

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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MAYOR



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Advisory Opinion No. 2005-2

I. Summary

A city officer violated Section 11-104, Revised Charter of Honolulu,^[1] when she used her city position to have the department where she was employed contract with her sister and sister-in-law to provide services to the department. In addition, she violated the same law by using her city position to reward political campaign volunteers with contracts to provide services to the department. The Commission recommends that the officer be disciplined with a two-week suspension from employment without pay.

II. Background and facts

The Honolulu Ethics Commission received a third-party request from Peter Carlisle, Honolulu Prosecuting Attorney, for advice regarding whether Jean Patterson, Executive Assistant for the Department of Prosecuting Attorney (PAT), had violated the ethics laws by selecting her sister and sister-in-law for contracts to serve legal papers on behalf of PAT.

One of Ms. Patterson's duties in her role as Executive Assistant was to gather names and recommend the persons PAT would use as process servers. Once the potential contractor passed a criminal history background check, he or she would be provided a contract. Ms. Patterson was not supervised in her discharge of this duty. Although the Prosecuting Attorney or the First Deputy Prosecuting Attorney signed the contracts, Ms. Patterson's recommendation had the practical effect of selecting the contractor.

For the period July 1997 through June 2004 Ms. Patterson recommended that PAT enter into contracts with her sister and her sister-in-law. In addition to her family connection, Ms. Patterson recommended contracts for the family members because they provided campaign assistance to the 1996 and/or 2000 campaigns of Peter Carlisle for election as the Prosecuting Attorney for Honolulu. Ms. Patterson had been a chief coordinator for and supporter of Mr. Carlisle in both elections. Ms. Patterson also recommended contracts with PAT for three other campaign volunteers who had also assisted on Mr. Carlisle's 1996 and/or 2000 campaigns.^[2]

PAT is annually allocated \$100,000, which is distributed to several process servers. For the period from July 1997 through June 2004, a total of 48 contracts were entered into between

PAT and the process servers, for a total of about \$643,000. Ms. Patterson selected family members and campaign volunteers for 23 of the 48 contracts, totaling approximately \$343,000.

PAT informed the Commission staff that, because each contract was for less than \$25,000 per year, the contracts were not subject to competitive procurement safeguards. It appears that the requirement that at least 3 bids be obtained for a contract below \$25,000 was waived because the fees for service of process are set by statute and could not be modified.

Over the seven-year period at issue, neither PAT nor Ms. Patterson sought bids for service of process contracts with the general public, even though Ms. Patterson from time-to-time had received inquiries about obtaining contracts from interested persons outside PAT. PAT implemented a competitive procurement process for these services for contracts beginning in July 2004.

PAT administrators state that the services rendered by the family members and campaign volunteers were satisfactory. There is no evidence that Ms. Patterson personally benefited from the contracts between PAT and her family members or the campaign volunteers.

It was not until late 2003 that Ms. Patterson's supervisors, the First Deputy Prosecuting Attorney and Mr. Carlisle, became aware that Ms. Patterson had selected her sister and sister-in-law as contract process servers. These facts were revealed during an investigation of an unrelated complaint made by Ms. Patterson's son^[3] against another employee. The delay in identifying the relationship between Ms. Patterson and her sister and sister-in-law resulted from the women having different last names from Ms. Patterson and her failure to inform her supervisors of the family relationships. Upon being confronted by Mr. Carlisle about her relatives' contracts, Ms. Patterson suggested that PAT immediately terminate the contract with her sister and this was done in March 2004.^[4]

Staff interviewed Ms. Patterson on March 29 and October 28, 2004. Ms. Patterson believed that the contracts awarded to relatives and campaign workers were appropriate. First, she explained she was unaware of any prohibition against nepotism or rewarding campaign volunteers with city contracts. She admitted, however, that she did not seek ethics advice. Second, a previous PAT administration had entered into contracts for process serving with relatives of an officer of that administration. Third, Ms. Patterson felt she could trust her relatives to perform the work proficiently. Similarly, she thought that the campaign workers who received contracts had shown a strong work ethic while volunteering for the campaign. Finally, Ms. Patterson believed that some state legislators rewarded campaign loyalists with government contracts or employment.

In particular, Ms. Patterson expressed that it was difficult to give jobs with PAT to people who helped on the campaign because potential employees either had to be attorneys or would have to go through the formal government hiring process for civil servants. Offering contracts appeared to be the only way to reward the campaign workers with employment.

After receiving a Notice of Possible Violation of the Standards of Conduct, Ms. Patterson entered into a Stipulation Regarding Violations of the Standards of Conduct (Stipulation). In the

Stipulation, Ms. Patterson acknowledged her conduct violated RCH Section 11-104 and accepted that the Commission would recommend a two-week suspension without pay from her position at PAT. Ms. Patterson also agreed to waive any appeal or grievance rights. The Stipulation is appended to this opinion.

III. III. Question presented

Whether, under the specific circumstances of this matter, recommending relatives or political campaign workers for contracts with a city agency is a violation of the fair and equal treatment law, RCH Section 11-104.

IV. IV. Analysis

A. A. Selecting relatives for non-bid contracts with a city department violates the fair and equal treatment policy.

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.^[5]

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.

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.^[6]

In this case, Ms. Patterson selected her sister and sister-in-law for seven non-bid contracts valued at about \$100,000. No attempt was made to offer the contracts to the general public, even though inquiries were made by those interested in securing a contract. We conclude that this conduct violated RCH Section 11-104 because Ms. Patterson used her city position to give

favorable treatment to her relatives insofar as she ensured certain family members obtained contracts that members of the general public were effectively prevented from obtaining.

B. Rewarding political campaign volunteers with non-bid contracts violates the fair and equal treatment policy.

It is undisputed that Ms. Patterson selected certain campaign workers for contracts with PAT based on her desire to reward them for their efforts in her supervisor's political races. Ms. Patterson rewarded political supporters with 16 contracts valued at over \$242,000, in violation of RCH Section 11-104.

Favoritism resulting from campaign support is not a proper basis upon which to select contractors any more than family membership is. Such conduct grants an unwarranted advantage to the campaign workers, while other qualified persons are denied the opportunity for contracts. Moreover, the fact that some campaign workers were being offered publicly funded contracts on an annual basis raises a serious concern that the contracts were political pay-offs or other *quid pro quo* for past and/or future support. There is a prevalent perception that government contractors who contribute services or funds to elected officials have an advantage in being selected for contracts.^[7] That perception became a reality in this case. The cumulative effect of these factors is to undermine the integrity of the office of Prosecuting Attorney.

C. Extent and effect of this opinion

Our opinion should not be read as requiring a competitive procurement for every contract entered into by the city. Generally, the procurement laws will remove the opportunity for improper influence in contracting decisions. We focus here on contracts that benefit the decision-maker's family members or campaign supporters. Both of these groups have traditionally been flagged as ones where loyalty on the part of government personnel may outweigh objectivity and merit in entering into contracts. Our opinion is limited to the facts of this case, including the process and rationale used by Ms. Patterson in selecting contractors who were family members or political supporters.

IV. Recommendations

If the Commission finds a violation of the ethics laws, it is required to submit a recommendation for discipline to the appointing authority and the appointing authority must, within 15 days, respond to the Commission stating the discipline it deems necessary. RCH Section 11-106 and Revised Ordinance of Honolulu Section 3-8.5(a).^[8]

We evaluate several factors in determining the type of discipline appropriate in this matter. The factors to be weighed include the nature and egregiousness of the violation, the duration of the violation, the number of recurring or similar violations, the effort taken by the violator to correct the violation, the degree of involvement in the violation, the intent of the violator and other relevant circumstances. *See e.g.*, Section 46-1.5(24)(D), Hawaii Revised Statutes, (describing the criteria to be used by the counties when setting a civil fine).

The violations began in 1997, when the contracts with family members and campaign workers were entered into, and continued through June 2004. In March 2004, Ms. Patterson's sister's contract was rescinded and Ms. Patterson was relieved of her duties regarding service of process contracts. However, the contracts with the campaign workers continued until their expiration at the end of June 2004. During the 7 years, 23 contracts were entered into with family members and campaign workers totaling approximately \$343,000. Each contract may be considered as a separate violation.

Ms. Patterson breached the public trust each time she selected a family member or a campaign co-worker for a contract. This was exacerbated by the fact that she knew other possible contractors were interested in the providing their services to PAT, but did not attempt to open the selection process to the general public. That there were no complaints about the quality of the contractors' services does not mitigate the violations.

Ms. Patterson did not disclose to her supervisors that her family members had contracts with PAT until Mr. Carlisle raised this fact in early 2004. She did not seek advice regarding the ethics of selecting family members and political loyalists for the contracts, even after receiving mandatory ethics training which covered the fair and equal treatment policy and the anti-nepotism law. Had she timely requested advice from the Commission, the violations could have been avoided.

We acknowledge that Ms. Patterson has been forthcoming with information and answers to questions in two interviews with staff. We also recognize that Ms. Patterson rationalized her preferential treatment toward her relatives and campaign workers by referring to questionable past practices. However, the rationalizations do not justify her conduct.

After balancing the factors, we conclude that the violations of RCH Section 11-104 in these circumstances were egregious and require significant discipline. Therefore, we adopt the recommendation stated in the Stipulation that PAT suspend Ms. Patterson for two weeks without pay beginning within 90 days of the receipt of this opinion.

In addition, we recommend that PAT be careful to avoid contracting practices based upon similar family or political relationships in the future.

Dated: February 2, 2005

/S/

ROBIN DAVID LIU, Chairperson
Ethics Commission

^[1] Section 11-104. Fair and Equal Treatment --

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

^[2] One of the campaign workers who received contracts was and is Ms. Patterson's daughter-in-law's brother.

^[3] Ms. Patterson's son had been and is a supervising investigator with PAT, a civil service position.

^[4] By this time, Ms. Patterson's sister-in-law was no longer on contract with PAT.

^[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1518 (3rd ed. unabridged 1993). BLACK'S LAW DICTIONARY (6th 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.

^[6] 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.

^[7] We note that in some contexts, "pay-to-play" practices are prohibited because they undermine the public's trust in government and create unfair advantages for campaign fund contributors. *See, e.g., Blount v. Securities and Exchange Commission*, 61 F.3d 938, 944-945 (D.C.Cir. 1995), *cert. denied* 116 S.Ct. 1352 (1996), upholding the Security and Exchange Commission's Rule G-37 which prohibits municipal bond dealers from contributing or soliciting contributions for the political campaigns of government officials from whom the dealers may later obtain business. The court noted that the dealers "campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the government entity." *Id.*

^[8] Section 11-106. Penalties and Disciplinary Action for Violations --

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the

ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance.

Sec. 3-8.5 Violation--Penalty.

- (a) The failure to comply with or any violation of the standards of conduct of this article or of Article XI of the revised charter shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article. Nothing contained herein shall preclude any other remedy available against such officer or employee.

APPENDIX I

STIPULATION REGARDING VIOLATIONS
OF THE STANDARDS OF CONDUCT, EC NO. 04-028 (w)

WHEREAS, on March 12, 2004, the Honolulu Ethics Commission (Commission) received a third-party request for advice regarding whether Respondent Jean A. Patterson (Respondent) had violated the standards of conduct in her position as Executive Assistant to the Honolulu Prosecuting Attorney by obtaining contracts with the Department of Prosecuting Attorney, City and County of Honolulu (PAT), for certain of her relatives;

WHEREAS, the Commission staff conducted an investigation regarding possible violations of the standards of conduct;

WHEREAS, the Commission found credible evidence that Respondent had obtained contracts to provide service of process to PAT for certain of her relatives and for certain individuals who had assisted in the campaigns to elect Peter Carlisle as the Prosecuting Attorney, City and County of Honolulu, in 1996 and/or 2000;

WHEREAS, a Notice of Possible Violations of the Standards of Conduct (Notice) from the Commission was received by Respondent on or about November 30, 2004;

WHEREAS Respondent does not intend to submit a response to the Notice; and

WHEREAS, the Commission and the Respondent desire to settle the issues raised in the Notice;

THEREFORE, the Commission and the Respondent hereby agree to the following:

1. At all times relevant hereto, the Respondent is and has been an employee of PAT. Respondent is required to comply with the standards of conduct stated in Article XI, Revised Charter of Honolulu, and Articles 3 and 6 of Chapter 3, Revised Ordinances of Honolulu, and is subject to the jurisdiction of the Commission.
2. One of Respondent's duties in her role as Executive Assistant during the period July 1, 1997 through March 31, 2004 was to recommend the persons with whom PAT would enter into contracts for service of process.
3. In her official capacity as an Executive Assistant of PAT, Respondent recommended, aided and otherwise participated in obtaining contracts for her relatives listed below:
 - a. Respondent's sister, Betty Whitmore, for one contract with PAT as a process server in the amount of \$16,500 for the period July 1, 2003 through June 30, 2004, which contract was rescinded on March 4, 2004; and
 - b. Respondent's sister-in-law, Edna Tokunaga, for six contracts with PAT as a process server over the period July 1, 1997 through June 30, 2003 in the total amount of \$84,250.
4. The conduct stated in paragraph 3 constitutes Respondent's use of her official position to secure or grant special consideration, treatment, advantage, privilege or exemption for Betty Whitmore and Edna Tokunaga in violation of Section 11-104, Revised Charter of Honolulu.[1]
5. In her official capacity as an Executive Assistant of PAT, Respondent recommended, aided and otherwise participated in obtaining contracts for the following persons who volunteered campaign assistance to the 1996 and/or 2000 campaigns of Peter Carlisle for election as the Prosecuting Attorney, City and County of Honolulu:
 - a. Respondent's sister, Betty Whitmore, for a contract in the period and amount stated in paragraph 2(a), above;
 - b. Respondent's sister-in-law, Edna Tokunaga, for contracts in the period and amount stated in paragraph 2(b), above;

- c. Clifford Goo[2], for seven contracts with PAT as a process server over the period July 1, 1997 through June 30, 2004 in the total amount of \$117,250;
 - d. Constante Domingo for four contracts with PAT as a process server over the period July 1, 1997 through October 31, 2000 in the total amount of \$47,993; and
 - e. Richard Mitchell for five contracts with PAT as a process server over the period July 1, 1999 through June 30, 2004 in the total amount of \$77,000
6. During the relevant times hereto, Respondent knew that there was no process to seek applicants for the position of contract process server from the general public and that on occasion persons from the general public sought positions as contract process servers.
 7. The conduct described in paragraph 5 constitutes Respondent's use of her official position to secure or grant special consideration, treatment, advantage, privilege or exemption for Betty Whitmore, Edna Tokunaga, Clifford Goo, Constante Domingo and Richard Mitchell in violation of Section 11-104, Revised Charter of Honolulu.
 8. The Commission acknowledges that the contract process servers named in paragraphs 3 and 5 carried out their contractual responsibilities to the satisfaction of PAT.
 9. The Commission acknowledges Respondent's assertion that she did not intentionally violate any provision of the ethics laws.
 10. Respondent cooperated in the Commission's investigation to date. Respondent will fully cooperate in any investigation conducted by the Commission involving contracts for service of process between PAT and any person.
 11. The Commission will recommend that Respondent receive discipline in the form of a suspension without pay for two weeks from any employment at PAT. Respondent will not protest, grieve, appeal or otherwise contest the suspension. The suspension will commence within three months of the date on which the Commission and Respondent execute this stipulation.
 12. The Commission will recommend that PAT take no additional disciplinary measures against Respondent for the conduct described in paragraphs 3 and 5, above.
 13. Respondent understands that the Commission will render an advisory opinion to the Prosecuting Attorney regarding her conduct and that her identity will not be

entitled to confidentiality when the Commission makes that opinion available to the public.

14. Respondent has read and understood this stipulation, has had the opportunity to seek the advice of an attorney in this matter and enters into this stipulation knowingly and voluntarily.

/S/
ROBIN D. LIU, CHAIR
Honolulu Ethics Commission

Date: 02/02/05

/S/
JEAN PATTERSON
Respondent

Date: 01/31/05

[1] Section 11-104. Fair and Equal Treatment --

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

[2] Mr. Goo is Respondent's daughter-in-law's brother.