

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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MUFI HANNEMANN
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

ADVISORY OPINION 2009-3

Pursuant to §3-6.3(b), Revised Ordinances of Honolulu (“ROH”), the Honolulu Ethics Commission (the “Commission”) shall render advisory opinions in circumstances where there is alleged to be a conflict of interest or unethical conduct on the part of any employee or officer of the city within the scope of the revised charter and ROH, Chapter 3, Article 8.

This matter arises out of Respondent’s retention of a witness fee received in connection with a subpoena compelling her to testify as a witness on October 9, 2006 at the trial of *English vs. City and County of Honolulu, et al.*, Civil No. 04-00108, in the United States District Court for the District of Hawaii (“*English*”).

I. PROCEDURAL BACKGROUND

This matter came before the Commission with the following procedural background:

1. [name] (“Respondent”) is an employee of the City and County of Honolulu, working in the Real Property Assessment Division, Department of Budget and Fiscal Services.
2. CHARLES W. TOTTO (“Complainant”) is the Commission’s Executive Director and Legal Counsel and, pursuant to Rule 6.2(a), Rules of Procedure of the Honolulu Ethics Commission, is designated by the Commission as the Complainant in this proceeding.
3. In approximately January of 2007, plaintiff’s attorney in *English*, Roger Moseley, Esq. (“Moseley”) contacted the Commission’s staff and requested that it investigate why a number of witnesses, including Respondent, had not returned the witness fee checks to his office. Moseley felt that the funds should have been returned because *English* had settled prior to trial and the witnesses had not been required to testify.
4. Following investigation of the matter, Complainant sent a Notice of Possible Violation of the Standards of Conduct dated November 3, 2008 to Respondent via certified mail.
5. By letter dated November 14, 2008, Respondent requested a hearing before the

Commission.

6. This matter was therefore initiated by Charge dated January 8, 2009. The Charge was sent to Respondent via certified mail.

7. Formal hearing of the matter was scheduled for April 16, 2009.

8. Respondent submitted a Response to the Charge dated February 9, 2009 and received by the Commission on February 11, 2009.

9. The formal hearing in this matter took place on April 16, 2009.

10. At the formal hearing, the Commission accepted into evidence Complainant's Exhibits A-J and Respondent's exhibit, marked for identification as Exhibit K, and considered testimony and argument offered by the parties.

B. FINDINGS OF FACT, CONCLUSIONS OF LAW

1. The Commission, following deliberations, made Findings of Fact and Conclusions of Law in the form attached hereto.

2. The Commission hereby adopts the attached Findings of Fact and Conclusions of Law and incorporates them herein by reference.

C. RECOMMENDATION

Based on the foregoing, the Commission recommends that no discipline be imposed if Respondent provides acceptable evidence to the Commission that she has provided the \$44.00 amount of the witness fee to the City's general fund or to Moseley within three weeks of the date of this recommendation. If no acceptable evidence is provided to the Commission within that time, the Commission will convene further proceedings to determine appropriate discipline.

DATED: 6-18-09

/S/
LEX R. SMITH, Chair
Honolulu Ethics Commission

| | | |
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| CHARLES W. TOTTO, |) | EC NO. 07-005(w) |
| |) | |
| Executive Director and Legal Counsel |) | FINDINGS OF FACT AND CONCLUSIONS |
| |) | OF LAW |
| Complainant, |) | |
| |) | |
| vs. |) | |
| |) | |
| [name of employee], |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for formal hearing before the Honolulu Ethics Commission (the “Commission”) on April 16, 2009. Matthew Viola, Esq. appeared for Complainant CHARLES W. TOTTO (“Complainant”) and [name] (“Respondent”) appeared *pro se*. After due consideration of the files and records herein, the testimony and arguments offered at the hearing, and in light of the entire record in this matter, the Ethics Commission hereby makes the following Findings of Fact and Conclusions of Law pursuant to Rule 6.7 of the Rules of Procedure of the Ethics Commission (“EC Rule”) and Hawaii Revised Statutes (“HRS”) §§91-11 and 91-12.

I. FINDINGS OF FACT

1. [name] (“Respondent”) is an employee of the City and County of Honolulu, working in the Real Property Assessment Division, Department of Budget and Fiscal Services.

2. CHARLES W. TOTTO (“Complainant”) is the Commission’s Executive Director and Legal Counsel and, pursuant to Rule 6.2(a), Rules of Procedure of the Honolulu Ethics Commission, is designated by the Commission as the Complainant in this proceeding.

3. While employed by the City, Respondent received a subpoena compelling her to appear on October 9, 2006 to testify as a witness in the trial of *English vs. City and County of Honolulu, et al.*, Civil No. 04-00108, in the United States District Court for the District of Hawaii (“*English*”).

4. In connection with the subpoena, Respondent received a witness fee check in the amount of \$44.00 from Roger Moseley, Esq. (“Moseley”), counsel for the plaintiff in *English*.

5. The \$44.00 witness fee was paid by a non-City source.

6. Respondent was subpoenaed as a witness because she had information relevant to *English* as a direct result of her employment with the City.

7. The person who served the subpoena on Respondent told her “to go have a nice lunch.”

8. Respondent was not designated by the City as an HRCP 30(b)(6) witness to testify on its behalf.

9. Non-City employees were also subpoenaed to testify and provided with the same \$44.00 witness fee.

10. In preparation for the trial, Respondent used the \$44.00 witness fee as part of the \$107.48 purchase price of a new outfit to wear for the trial. Respondent paid to have the outfit altered and, as a result, could not return it. Respondent did not feel she had clothes appropriate for court and therefore purchased the outfit so that she would feel more confident and comfortable during her court appearance.

11. Respondent was subpoenaed because she was a percipient witness to events at issue in *English*. Respondent conceded that “to some extent” her testimony was work-related in the sense that it occurred because of work.

12. Respondent’s job description states that, among other duties, she must “[serve] as witness before the Boards of Review, Tax Appeal, Small Claims, Circuit, or Federal Courts in matters relating top [sic] property assessments” and “[other] duties as required.”

13. Respondent was not allowed to prepare for trial during normal working hours because she had to perform her regular duties at that time. She took her own time to prepare by trying to recall the events at issue in *English*.

14. Respondent did not lose any city compensation or benefits as a result of being subpoenaed.

15. The Commission finds that Respondent’s obligation to appear as a witness when subpoenaed constituted part of her official duties as an employee of the City.

16. Respondent was not required to testify because *English* settled before trial commenced.

17. In approximately January of 2007, Moseley contacted the Commission’s staff and requested that it investigate why a number of witnesses, including Respondent, had not returned the witness fee checks to his office.

18. Commission staff contacted the witnesses and asked if they had returned,

destroyed, or cashed the witness fee check.

19. Via e-mail dated February 28, 2008, Respondent indicated that she had cashed the check.

20. Via May 31, 2008 e-mail, Commission staff asked Respondent to reimburse Moseley's firm, Moseley Biehl Tsugawa Lau and Muzzi LLC by June 9, 2008 and stated that her failure to do so might constitute a violation of the City's ethics laws.

21. Respondent and Commission staff discussed the matter but Respondent was unwilling to return the funds without a decision by the Commission.

22. Respondent felt that she should not have to return the witness fee because, even though she was not required to attend the trial, she was inconvenienced by having to alter her work and personal schedule to be available for trial and because she had purchased the above-mentioned outfit.

23. A Notice of Possible Violation of the Standards of Conduct dated November 3, 2008 was sent to Respondent via certified mail. It was delivered and signed for, by Ed Agcaoili, on November 5, 2008. Respondent did not contest service of the Notice at the formal hearing.

24. By letter dated November 14, 2008, Respondent requested a hearing before the Commission.

25. This matter was therefore initiated by Charge dated January 8, 2009. The Charge was sent to Respondent via certified mail. It was delivered and signed for by Ed Agcaoili on January 13, 2009. Respondent did not contest service of the Charge at the formal hearing.

26. Complainant charged that Respondent violated RCH §11-104 and §11-102(d).

II. CONCLUSIONS OF LAW

1. As an employee of the City and County of Honolulu, Respondent was subject to the Standards of Conduct as set forth in Article XI of the Revised Charter of Honolulu ("RCH") during the time period at issue in this matter.

2. As an employee of the City and County of Honolulu, Respondent is within the jurisdiction of the Commission pursuant to RCH §11-107.

3. Complainant bears the burden of proof by preponderance of the evidence. HRS §91-10(5); Rule 6.6(a), Rules of Procedure of the Ethics Commission.

4. HRS §607-12 provides:

The fees of witnesses shall be as follows: Every witness attending and testifying,

or subpoenaed and attending, upon the trial of any civil cause, in any court, shall be paid the sum of \$4 for each day's attendance in court, and traveling expenses at the rate of 20 cents a mile each way. Every such witness, coming to attend upon court from any island other than that upon which the court is holding session, shall be entitled to \$6 for each day's attendance in addition to the actual round trip cost of plane or ship travel and 20 cents for each mile actually and necessarily traveled on the ground each way.

5. HRS §607-12 is silent as to whether a witness fee must be returned if the witness does not actually testify.

6. Federal Rule of Civil Procedure ("FRCP") 45(b)(1) states in relevant part:

Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

7. FRCP 45 is silent as to whether a witness fee must be returned if the witness does not actually testify.

8. Respondent is a member of Bargaining Unit 13 and was covered by the above-mentioned HGEA Contract provisions during the period relevant to this matter.

9. Article 39 of the Hawaii Government Employees Association Unit 13 contract ("HGEA Contract"), in effect during July 1, 2007 – June 30, 2009, provides in relevant part:

A. An Employee covered by the terms of this Agreement, if summoned to serve as a witness or juror in any judicial proceedings except those which may involve or arise out of the Employee's outside employment or the Employee's personal business or private affairs shall, if the Employee serves, be entitled to leave of absence with pay.

B. An Employee who serves as a witness or as a juror, and who receives a fee or mileage allowance shall not suffer the loss of such monies or have it offset against the Employee's salary account.

10. The HGEA Contract is silent as to whether an employee may retain a witness fee where the witness does not actually testify as a witness.

11. While HRS §607-12, FRCP 45(b)(1), and the HGEA Contract are silent as to what to do with a witness fee when the witness does not actually testify at trial, the City's Standards of Conduct may provide that policy.

12. Complainant argued Respondent's retention of the witness fee check for her personal benefit constituted use of her official position to secure or grant herself special

consideration, treatment, advantage, privilege or exemption in violation of RCH §11-104.

13. RCH § 11-104 provides:

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.

14. Respondent argued retention of the witness fee cannot be construed as using a City position to obtain a special benefit or privilege for herself since the same fee was granted to all witnesses regardless of their specific employment.

15. Based on the foregoing, the Commission determines that Complainant has failed to prove that Respondent violated RCH §11-104 by the requisite preponderance of the evidence.

16. Complainant also argued that Respondent's retention of the witness fee check for her personal benefit constituted compensation from a non-City source for her services as a City officer or employee in violation of RCH § 11-102(d).

17. RCH § 11-102(d) provides:

No elected or appointed officer or employee shall: . . . (d) Receive any compensation for such person's services as an officer or employee of the city from any source other than the city, except as otherwise provided by this charter or by ordinance.

18. Respondent's argument that retention of a witness fee cannot be construed as compensation for City services, since it was provided solely as a requirement of a subpoena and not related to her duties as a City employee, is rejected.

19. Based on the foregoing, Respondent's argument that the witness fee is essentially a private matter between herself as a private citizen and plaintiff's counsel and, as such, that it did not impinge on the City's Standards of Conduct and that it was not a matter requiring judgment by the Commission is rejected.

20. Respondent's retention of the witness fee check therefore constituted receipt of compensation for her services as an employee of the City from a source other than the City in violation of RCH § 11-102(d).

21. Respondent's violation of RCH § 11-102(d) subjects her to potential disciplinary action, as set forth in RCH §11-106.