

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2008-1

I. Summary

Two city board members must disqualify themselves from participating in a contested case hearing because they have apparent conflicts of interest arising from their financial and personal interests.

II. Factual Background

In January 2007, the Department of Planning and Permitting (DPP) issued a conditional use permit to Mohala Pua School/Waldorf School, allowing the school to build a new high school on its Niu Valley campus.

Following the DPP's decision to approve the conditional use permit, a number of individuals filed a petition with the Zoning Board of Appeal (ZBA), requesting a contested case hearing.¹ At a meeting on March 22, 2007, three of the five ZBA members, David Minkin, Glenn Kaya and Herbert Chock, disclosed to the parties that they would not be participating in the contested case hearing (hereinafter, the "Waldorf School matter") because they believed that they had disqualifying conflicts of interest. Their recusals left the ZBA with too few members to hear the case. All three ZBA members subsequently submitted the Ethics Commission Disclosure of Conflicts of Interest Statements requesting advice from the Ethics Commission as to whether they had conflicts of interest under the ethics laws.

Mr. Chock's disclosure statement indicated that his conflict arose from the fact that his company, Herbert Chock & Associates, Inc., had been retained by the Alston Hunt Floyd & Ing law firm to provide expert testimony in an unrelated arbitration matter. He stated that one of the petitioners in the Waldorf School matter, Corianne Lau, is a partner in the Alston Hunt firm and that Ms. Lau's father, Henry Lau, was also a petitioner in the Waldorf School matter and designated spokesperson for the petitioners.

¹ The ZBA consists of five members, serving five-year staggered terms. It hears and determines appeals regarding decisions of the director of the Department of Planning and Permitting in the administration of zoning and subdivision ordinances and related rules and regulations. The ZBA also hears requests for variances from the city's land use ordinance.

Mr. Kaya's statement disclosed the following:

I lived in this area where the site was originally designated to be a park. I lived in a different home, on a different street in this subdivision when this school was built. I have not lived in the valley for 25 years but my son and his family live in what was my second home on Halaki Street which is directly across from the school. I note that none of the petitioners live on Halaki Street or Panio Street where my first home was located. Now, under these circumstances I must recuse myself from voting because I may be subjective. However, I have certain historical facts that I would like to bring up later as I listen to it.

Mr. Minkin's statement indicated that he is a partner in the McCorriston Miller Mukai McKinnon law firm and that an associate attorney in his law firm "has a daughter attending Waldorf School and the associate attorney has testified in favor of the new building to be constructed by Waldorf School." Mr. Minkin subsequently updated his disclosure to inform the Commission that his associate's daughter no longer attended the Waldorf School.

On May 3, 2007, the ZBA held a status meeting with the parties in the Waldorf School matter. At that meeting, the petitioners asked the parties and the ZBA to waive their conflicts of interest. The ZBA responded that they would seek guidance from the Ethics Commission. It is our understanding that the scheduling of the contested case has been stayed pending a response from the Ethics Commission.

III. Question Presented

Do the ZBA members have conflicts of interest under the ethics laws that would prevent them from participating in the Waldorf School matter?

IV. Discussion

A. Relevant ethics laws

1. RCH § 11-102(c) -- conflicts arising from financial/business interests

Revised Charter of Honolulu (RCH) § 11-102 sets forth prohibited conflicts of interest for city officers and employees. RCH § 11-102(c) provides that no elected or appointed officer or employee shall:

(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or

which may tend to impair the independence of judgment in the performance of such person's official duties.

At its core, RCH § 11-102(c) prohibits city officers and employees from placing themselves in situations where their personal business or financial interests conflict, or may conflict, with their official responsibilities. *See* Advisory Opinion No. 2001-2.

In analyzing whether a particular situation presents a prohibited conflict under RCH § 11-102(c), proof that one's judgment in discharging his/her official duties is actually impaired is not required. The possibility – or the reasonable appearance -- of impairment through conflicting loyalties is sufficient to establish a violation. *See, e.g.*, Advisory Opinion No. 2001-06 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH § 11-102(c)); Advisory Opinion No. 158 (possibility of real conflict of interest arising is sufficient to establish violation of RCH § 11-102(c)).

Stated otherwise, the Ethics Commission applies an objective approach under RCH § 11-102(c). That is, we determine whether under the totality of the circumstances a reasonable member of the public would perceive that the business or financial interest of the officer or employee is “incompatible with the proper discharge of such person's official duties or . . . may tend to impair the independence of judgment in the performance of [his/her] official duties.” RCH § 11-102(c). As we have stated:

One purpose of the ethics laws is to prevent conflicts of interest because city officers and employees should not serve two masters. Therefore, the Commission has regularly required city officers and employees to forego activities that are likely to place them in a position where conflicts will arise. These limitations are imposed without a finding that the officers or employees would allow themselves to be swayed by the personal or financial interest because such an analysis is inherently subjective and unreliable. Instead, the objective standard used is whether a reasonable person, given all the facts, would conclude that the officer's independent judgment may tend to be impaired.

Advisory Opinion No. 2001-2 (citations omitted).

2. RCH §§ 11-101 and 11-103 – conflicts of interest arising from personal relationships

In addition to the conflicts of interest specifically identified in RCH § 11-102, the city's revised charter recognizes that conflicts that arise from other relationships or interests that do not fall directly within the specific ambit of RCH § 11-102 can also undermine the public's confidence in the integrity of its government and should therefore be prohibited. For instance, RCH § 11-101, which declares the general policy behind the ethics laws, provides:

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of *personal* considerations.

(Emphasis added.)

In addition, RCH § 11-103, which contains the basic requirement that conflicts of interest be fully disclosed, does not delimit the type of conflicts that require disclosure. It simply provides that

any elected or appointed officer or employee who possesses or who acquires *such interests as might reasonably tend to create a conflict with the public interest* shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent.

(Emphasis added.)

In reliance on these mandates, the Ethics Commission has opined that conflicts that arise from personal relationships that “might reasonably tend to create a conflict with the public interest” (*id.*) are prohibited. Thus, for instance, in Advisory Opinion No. 184, the Ethics Commission concluded that the personal friendship between a commissioner and a person appearing before her in her official capacity was inconsistent with RCH § 11-101 and required the commissioner to disqualify herself from any official business concerning her friend. In reaching this conclusion, the Ethics Commission explained:

The Commission believes personal relationships could influence an officer or employee. For example, if a close friend asks a favor, the request may be difficult to refuse. Absent a request, the mere existence of a relationship may influence the officer or employee. In any event, the friendship will create the appearance of a conflict of interest if the friend is subject to the discretionary authority of the officer or employee to enforce the law. In this case, Ms. X [the commission member] and Mr. Y are frequent social companions and co-host civic and cultural events. Ms. X

acknowledges that she and Mr. Y are personal friends. Given this friendship, other members of Commission Z may be hesitant to take official action that is adverse to Mr. Y's interests. Other persons who have business before Commission Z may believe Commission Z favors Ms. X's friend. And the public may lose confidence in the government of which Commission Z is a part. Therefore, when members of Commission Z have personal friendships with persons who appear or have business before Commission Z, the commissioners create for themselves the appearance of conflicts of interest, for which they are accountable.

See also, e.g., Advisory Opinion No. 2001-2 (a city officer whose spouse advised clients that might be affected by the officer's discretionary official actions had a conflict under RCH § 11-101).

In analyzing the types of conflicts arising from personal relationships that are prohibited, the Commission follows the same “objective” or “reasonable person” approach that it applies under RCH § 11-102(c). That is, it considers whether the facts and circumstances would lead a reasonable person to conclude that the city officer's or employee's personal relationships or interests would tend to interfere with his/her judgment in carrying out his/her official responsibilities. This showing does not require proof of *actual* interference or conflict in the official's decision-making; it is sufficient that there is an *appearance* of a conflict. *See, e.g.*, Advisory Opinion No. 2001-2 (an apparent conflict “arises when one may reasonably *perceive* that the officer's public duty may be interfered with or compromised by a personal or financial interest[,]” even if the personal and public interests do not actually conflict with each other); Advisory Opinion No. 2001-6 (“RCH § 11-101 has been interpreted by this Commission to prohibit even the appearance of a conflict of interest by city personnel.”); Advisory Opinion No. 184; Advisory Opinion No. 2004-7.

B. Application of relevant ethics laws

We now turn to the specific question presented for advice: whether the ZBA members have conflicts of interest under the ethics laws discussed above that would prevent them from participating in the Waldorf School matter.

As an initial matter, we note that conflicts of interest cases depend heavily on the specific facts and circumstances presented. The importance of and weight given to factors such as the monetary significance of the financial or business interests involved, the amount of discretionary authority the officer/employee has, and the depth of the personal relationships involved (*see* Advisory Opinion No. 2001-2) can vary widely from case to case. Thus, because each case turns on its own particular facts, our conclusions in this case should be understood as being strictly limited to the specific facts presented.

1. Herbert Chock

Mr. Chock's disclosure indicates that his conflict arises from the retention of his company as experts by the law firm of Alston Hunt Floyd and Ing. Our understanding is the engagement was significant, involving a "six figure" fee. This retention constitutes a financial interest for purposes of our analysis. *See* Revised Ordinances of Honolulu (ROH) § 3-8.1.² Although there is no evidence that the Alston Hunt firm is directly involved in the Waldorf School matter pending before the ZBA, one of the firm's partners, Corianne Lau, is a petitioner.

The question at hand is whether Mr. Chock's financial interest – *i.e.*, his company's engagement by the Alston Hunt firm -- creates a reasonable perception that his judgment might tend to be impaired in the Waldorf School matter. We conclude that it does. In our view, a reasonable person could question whether Mr. Chock's work for the firm would be a factor in his decision-making process. For instance, it would not be unreasonable for one to question whether he would, even subconsciously, consider the possibility that Ms. Lau would use her position as a partner in the Alston Hunt firm to affect, either positively or negatively, his work for the firm (or the likelihood of obtaining further work), depending on how he ruled on the Waldorf School matter.

Positing this possibility in no way suggests that Mr. Chock would actually consider the ramifications of his decision on his work with the Alston Hunt firm or that that Ms. Lau would take any action based on how Mr. Chock ruled. Under the objective standard that applies in conflict of interest cases, however, the Commission is required to determine whether a reasonable member of the public might harbor these concerns.

Accordingly, the Commission concludes that Mr. Chock's retention by the Alston Hunt firm creates a conflict of interest under RCH § 11-102(c), insofar as it brings into question whether his independent judgment in deciding the Waldorf School matter would tend to be impaired.

2. Glenn Kaya

Mr. Kaya's disclosure does not indicate that he has any business or financial interests that could be affected by the outcome of the Waldorf School matter. However, Mr. Kaya's son and his family live in a home located on a street that is "directly across the school." The question is whether this personal relationship creates the appearance of a conflict of interest.

Under the circumstances, we conclude that Mr. Kaya does have a conflict of interest that precludes his participation in the Waldorf School matter. Although Mr. Kaya's son is apparently not among the petitioners, it is not unreasonable to assume that, given his proximity to the proposed construction site, he and his family would be impacted by the proposed project. For

² ROH § 3-8.1: "Financial interest" means an interest held by an individual, the individual's spouse or minor children which is: (1) an ownership interest in a business; (2) a creditor interest in an insolvent business; (3) an employment, or prospective employment for which negotiations have begun; (4) an ownership interest in real or personal property; (5) a loan or debtor interest; or (6) a directorship or officership in a business.

instance, the proposed new school buildings might increase traffic and noise in the neighborhood, affect home values, *etc.* Significantly, Mr. Kaya himself raised a concern that he might be subjective in his review of the case. Consequently, a reasonable person might conclude that Mr. Kaya would take into account these potential impacts on his son and his family when deciding the Waldorf School matter.

In reaching this conclusion, we wish to be very clear that it is limited to the specific facts presented, including, the close proximity of Mr. Kaya's son's home to the proposed new construction site, and should not be construed as indicating any general inclination on our part to expansively interpret the kinds of personal relationships that give rise to prohibited conflicts of interest under the ethics laws.

3. David Minkin

Mr. Minkin made his disclosure because one of the associate attorneys in his law firm has a daughter who attends the Waldorf School, and this associate has already testified in support of the school's plans to construct a new high school building on its Niu Valley site and could testify again at the ZBA hearing.

As noted above, Mr. Minkin's disclosure was supplemented as soon as he became aware that his associates' daughter no longer attended the Waldorf School. We view this additional information as dispositive.

In our opinion, the key issue as to whether Mr. Minkin has a disqualifying conflict of interest is the potential impact his decision could have on a close colleague at work. If Mr. Minkin's associate's daughter continued to attend the Waldorf School, we would be inclined to conclude that a reasonable person might fairly question whether he might take into account the effect his decision in the Waldorf School matter would have on the family of someone with whom he worked closely. The fact that his associate would have the opportunity to testify in the ZBA hearings would make this concern even more acute.

However, because Mr. Minkin's associate's daughter no longer attends the Waldorf School, this concern effectively disappears: Mr. Minkin's decision – whether it be in support of or against the construction of the new high school -- will no longer directly affect his associate's family. Thus, in our opinion, there is no longer any significant risk that his decision on the Waldorf School matter might be influenced by any consideration as to how it might affect the family of a colleague. While Mr. Minkin's associate may still personally be in favor of the new school (and might even testify at the ZBA hearing), we do not believe that a reasonable taxpayer would necessarily conclude that her mere personal point of view, decoupled from the potential impact on her family, would be enough to influence Mr. Minkin's decision in the Waldorf School matter.

In sum, we conclude that Mr. Minkin does not have a conflict of interest under the ethics laws that would disqualify him from participating in the Waldorf School matter.

V. Proposed waiver of conflicts by petitioners

The petitioners in the Waldorf School matter have apparently indicated that they would be willing to “waive” the conflicts disclosed by the ZBA members. We do not believe that such a waiver would be effective with respect to the apparent conflicts identified above.

The conflicts of interest provisions of the ethics laws are in place to protect the public’s confidence and trust in the integrity of the government. RCH § 11-101. Although the petitioners are members of the public and will be most directly affected by the ZBA’s decision in the Waldorf School matter, they do not speak on behalf of the entire public. Stated otherwise, the proceedings before the ZBA are not a purely private matter, and the integrity of the process, in both fact and appearance, is a matter that extends beyond the direct participants in the Waldorf School matter. Thus, the petitioners are not in a position to waive apparent conflicts that might affect the confidence and trust that members of the public at large have in their government.

VI. Required Action

Insofar as we have concluded that Mr. Chock and Mr. Kaya have conflicts of interest, we must address whether they must disqualify themselves from participating in the Waldorf School matter.

The city’s revised charter is silent as to whether recusal or disqualification is necessary when a city official has a prohibited conflict of interest. The only specific action the charter requires officers or employee to take is to file a disclosure statement. RCH § 11-103.³ Therefore, the Ethics Commission, as an advisory body, does not have the power to *require* an official to disqualify him or herself from participating in decisions in which he/she has a conflict. However, the Commission is obligated to provide guidance to officers and employees as to how they can comply with the ethics laws.

In its advisory capacity, the Commission has a longstanding practice of recommending disqualification in conflicts cases where the source of the conflict cannot be eliminated. *See* Advisory Opinion No. 2001-2 (“should a conflict arise, the officer has a duty to report it and remove himself or herself from the matter raising the conflict. This can be done by recusal or by divesting the financial interest.”); Advisory Opinion No. 2007-1 (“Generally, if a city officer or employee has a conflict of interest, he or she may not participate in the decision making process affecting the matter creating the conflict.”); Advisory Opinion No. 184 (“city personnel should not have personal relationships, such as sexual, platonic, or business, with parties who regularly have business before their city agencies. If such a relationship exists, the personnel should abstain from official action concerning friends.”); Advisory Opinion No. 108.

This approach acknowledges that, as a practical matter, the only way to avoid an ethics violation is removal from participation in the official action at issue. The Hawaii State Ethics Commission also follows this approach (*see, e.g.*, State Ethics Commission Advisory Opinion No. 87-1), and it is consistent with the general common law rule regarding conflicts of interest.

³ The ZBA members have met this requirement.

See In the Matter of the Water Use Permit Applications, 94 Hawai‘i 97, 122, 9 P.3d 409, 434 (2000) (“The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator.” (Citations omitted.)); *see also State v. Ross*, 89 Hawai‘i 371, 379, 974 P.2d 11, 19 (1998) (“[A]side from the technical absence of bias or conflict of interest, certain situations may give rise to such uncertainty concerning the ability of the [adjudicator] to rule impartially that disqualification becomes necessary.”).

In this case, there is no compelling reason to depart from our practice of recommending disqualification. It does not appear that Mr. Chock and Mr Kaya can take steps that would completely eliminate the source of their conflicts. Disqualification therefore appears to be the only prophylaxis to an ethics violation.

VII. Conclusion and Recommendation

Based on the foregoing, we conclude that:

(1) ZBA members Herbert Chock and Glenn Kaya each have conflicts of interest with respect to their participation in the Waldorf School matter and they should disqualify themselves from participating, deliberating or voting in the contested case hearing; and

(2) ZBA member David Minkin does not have a conflict of interest under the ethics laws with respect to his participation in the Waldorf School matter.

Dated: January 11, 2008

/S/

LEX R. SMITH
CHAIRPERSON
HONOLULU ETHICS COMMISSION