. Tutto, Executive Director and Legal Counsel (EDLC)
(except for Item V.C)
Laurie A. Wong, Associate Legal Counsel (ALC) (except for Item V.C)
Letha A. S. DeCaires, EC Investigator (except for Item V.C)
Geoffrey Kam, Deputy Corporation Counsel, COR
Diane Kawauchi, Deputy Corporation Counsel, COR
Catherine Maki, Administrative Services Officer, COR
Alia Wong, Reporter, Civil Beat
Dan Purcell, Interested Member of the Public
Jay Parasco, Managing Director's Office
[REDACTED], Respondent (Item V.B only)
[REDACTED], accompanying Respondent (Item V.B. only)

Excused: Charles W. Gall, Chair
Stanford Yuen, P.E., Commissioner

Absent: Rachael S. Wong, Dr.PH, Commissioner

Stenographer: Lisa P. Parker, Legal Clerk

I. CALL TO ORDER

The 481st meeting of the Ethics Commission ("Commission" or "EC") was called to order at approximately 11:39 a.m. by Vice Chair Chen.

The Commission had before it the EDLC's memorandum regarding the Agenda Items for the June 26, 2014 Meeting, Open Session, dated June 20, 2014.

II. FOR ACTION: REQUEST FOR A MOTION TO APPROVE THE MINUTES OF THE OPEN SESSION OF THE MAY 30, 2014 MEETING

Vice Chair Chen asked for clarification to the minutes presented. EDLC stated that because there was movement in and out of Executive Session, he had directed the Legal Clerk to re-arrange the minutes by issue, instead of chronological order. To remedy the confusion, the minutes would be revised as follows:

1. Page 1, move, "Vice Chair Chen entered the meeting at 1230 p.m." to directly after "stenographer";
2. Page 4, state that Vice Chair was not present until 1230 p.m.;
3. Page 4, state that there had been a return to open session on the second paragraph from the bottom;
4. Page 8, "Chair Gall recused himself and left the meeting..." should be deleted;
5. Page 5, 3rd paragraph, amend to "Vice Chair asked about Chair Gall's recusal."
6. Page 5, 4th paragraph, change the last sentence to: "just leads to cases possibly being grieved by the same employees who are the subject of the investigations.";
7. Page 8, delete the term "thwarted" in Commissioner Lilly's statement – corrected statement should provide: "for want of a \$600 piece of equipment, they compromised an investigation that could have identified fraud, waste and abuse of a quarter of a million dollars."; and
8. Page 2, section III, paragraph 2, delete everything after 1130 a.m. as irrelevant.

Dan Purcell (member of the public), commended the Commission and staff for their work to stay up-to-date and accurate on their current meeting minutes. Mr. Purcell stated that he attends various other board meetings and many of the boards have significant delays in publishing their information which is irresponsible.

Commissioner Lilly moved that the minutes be accepted as corrected. Commissioner Silva seconded the motion. Commissioner Burroughs stated that since he was not present at the May meeting and would not vote. EDLC asked if Commissioner Burroughs had read the minutes. Commissioner Burroughs responded in the affirmative;

The EDLC stated that his review would validate his vote to approve the minutes. Commissioners voted unanimously to approve the corrected minutes.

III. OLD BUSINESS

The Commissioners discussed further dates for meetings and confirmed availability for hearing motions for a contested case on Wednesday, July 23, 2014 at 11:30 am.

Given that a contested hearing is scheduled for August 27, 2014 at 11:30 am, the Commission agreed that the next regular meeting should be held on, Wednesday, September 17, 2014 at 11:30 a.m. with the approval of the three missing commissioners.

IV. NEW BUSINESS

A. For Discussion: Administrative News. The EDLC requested that Investigator (Inv.) Letha DeCaires' investigator year-end report be added as an 8th item for New Business discussion. The Commission agreed.

1. Complaints and requests for advice statistics through last month. A new record, 103 investigative complaints have been opened.
2. Website statistics. (Please see Open Session Memo for statistics.)
3. Fiscal Year 2014 Year-end Report regarding Complaint Investigations. (Please see Open Session Memo for statistics.)
4. Administrative Service Officer Training Update. The EDLC explained that the intent for this specialized training for the ASOs is so that they can work more efficiently and effectively with EC staff for investigative purposes. Departments are required to follow, the "7 Steps of Just Cause" before taking any disciplinary action against employees. In order to prevent past unnecessary duplicative efforts by the EC staff and ASOs, the staff informed the ASO's that the EC investigation completes steps 1-5. The remaining steps 6 and 7 must be completed at the departmental level. Departments also have a responsibility to perform a due diligence review on our report. For example, the department should re-interview critical witnesses for concurrence, but they don't need to recreate the entire investigation as that would be a waste of resources. The EDLC reported that he has seen recent improvements in the EC staff communication with the ASOs.
5. Move to the Sprint Building located on Dillingham/Alakawa. The EDLC stated that the Ethics Commission office is on the top of the list of boards and commissions to move. The earliest date for the move is December 2014. EDLC voiced concern over the relocation due to physically moving the office, parking for commissioners, and public accessibility. The EDLC

stated that the administration has informed us that we can work with the architect in regard to designing a conference room that is large enough in size to accommodate members of the public, staff, and commissioners and can also be used as a hearing room for contested hearings.

Mr. Purcell, commented that he attends multiple state and city meetings full-time and he would be unable to attend an EC meeting if the EC were to move away from City Hall. He stated that the decrease in accessibility would be a disservice to the public. EDLC stated that he appreciates the comment because staff has made strenuous arguments to the administration that the EC should stay near Honolulu Hale for accessibility. Unlike other boards and commissions, the EC completes over 500 interviews of City employees a year. But, the concerns fell on deaf ears. EDLC stated that most of the boards and commissions (except Liquor Commission) will be housed at the Sprint Building. The main reason for the move is to save money.

6. Status of Corporation Counsel Legal Opinions to Ethics Commission. EDLC stated that there is only one outstanding legal opinion request regarding the basis of COR's claim to have budget authority over the Commission. Diane Kawauchi, Deputy Corporation Counsel, reported they are still working on the opinion as of two to three weeks ago.

7. Fiscal Years 2014 and 2015 Budget Update. We are trying to spend the remaining monies this month on equipment and outside services. Administration has stated that they will allow us to take this year's savings of \$25,000 and use it in our next year's budget for the ORI investigation. EDLC stated that he had asked for the flexibility to use that saved money on multiple investigations since at this time we are uncertain if we will utilize that whole amount on that one case, but were told that it could only be used for ORI. In FY15 we want to establish a Legal Clerk I position and fill that position as well as reallocate the current Investigator II to an Investigator IV position and create and fill the Associate EDLC. The EDLC explained that we had asked for another ALC and it was denied by COR, the Administration, and City Council.

8. Investigator Fiscal Year End Report. Inv. DeCaires stated that it has been her pleasure to work for the EC and staff who are all very professional. It has been a big year for cases investigated, a 16% increase from the previous year, likely due to the mandatory ethics training for all city employees and also having a dedicated investigator to respond to complaints promptly.

Some of the difficulties that occurred this year revolved around the filling of the investigator contract. The interviews for this job occurred in June 2013, a tentative job offer was provided to Inv. DeCaires by the end of June. But, the 89-day personal services contract was not approved until the end of August. Further, there were delays in the renewal of the contract. These contracts allow for retirees receiving a retirement pension from the ERS system to work without penalties. The reason that this position was filled in this method was because there were no qualified candidates for the civil service full-time position. Due to the delays, the contract which should have covered a 12 month period, was only filled for 9 months. The new FY15 contract has been approved and the hope is that this next year will result in more timely executions of the contract renewal process.

The current budgeted Investigator position is for a II, but the position actually requires skills at the level of an Investigator IV. Half of the 64 cases investigated and closed were complex cases, and half of the complex cases fit the definition of super complex investigations.

This job includes dealing with a large volume and a broad variety of cases in different departments; forensic analysis of electronic data, drafting lengthy investigative reports that include analytical review and synthesizing of material, and factual conclusions and recommendations.

In order to accommodate the increased staffing, the new space in the Sprint Building should be large enough to provide privacy to those meeting with the investigator. Currently, there is not enough room in the current location to adequately house an investigator and the voluminous documents that accompany complex cases.

The current method of intake and assignment of case numbers should be revised as it does not provide a realistic view of the actual cases investigated and resources used. When cases are received, the EDLC assigns it one case number. But, sometimes the investigation of one case results in three dozen interviews that had several different possible violations and additional subjects of investigations. Inv. DeCaires stated that she believes that multiple numbers could be assigned to help identify that the case involved multiple investigations, not just one.

The EDLC has often stated that the most similar investigator position in the city to the EC's investigator for the purposes of comparing work load volume is an HPD detective assigned to administrative investigations within the Internal Affairs Division (now known as the Professional Standards Office-PSO). HPD reported that the PSO investigators conduct 18 case investigations per year per detective. Inv. DeCaires reminded the Commission that she had just closed 64 investigations. Further, had she been able to work the allotted 12 months of the contract period, she would have likely completed over 80 investigations, the equivalent to that of four PSO investigators. It is important to note the case load comparison because of the potential for staff burnout is a big factor in an under-resourced office that performs ongoing complex administrative investigations. As such, having an appropriate amount of staffing is critical to the long term success of the EC office.

Commissioner Lilly stated that Inv. DeCaires is a "breath of fresh air" and that she has brought a wealth of expertise in law enforcement to the EC and that he is happy that she is here. EDLC added that the staff has learned so much from her. EDLC stated that if the EC doesn't have the right set of resources we are going to have other problems. Hopefully the move to the Sprint building will give staff more physical room and FY16 will be focused on the appropriate staffing needs.

Commissioner Silva commended Inv. DeCaires for keeping the cases active – no backlogs. Inv. DeCaires stated that she has thirty open super complex cases. EDLC stated that a

simple case is obviously easier to close, and just as the contested case before the commission, a super complex case takes more time to complete.

B. For Action: Review and Adoption of Draft Memorandum to Mayor Regarding Concerns with Corporation Counsel's Budget Authority Over Ethics Commission and Administration's Position Toward Commission.

EDLC reminded the Commission that this issue began last fall when Corporation Counsel, Donna Leong, stated that she had line item veto power over the EC budget. As a result, the EC formally requested COR's legal justification for that budget authority.

As discussed at the last meeting, EC staff encountered another issue when it recently requested approval for the purchase of a GPS tracking device to investigate substantiated allegations that involved misuse of City vehicles. After several weeks, COR eventually informed the EC staff that the purchase of the GPS was under review, because it had policy implications. Then 5 weeks later, staff received conditioned approval (Memo attached in Open 1).

EDLC recommended that the Commission should not direct him to sign COR's conditional approval memo, because COR did not provide any explanation of its concerns or why they are imposing conditions on the EC. EDLC stated that this is even more confusing since the EC has a legal opinion from COR about the legal use of GPS devices in investigations which staff has followed for this request.

Commissioner Lilly stated that he is appalled at the conditional memo from COR. He further summarily stated that: COR does not have the authority to oversee the EC; COR's authority ends with signing off on a budget request; to tell the EC that COR will only approve a budget request if there are a series of conditions imposed, COR is completely off base and overstepping authority. Commissioner Lilly likened COR's function to that of the State Attorney General. COR represents City employees and agencies. But, City agencies don't work for the Corporation Counsel. COR is now instructing the EC as to what they can or cannot do, as opposed to providing advice.

The EC asked staff to make the following revisions to the proposed letter including:

1. Add a second paragraph after, "...overstepped its limited authority and undermined the EC's independence," words to the effect: "The Ethics Commission is an independent agency which is only assigned to COR for administrative purposes. It is vital that the EC maintain its independence with the authority to conduct its investigations unimpeded by any agency of city government. Because we enforce the Ethics laws which govern the conduct of all city employees, this independence must remain inviolate." (Commissioner Lilly)

2. Change “best services” to “best ethics oversight.” (Commissioner Lilly).
Vice Chair added that it should include “of Honolulu employees.”
3. Page 2, first paragraph after the words, “had closed” add the following: “such investigations have very short windows of opportunity. Because the request was not timely approved, the investigation was compromised and for want of \$600 GPS, an investigation that could have identified fraud, waste and abuse of a quarter of a million dollars was thwarted.” (Commissioner Lilly)
4. Last line of the letter should include words to the effect: “We look forward to your confirmation of our independence and that we are not subjected to any oversight of any city agency of city government.” (Commissioner Lilly)
5. Include a time frame for a response i.e., ten days. (Vice Chair Chen)
6. Strengthen the very last paragraph of the letter to include words to the effect that the EC is looking to you, Mayor, for exhibiting the values in your own personal leadership to support the EC and to set an example for the rest of the administration. (Vice Chair Chen)
7. Page 2, section that includes the terms: “instead of mulling over policy implications,” should refer to the specific person using her exact responses to the EC. (Vice Chair Chen)
8. Page 2, cite to the COR legal opinion – including the exact date of the memo) that supports the sentence: “the purchase request was approved by COR.”
9. Page 2, reevaluate the entire paragraph to direct the reader – decrease the amount of detail to instead provide more impact. (Commissioner Burroughs)
10. Convey that summarily, COR’s memo to the EC is inappropriate because:
(1) it oversteps COR authority because the EC doesn’t work for COR; and (2) it is contrary to a COR opinion which authorized purchase of the GPS device.
(Commissioner Lilly)
11. Send a final draft directly to Vice Chair Chen for final approval and signature.
(Commissioner Lilly)

A short private discussion was held by Mr. Kam and Commissioner Lilly. The EDLC asked if the private discussion could be heard by all. Commissioner Lilly stated that it could be heard in Executive Session.

Commissioner Lilly moved to enter into Executive Session. Commissioner Silva seconded the motion. The motion passed unanimously and the Commission entered into

Executive Session for the purposes of consulting with Mr. Kam.

After discussion, Commissioner Lilly moved to exit Executive Session, Commissioner Burroughs seconded the motion. The motion was unanimously approved.

Commissioner Burroughs moved to direct the Ethics Commission staff to redraft the letter based on the comments at the meeting and to send the draft to Vice Chair Chen for approval and signature. Commissioner Silva seconded the motion. The motion was passed unanimously.

Deputy Corporation Counsel Diane Kawauchi introduced herself and COR Administrative Services Officer, Cathy Maki. Ms. Kawauchi stated that she was present at the EC meeting in November 2013 when the issue regarding the EC's budget was raised. Ms. Kawauchi stated that she would brief Ms. Leong on the issues discussed at this meeting and that she would hopefully have an opportunity to review the letter when it is issued from the EC to the Mayor. Ms. Kawauchi stated that COR is working as fast as they can to respond to the Commission. She further stated that in her heart she believes that COR is not seeking to be negligent or inattentive to the requests of the Commission. Ms. Kawauchi stated that she has the budget memo at this time and that it would be completed in the near future.

V. EXECUTIVE SESSION SUMMARY

Commissioner Burroughs moved to enter into Executive Session. Commissioner Silva seconded the motion. The motion was unanimously approved. The Commission entered into Executive Session to address the Executive Session Agenda Items.

- A. For Action: Request for a Motion to Approve and Adopt the Minutes of the Executive Session of the May 30, 2014 Meeting.

After discussion, the Commission approved the Minutes as corrected.

- B. For Action: Request for a Motion to Approve and Adopt Settlement After Notice of Alleged Violation for Misuse of City Resources (RCH Sec. 11-104) Against a City Employee.

After hearing from Complainant and Respondent, the Commission unanimously approved the Motion to Settle.

- C. For Action: Request for a Motion to Approve and Adopt Advisory Opinion No. 2014-5 Regarding Misuse of City Resources (RCH Sec. 11-104) by a City Employee.

After consultation with Mr. Kam in which neither of the parties were present, the Commission reconvened and unanimously approved Advisory Opinion No. 2014-5.

VI. ADJOURNMENT

Commissioner Burroughs moved to exit Executive Session and adjourn the meeting. Commissioner Lilly seconded the motion. The motion passed unanimously.

The meeting adjourned at approximately 1:30 p.m.