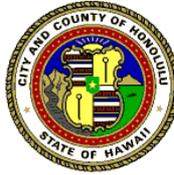


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics



MUFI HANNEMAN
MAYOR

CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion No. 2010 – 2

I. Summary

This case required a review of the reimbursements to Councilmember Rod Tam from the city Council's Annual Contingency Allowance. This discretionary fund is available for miscellaneous expenses related to carrying out the councilmembers' city duties. Councilmember Tam sought and received reimbursement from the fund for hundreds of meals for himself with other individuals or groups totaling over \$22,000 during fiscal years 2006 through 2009.

Councilmember Tam violated the standards of conduct by charging the city for meals in circumstances where (1) he paid less for the meal than the amount he charged the city; (2) his justification for the meal was false; (3) the meal was not directly related to his councilmember duties; (4) the meal was with his personal business associates; or (5) the meal was with his family members.

In addition, during the investigation the Commission discovered that over a 9-year period the councilmember failed to disclose significant financial information, as required by law, regarding businesses and nonprofits in which he was an officer or director. He also failed to disclose conflicts of interest arising from these relationships as required under the standards of conduct.

The Honolulu Ethics Commission ("Commission") approved a stipulation to settle the claims against the councilmember, attached hereto as Attachment A. The stipulation requires repayment of some of the city funds expended for meals and payment of a \$2000 civil fine, for a total of \$13,700. The Commission dismisses the claims against Councilmember Tam. Pursuant to the stipulation, the councilmember admits no wrongdoing and does not believe there is a basis to impose a civil fine.

Furthermore, the Commission recommends that the Council review the discretionary fund policy and amend the language to reduce the likelihood of similar problems recurring. This should include a process to review and deny reimbursement requests that are not justified.

Because the matter was settled, this advisory opinion is not a decision on the facts and law resulting from a contested case hearing. However, pursuant to Revised Ordinances of Honolulu Section 3-6.7(c),¹ this opinion reflects the investigation conducted by the Commission's staff, the positions of the councilmember, and describes the specific violations of law discovered as a result of the investigation.

II. Investigation of Councilmember Rod Tam's use of city funds to pay for meals

A. Facts

On April 3, 2009, the Commission received a complaint, and documentation in support, that Councilmember Rod Tam had misused the Council's Annual Contingency Fund ("ACA") by purchasing meals for himself and others. The Commission staff began an investigation of the allegations and this opinion describes the information obtained by staff. The Commission staff and the attorney for Councilmember Tam submitted a stipulation to settle all claims in the case, which is attached to this opinion as Attachment A.

The ACA is a government fund that permits a councilmember ". . . to cover discretionary expenses in carrying out his/her duties as an elected official." ACA Policy, Administrative Manual of the Honolulu City Council (ACA Policy), para. 1. "Discretionary expenses connected with council duties include expenditures incurred when carrying out official duties or activities; enhancing accessibility to, and communication with, the community and constituents; and carrying out the public's expectations of a councilmember's role and responsibility to the community and constituents." The allocated amount is the same for each councilmember and is determined by the Council through the budgeting process. *Id.*

In recent years the amount budgeted per councilmember has been: Fiscal Year (FY) 2005-2006: \$9,920.00; FY 2006-2007: \$12,000.00; FY 2007-2008: \$18,011.11; and FY 2008-2009: \$18,111.11. The staff focused on the FY2006 through FY2009 period in examining ACA transactions. During these four years, Councilmember Tam was reimbursed through the ACA for over \$22,000 in meals.

At the threshold, the ACA Policy does not explicitly allow or prohibit paying for meals to facilitate discussion of Council matters or to aid in carrying out a councilmember's duty. The only specific allowance for food is stated in para. 1a, which gives examples of proper expenses: "Community meeting expenses such as facility rental fees, security services, light refreshments, flyer handouts, lei for speakers and rental of special equipment." (Emphasis added.)

The ACA Policy describes general limits on the types of charges that will be reimbursed. "The annual contingency allowance shall not be used for any personal, political, campaign

¹ **Sec. 3-6.7 Requests by third parties.**

(c) Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

related expenses or expenses related to the conduct of other than official duties and activities of a councilmember.” *Id* at para. 3. Also, “[e]xpenses shall conform to the Ethics Commission’s guidelines regarding appropriate use of public funds.” *Id* at para. 2.

The ACA reimbursement process requires that a councilmember submit receipts to the Council fiscal office with (1) a description of the items purchased, (2) a justification for the expenditures, and (3) a statement signed by the councilmember that the information submitted with the form is “. . . correct and true.” Form ACA-1. The fiscal officer then determines whether there are sufficient funds available to reimburse the councilmember. The fiscal officer does not have authority to decide whether the purchase complies with the ACA Policy. Councilmember Tam stated that he was the only person who wrote and submitted the ACA claim forms for his reimbursements.

In his interview, Councilmember Tam related that he prefers to have meals with constituents for a number of reasons. He believes that having a meal will calm a stressful situation. He also believes that in local Chinese culture, people expect to discuss issues over a meal rather than at an office desk. Furthermore, he does not like to use his city office because parking for constituents is difficult near Honolulu Hale and there are allergens in the building that cause him sinus problems. Therefore, if he feels he needs to meet with someone, he will ask him or her for the restaurant at which they would like to meet.

Councilmember Tam recognized that a meal is not necessary to conduct his Council duties or discuss a constituent problem. He was aware that there are a number of cheaper, more traditional ways to meet with constituents – such as at the office, his or the constituent’s home or business, other public places, etc. Councilmember Tam also admitted that he could pay for a meal, without reimbursement by the city, if he thought it was important to have a meal. Councilmember Tam never asked for guidance from the Council Chair, the Commission or Corporation Counsel about whether he was permitted to have the ACA pay for his meals.

The complaint and investigation focused on ACA reimbursements to Councilmember Tam for meals purchased during meetings supposedly held in connection with or to facilitate carrying out his duties as a councilmember. The investigation raised questions about whether some of the purchases were made for legitimate government purposes. There are several categories of expenses at issue:

1. Meals where Councilmember Tam charged the city more than he had paid for the meals;
2. Non-Council related meals for which Councilmember Tam created a Council justification where there was none;
3. Meals charged where the meeting topic was not directly related to a specific Council issue or councilmember duty;

4. Meals with personal business associates; and
5. Meals with family members.

These matters are discussed below.

B. Charging the ACA more than Councilmember Tam was billed for the meals

1. Results of the investigation

Councilmember Tam sought reimbursement for over 90 meals ostensibly related to Council business, but where he did not submit the restaurant copy of the receipt or a charge card receipt. Instead, he submitted guest receipts² after he filled in the blank spaces for date and cost and hand wrote the name of the diners and a brief description of the discussion topic had during the meal. By this means he recouped from the ACA the cost of the meal.

Staff contrasted the guest receipts for 28 recent meals submitted by Councilmember Tam to the actual receipts maintained by the restaurants. Each receipt submitted by Councilmember Tam differs from the restaurant receipt for the same meal. For 26 of the 28 meals in question, Councilmember Tam presented guest receipts that overcharged the ACA, while 2 show undercharges. The net errors amount to an overcharge to the ACA of slightly over \$1,000.

To elicit an explanation from Councilmember Tam for the discrepancies between his claims and the restaurant records, staff sent him a copy of the restaurant receipts for most of the 28 meals in question. Councilmember Tam responded in a May 3, 2009 memorandum by stating: “After reviewing the receipts you sent, I acknowledge the blind errors due to recalling by memory. Thus, I take responsibility for unconsciously and inaccurately recording reimbursements. I requested reimbursement amounts both more and less than the restaurant amounts recorded by the restaurants.” (Emphasis in original.) He offered to reimburse the city for \$499 reflecting his estimate of the net overcharges at the time.

2. Analysis

Public funds may only be expended for a legitimate public purpose. *See*, Article VII, Section 4, Hawaii State Constitution.³ In addition, the party spending the funds must be

²In this case, a guest receipt refers to the 1/2 inch by 3 inch tear-away portion of the tab on which the customer’s order is taken.

³ **ARTICLE VII: TAXATION AND FINANCE**

Section 4. APPROPRIATIONS FOR PRIVATE PURPOSES PROHIBITED

No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 4 of Article I of this constitution. No grant of public money or property shall be made except pursuant to standards provided by law.

authorized, either explicitly or implicitly, by law to spend the public money. *See, Rees v. Carlisle*, 113 Hawaii 446, 153 P.3d 1131 (2007) (use of public funds and resources by prosecutor to advocate for a constitutional amendment not authorized by law); and Advisory Opinion Nos. 2002-2 and 2005-4 (expenditures by mayor and administration authorized by law).

City government officials may only use city funds for city purposes. Section 11-104, Revised Charter of Honolulu (RCH);⁴ Advisory Opinion No. 2001-1 (Councilmember Rene Mansho's use of her city paid staff for her political benefit constituted special treatment for herself in violation of RCH Section 11-104); and the Commission's *Guidelines on the Use of City Resources*.

Councilmember Tam contends that his record keeping was inaccurate and that caused him to seek reimbursements for which he was not entitled. Even if that were the case, there is no question that an officer with the authority to expend city funds has a duty to properly account for the expenses. This duty is imposed to prevent fraud against the public and to place the responsibility for public funds on the official charged with care of the funds. *See, American Jurisprudence 2d, Public Officers and Employees*, Sections 241 and 257. This is why the reimbursement form requires a signed statement that the supporting information is "true and accurate."

Councilmember Tam implies that because he both undercharged and overcharged the city in his reimbursement requests, he did not intend to shortchange the public. If he were making random errors based on a faulty memory, the number and amount of the mistakes in his favor would be roughly equal to the number and amount of mistakes in the city's favor. However, 26 of the 28 errors are in the councilmember's favor, with a net loss to the city of over \$1,000.

In this case, there is no question that Councilmember Tam either knew or should have known that the actual costs were less than what he claimed from the city. Each overcharge is a violation of RCH section 11-104.

C. Non-Council related meals for which Councilmember Tam created a Council justification

1. Results of the investigation

Three personal meals among the 28 reviewed by staff raise an additional concern as to why they were charged to the ACA.

(1) Councilmember Tam submitted a guest receipt from Kabuki Japanese restaurant for a claimed March 12, 2009 meal of \$88.18. Attached to his ACA expense form, Councilmember Tam wrote in the date, amount and that he had met with two state employees to

⁴ **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.

discuss “How economy affects HI’s public education.” However, the restaurant’s copy of the matching receipt and the credit card receipt showed a dinner on Saturday, February 14, 2009 -- Valentine’s Day -- paid by his wife Lynnette for a party of four. When asked, Councilmember Tam admitted the Valentine’s Day dinner had nothing to do with his councilmember duties and offered to repay the city.

(2) On March 26, 2009, Councilmember Tam attended a Chinatown crime prevention meeting at the Empress restaurant, at which the participants had dinner. He did not pay for this meal. On March 29, he hosted a family party at the same restaurant, which cost \$240.00. On March 31, he submitted a guest receipt for a \$240, justifying the reimbursement as for the “crime in Chinatown meeting.” Thus, he claimed the ACA owed him for the \$240 family dinner.

(3) He was reimbursed for a \$101.76 meal supposedly had at Kabuki Japanese restaurant on October 13, 2008 regarding “Asian countries’ economy.” However, the restaurant manager states that they have no record of Councilmember Tam paying for any meal on that date. The manager further stated that the guest receipt number series and its format were never used by the restaurant.

2. Analysis

Councilmember Tam either confused his personal and city meal expenses, or he invented Council related issues to justify charges for three personal meals totaling \$430. At the very least, these three examples underscore that Councilmember Tam failed to comply with his duty to ensure that he sought repayment only for the expenses to which he was entitled.⁵ Councilmember Tam had to take conscious steps to create a record that these expenses were related to his city duties, when they clearly were not.

D. Charges for meals not directly related to a Council issue or a Councilmember’s duty

1. Results of the investigation

Councilmember Tam asked for and received repayments for hundreds of meals because, according to him, they were related to a Council matter or his councilmember duties and, therefore, were allowed under the ACA Policy. Over the four years reviewed, Councilmember Tam spent over \$22,000 on meals supposedly related to his duties as a councilmember. However, upon inspection of the receipts and other information supporting the reimbursements, staff questioned approximately \$10,000 in meals because they appeared not directly related to a specific Council issue or councilmember duty.

In his July 9, 2009 interview, Councilmember Tam agreed that the only meals which should be reimbursed are those that facilitate discussions regarding a specific Council issue or councilmember’s duty (including constituent concerns). In an interview a week later,

⁵ RCH Section 13-110 states that “. . . all officers and employees of the city shall be entitled to their traveling and other necessary expenses incurred in the performance of their duties.”

Councilmember Tam expanded his position by suggesting that any meal had during the discussion of a topic that relates to city government should be reimbursed from the ACA.

Many of the meal justifications claim that the meals occurred during meetings involving generic topics such as “Hawaii’s economy,” “economic development,” “city’s economy,” “international relations,” or “meeting with Chinese community leaders.” Councilmember Tam was interviewed about some of the expenses in these open-ended categories. For the most part he could not recall whether the meal topic was related to a specific Council issue or councilmember duty.

In addition, some of the most expensive dinners hosted by Councilmember Tam were provided for foreign groups whose relevance to Council business or a councilmember’s duties are not apparent and were not explained by Councilmember Tam. These include a \$245 “Dinner for delegates from Zhoa Jianxin Yangzhou Polytechnic University;” a \$443 dinner for a “Meeting with Mercy Corps [a global charity headquartered in the U.S.] from Taiwan re diplomatic relations with Taiwan;” and \$396 for “Hosted dinner for artist delegates from Beijing China.” These and three other dinners put on for foreign groups totaled almost \$1,800.

In comparison, it appears that a few of the councilmembers have expended ACA money for an occasional staff lunch. Likewise, the Mayor’s discretionary fund has paid for meals with other Hawaii mayors during working meetings. It appears councilmembers use ACA funds to pay for meals that are included in their per diem while away from Honolulu on Council business. Some councilmembers have not used any ACA funds for any meals. None of the councilmembers submitted meal reimbursement requests for the number, total cost or reasons submitted by Councilmember Tam.

Even though Commission staff questions over \$10,000 in meal expenses, it does not dispute approximately \$8,000 of Councilmember Tam’s ACA reimbursements for meals that occurred while discussing issues directly related to Council matters or his duties. For example, the sale of affordable public housing and crime in his district raised significant legitimate concerns among his constituents for many months about what the city could do to remedy the situation. In addition, meals during meetings with his Council staff, other councilmembers and administration employees were not excluded.

2. Analysis

The ACA Policy allowing reimbursements for “[d]iscretionary expenses connected with council duties . . .” is broadly worded and may lead to unintended costs being paid from public funds. The issue for the Commission is to try to effectuate the intent of the Council’s policy while ensuring that the ethics laws are followed. Therefore, in this case, for a meal to qualify for ACA reimbursement, the meal had to be directly related to a discussion of a Council matter or a councilmember’s duty, including dealing with a constituent concern. This standard is consistent with RCH Section 11-104, our precedent and the ACA Policy.

A city officer who seeks reimbursement needs to demonstrate that the expense was reasonable and necessary. *See*, RCH Section 13-110. If the officer does not provide sufficient details to justify repayment, the lack of information should not be used to his or her advantage, especially when there is no practical way after the fact to confirm or refute whether the expense was legitimate. Councilmember Tam was unable to show that many meals were directly connected to his councilmember duties or Council issues. As a result, those meals should not be paid by the taxpayers.

Although Councilmember Tam agreed with the standard as far as it went, he wanted to broaden it to include all meals had during discussion of any issue that might affect the city. Under his interpretation, almost any meal could be charged to the ACA as long as it touched on a topic of potential relevance to the city. Such an interpretation of the ACA Policy would make it impractical to determine whether an expenditure of city funds was for a legitimate government purpose as required by the state constitution and RCH Section 11-104.

Advisory Opinion No. 2001-1 is instructive about the application of RCH Section 11-104 here. In that case, former Councilmember Rene Mansho used her city position, as well as government funds and city paid personnel, for the benefit of Aloha Boat Days and its non-profit support group. The question in the case was whether she could lawfully use city funds for activities that were of interest to the city because they affected the cruise ship and visitor industries in Honolulu. The Commission found that her Aloha Boat Days project was “not directly related to the business of the Council” despite the potential impact on the city’s economy. The Commission concluded that the use of city resources to support Aloha Boat Days violated RCH Section 11-104. Similarly, we believe that Councilmember Tam knew or should have known not to use city funds to pay for meals when the topic of the meal was not directly related to his councilmember duties.

Applying the holding in Advisory Opinion No. 2001-1, would result in allowing Councilmember Tam to recoup only those expenses that were directly related to a Council issue or his councilmember duties. As a result, it is reasonable to require Councilmember Tam to repay the city approximately \$10,000 for this category of expenses.

The Commission does not support the continued use of the ACA policy as it is currently worded. This case is a prime example of how a general policy may be used to justify conduct that was unintended. Accordingly, the Commission recommends that the Council modify the policy.

E. Charges for meals with business associates

1. Results of the investigation

During the course of the investigation, it became evident that Councilmember Tam had several private business and fiduciary relationships while he was in city office. Councilmember Tam charged dozens of meals against the ACA taken with the gentlemen who were officers or

directors in his personal businesses: [names redacted] “A,” “B,” “C,” and “D.” The cost for meals with these businessmen was about \$3,000.

Councilmember Tam stated that the meals occurred during meetings either to discuss the associate’s problem as a constituent or the meal topics were related to a Council issue. In response to questions whether Councilmember Tam and his business associates would also discuss other matters during the meals, such as their mutual business interests, he noted his practice was to talk only about city-related issues -- not personal business -- with his business associates when they were dining with ACA funds. He added that this practice was well-understood by his associates. Three of the business partners who failed to appear for interviews despite Commission-ordered subpoenas to do so, submitted brief letters stating that only city business was discussed at the meals.

However, Councilmember Tam’s ACA submittals show that topics relevant to his personal business were often discussed. For example, Councilmember Tam wrote on his ACA Forms that several of the meetings with meals he had with [name redacted] “A” were to discuss Hawaii’s film industry or real estate development. At the time of the meals, Councilmember Tam was a director or officer with “A” in [names redacted] “Company 1” and “Company 2,” two companies formed to develop and promote motion pictures and television in Hawaii. Furthermore, he and [name redacted] “A” were partners in [name redacted] “Company 3,” a land development company.

Similarly, Councilmember Tam had dozens of meals during discussions with [names redacted] “C” and “D” regarding relations between the city and Taiwan, the city and China and international relations generally. As of the dates of most of these meals, [names redacted] “C” and “D” were Councilmember Tam’s “volunteer international coordinators” for his Council office. Furthermore, the three were also the officers of [name redacted] “Company 4.” This business was formed in 2007 to consult with overseas businesses, including those from Taiwan and China, on doing business in Hawaii. Although Councilmember Tam stated the firm had no business plan or clients, it is reasonable to infer that the discussions about foreign relations and business affairs with East Asian countries were of direct interest to these men in both their city and private business capacities.

2. Analysis

RCH Section 11-102(c)⁶ prohibits a city official from having a business activity or financial interest that may tend to impair his judgment in carrying out his city duties. Many of the ACA documents show that Councilmember Tam and his business dining guests were

⁶ **Section 11-102. Conflicts of Interest --**

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.

personally interested in the topics discussed. His paying for meals related to his personal business conflicted with his duty to use the ACA for Council-related purposes only.⁷ Additionally, purchasing meals for his business associates is a violation of RCH Section 11-104, which prohibits using city resources for special treatment or for non-city purposes. Under these circumstances, taxpayer funds should not be used to pay for meals with his personal business associates.

F. Meals with family members

1. Results of the investigation

Over the time period examined, Councilmember Tam had several meals with his brother, sister and brother-in-law at a cost of about \$400. The diners were not identified as family members on ACA documents, but were labeled as “constituents.” When asked who these “constituents” were, Councilmember Tam was reluctant to disclose his family relationships. He stated that he used the term “constituents” because they had requested to meet with him in his official capacity. Even though the topics for discussion were rather simple such as parking issues, he claimed in his interview that he would only discuss their constituent issues during the meals. According to Councilmember Tam, any family matters would have to be discussed at another time.

2. Analysis

Requesting reimbursements for meals with his brother, sister and brother-in-law are acts of nepotism, which is prohibited as a form of unwarranted special treatment. *See*, Advisory Opinion No. 2005-2 (city official who gave contracts to her family members violated RCH Section 11-104 even though the contracts were carried out satisfactorily).

III. Failure to disclose business and fiduciary interests

In the course of this investigation the staff discovered that Councilmember Tam filed incomplete financial disclosures for 2001 through 2008 by failing to supply information regarding 10 businesses and non-profits.⁸ Most of the businesses and non-profits were not disclosed in most of the annual filings and some were never disclosed, for a total of 39 separate violations. The annual financial disclosure forms require the following verification by the filer:

⁷ Under RCH Section 11-102(c) there is no requirement to show actual impairment of judgment, only that a reasonable person would question the impartiality of the city officer. *See*, Advisory Opinion No. 2008-1 (board member was disqualified from participating in case where a partner in a law firm that retained board member’s firm in another matter submitted testimony in the case before the board).

⁸ The businesses include Ko’olau Loa Partners, Inc.; Hawaii Pacific Studios, Inc.; Pearl Harbor Entertainment, Inc.; East-West International Liaison, LLC; and Asia Pacific Technologies, Inc. The non-profit groups include Honolulu Culture and Arts District Association; Tom Association; Pauoa Community Association; Academy of Integrated Medicine International; and Hawaii Multi-Cultural Village Association.

“I declare that I have used all reasonable diligence in preparing this form, that I have reviewed Item Nos. 1 through 9,⁹ and to the best of my knowledge the information provided in this form is true and correct.” When asked why he had not reported the businesses and non-profits, Councilmember Tam stated: “I forgot.”

A few days after being questioned about his financial disclosures, Councilmember Tam submitted a memorandum to the Commission formally disclosing Ko’olau Loa Partners, Inc., and to inform the Commission that East-West International Liaison, LLC, was in the process of being dissolved. With these changes, only the Tom Association, a non-profit family association, was not disclosed for 2008. The disclosures for prior years have not been amended.

ROH Section 3-8.4(c)(3),¹⁰ as well as the instruction form for financial disclosures, require the reporting of businesses where more than \$5,000 or 10% of the ownership is attributed to the city official. In addition, ROH Section 3-8.4(c)(4)¹¹ and the instructions require reporting each fiduciary relationship.

The penalty provisions for failing to file a complete disclosure are stated in ROH Section 3-8.4(f)(1)¹² and permit the Commission to impose sanctions under ROH Section 3-8.5. In turn,

⁹ Item number 3 requires the disclosure of the businesses and nonprofits.

¹⁰ **Sec. 3-8.4 Financial disclosures.**

- (c) The disclosure of financial interests shall state, in addition to the financial interests of the person disclosing, the financial interests of the person's spouse and dependent children, and shall include:
- (3) The amount and identity of every ownership or beneficial interests held during the disclosure period in any business incorporated, regulated, or licensed to carry on business in the state having a value of \$5,000.00 or more or equal to 10 percent of the ownership of the business and, if the interest was transferred during the preceding calendar year, the date of the transfer; provided, that an interest in the form of an account in a federal or state regulated financial institution, an interest in the form of a policy in a mutual insurance company, or individual items in a mutual fund or a blind trust, if the mutual fund or blind trust has been disclosed pursuant to this paragraph, need not be disclosed.

¹¹ **Sec. 3-8.4 Financial disclosures.**

- (c) The disclosure of financial interests shall state, in addition to the financial interests of the person disclosing, the financial interests of the person's spouse and dependent children, and shall include:
- (4) Every officership, directorship, trusteeship or other fiduciary relationship held in a business during the preceding calendar year, the term of office and the annual compensation.

¹² **Sec. 3-8.4 Financial disclosures.**

- (f) Penalty.
- (1) Officers and Employees.
- (A) Late Filing. Any officer or employee of the city whose required financial disclosure is not received by the ethics commission or the city clerk, whichever is applicable, by the close of business on the deadline date specified in subsection (b), shall be given a notice of violation of the provisions of this section by the ethics commission or the city clerk, whichever is applicable. The notice shall state that the city officer or employee has 10 days from receipt of the notice in which to file the required financial disclosure or be subject to the penalties provided in this paragraph and Section 3-8.5. Any city officer or employee, who has received this notice and fails to file the required disclosure within 10 days of receipt of the notice, shall be subject to a

ROH Section 3-8.5(d)¹³ allows for the commission to levy civil fines against elected officers

civil fine according to the following schedule: \$100.00 for the first late filing; \$200.00 for the second late filing; and thereafter, for each additional late filing, the fine imposed for the previous late filing plus \$200.00. Any penalty or fine shall be imposed after an opportunity for a hearing conducted by the ethics commission under HRS Chapter 91.

- (B) Failure to File. Any officer or employee of the city who fails to file a financial disclosure as required in this section within 30 days from receipt of the notice of violation referred to in paragraph (A), shall, in addition to any civil fines imposed under paragraph (A), be subject to:
 - (i) The provisions of Section 3-8.5 relating to noncompliance; or
 - (ii) A criminal penalty of a fine of not more than \$2,000.00 or of imprisonment for not more than one year, or of both such fine and imprisonment, or to both (i) and (ii).

¹³ **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.
- (b) In addition to any other penalty provided by law, any contract entered into by the city in violation of Article XI of the revised charter or of this article is voidable on behalf of the city; provided, that in any action to void a contract pursuant to this article the interest of third parties who may be damaged thereby shall be taken into account, and the action to void the official act or action is initiated within six months after the matter is determined by the ethics commission.
- (c) The city, by the corporation counsel, may recover any fee, compensation, gift or profit received by any person as a result of a violation of the standards in this article or in Article XI of the revised charter by an officer or employee or former officer or employee. Action to recover under this subsection shall be brought within four years of such violation.
- (d) In addition to any other penalty, sanction or remedy provided by law, the ethics commission may impose a civil fine against a former or current officer or exempt employee of the city who has been found by the ethics commission to have violated the standards of conduct in Article XI of the revised charter or this article. For the purposes of this section, "officer" has the same meaning as in Section 13-101.4 of the revised charter and "exempt employee" means all employees of the executive and legislative branches of the City and County of Honolulu who are exempt from civil service pursuant to revised charter Sections 6-1103(a) – (d) and (i) and 6-1104(a) – (d), but shall not mean exempt employees in clerical positions or employees within a bargaining unit as described in Section 89-6, Hawaii Revised Statutes.
 - (1) Where a civil fine has not otherwise been established in this article, the amount of the civil fine imposed by the ethics commission for each violation shall not exceed the greater of \$5,000 or three times the amount of the financial benefit sought or resulting from each violation.
 - (2) In determining whether to impose a civil fine and the amount of the civil fine, the ethics commission shall consider the totality of the circumstances, including, but not limited to:
 - (A) The nature and seriousness of the violation;
 - (B) The duration of the violation;
 - (C) The effort taken by the officer or exempt employee to correct the violation;
 - (D) The presence or absence of any intention to conceal, deceive or mislead;
 - (E) Whether the violation was negligent or intentional;
 - (F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney;
 - (G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited;
 - (H) The amount, if any, of the financial or other loss to the city as a result of the violation;
 - (I) The value of anything received or sought in the violation;

based on the factors listed.

Financial disclosures are an important tool by which the public and the Commission are able to review the business activities and the fiduciary and financial interests of public officials. In fact, they are required by the Hawaii State Constitution, Article XIV.¹⁴ In this case, complete financial disclosures could have alerted the public and the Commission to conflicts of interest and the misuse of public funds. Forgetting to comply with the law does not excuse the failure to file.

IV. Failure to disclose conflicts of interest

Councilmember Tam also failed to disclose the conflicts of interest that arose from his duty to use city funds for city purposes and his practice of claiming reimbursement from city funds for the meals with his family and business associates and for meals unrelated to his councilmember duties. The duty to publicly disclose such conflicts is stated in RCH Section 11-103.¹⁵ Like the financial disclosures discussed earlier, the disclosure of specific conflicts of

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- (J) The costs incurred in enforcement, including reasonable investigative costs and attorneys' fees;
 - (K) Whether the officer or exempt employee was truthful and cooperative in the investigation; and
 - (L) Any other relevant circumstance.
- (3) No civil fine shall be imposed unless the requirements of Chapter 91 and HRS Section 46-1.5(24), have been met.
 - (4) The ethics commission may recover any civil fines imposed pursuant to this section and may, through the corporation counsel, institute proceedings to recover any civil fines.
 - (5) Pursuant to Chapter 1, Article 19, the ethics commission shall have executive authority to add unpaid fines by administrative order to any taxes, fees or charges.
 - (6) Notwithstanding Section 3-6.3(c), no civil fine may be imposed under this subsection:
 - (A) If the applicable complaint or request for advisory opinion is submitted more than four years after the alleged violation occurred; or
 - (B) For an investigation commenced by the commission on its own initiative, if the investigation is commenced more than four years after the alleged violation occurred.

¹⁴ Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction. The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees as provided by law to make public financial disclosures. Other public officials having significant discretionary or fiscal powers as provided by law shall make confidential financial disclosures. All financial disclosure statements shall include, but not be limited to, sources and amounts of income, business ownership, officer and director positions, ownership of real property, debts, creditor interests in insolvent businesses and the names of persons represented before government agencies.

¹⁵ **Section 11-103. Disclosure of Interest --**

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. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he or she has a personal or private interest, direct or

interest shed light on the personal interests that may affect the actions of city officers and employees in discharging their duties to the public. In addition, these disclosures require the city official to reflect on whether he or she has a conflict of interest and, if not sure, to request advice from the Commission.

V. Civil fine

Under ROH Section 3-8.5(d), the Commission may impose civil fines of up to \$5,000 or three times the amount of the financial benefit sought or resulting from each violation, whichever is greater. In deciding whether to impose a civil fine, the Commission evaluates the aggravating and mitigating factors listed in ROH Section 3-8.5(d)(2):

(A) Nature and seriousness of the violation:

The 28 meals that Councilmember Tam submitted without restaurant receipts were all incorrect. 26 out of 28 ACA claims reflect a pattern and practice of overcharging the ACA. In addition, Councilmember Tam massaged three claims so they appeared related to Council business: the Valentine's Day dinner, the March 29, 2009 Tam family luncheon and the meal expensed on the wrong guest receipt. These errors were compounded by the fact that he signed the ACA expense forms affirming that each claim and receipt was justified and "true and accurate" when they clearly were not. For these 26 meals, it is reasonable to infer that Councilmember Tam either was grossly negligent in his accounting of the public's money or that the errors were made deliberately in his favor.

Councilmember Tam also established a pattern and practice of charging taxpayers for dozens of meals with family members and his business associates. In addition, he was repaid for meals without establishing how the discussion (which the meal supposedly facilitated) was connected to a specific Council issue or councilmember duty.

Even if his errors were the result of "unconscious and inaccurate recording" as Councilmember Tam states, a fine is appropriate to deter similar egregious failures to properly account for public funds.

Similarly, there is no excuse for forgetting to disclose multiple business and fiduciary interests in his financial disclosures over several years despite verifying that the disclosure forms were prepared with due diligence and true and correct information.

(B) The duration of the violation:

The misconduct occurred over several years of his term of office.

indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

(C) The effort taken by the officer or exempt employee to correct the violation:

When the ACA discrepancies were brought to his attention, Councilmember Tam offered to repay the city for the misspent funds, and now has agreed to settle the case. Also, he has tried to correct his financial disclosure statement for 2008.

(D) The presence or absence of any intention to conceal, deceive or mislead:

Councilmember Tam's failure to submit copies of the actual receipts for meals led to significant misstatements on his ACA submittals. His use of guest receipts could reasonably be inferred as an attempt to enrich himself. He also seems to have ignored the disclosure reporting requirements.

(E) Whether the violation was negligent or intentional:

As described in (A), the misconduct taken as a whole was at least negligent.

(F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney:

Even though the ACA Policy did not expressly allow for meals and despite the fact that other councilmembers did not expend thousands of dollars for meals, Councilmember Tam did not seek guidance from the Council Chair, Corporation Counsel or the Commission.

(G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited:

According to Councilmember Tam, he had no notice regarding any problem with his charging the ACA for meals over the years. As to his forgetting to disclose his interests in businesses and nonprofits on the annual disclosure forms, however, this excuse is hard to accept from someone who has been filing disclosures for almost 30 years as a state representative and senator and councilmember. The annual instructions state what must be filed.

(H) The amount, if any, of the financial or other loss to the city as a result of the violation:

The financial loss to the city was about \$14,500, before the settlement. The loss of the public trust in the Council and other city agencies and officials will be significant because Councilmember Tam exemplified at least a careless attitude by a member of the highest level of city government toward taxpayer funds.

(I) The value of anything received or sought in the violation:

By using the fund to treat voters, community leaders, his family and his business

associates to meals, Councilmember Tam enhanced his goodwill with these groups at the taxpayers' expense. This likely increased his stature in the community and inured to his political benefit. Of course, he literally received hundreds of free meals courtesy of the taxpayers.

(J) The costs incurred in enforcement, including reasonable investigative costs and attorneys' fees:

Although these costs were not precisely tracked, at least 200 hours of staff attorney's time has been invested in this case.

(K) Whether the officer or exempt employee was truthful and cooperative in the investigation:

Councilmember Tam has been cooperative, although this was off-set to some degree by his attorney's demand that the councilmember be subpoenaed rather than attend the investigative interviews voluntarily. Councilmember Tam also initiated the idea of reimbursing the city for the money he overcharged the ACA and agreed to settle the case.

(L) Any other relevant circumstance:

Restitution alone may be appropriate where there is an innocent or unintentional mistake that deprives the public of funds. But the conduct here reflects the irresponsible, and at times possibly deliberate, use of the public purse for personal benefit. Simply repaying the money unlawfully obtained would send the wrong message to government officials and the public.

The circumstances in this case support a civil fine of \$2,000 when compared with other recommendations by the Commission. The Commission has recommended suspension without pay – the equivalent of a fine – in two recent cases. In Advisory Opinion No. 2005-2, the Commission recommended a two-week suspension of a city officer who contracted with her sister and sister-in-law on behalf of the Prosecuting Attorney's office for several hundred thousand dollars over several years. There was no financial harm to the city because the contract work was done to the department's satisfaction. Nor was there any evidence that the city officer personally benefited from the misconduct. Assuming that the administrative assistant's salary was about \$70,000, she lost about \$3,000 as a result of the suspension.

Similarly, in Advisory Opinion No. 2005-5, the Commission recommended a suspension of 1 to 2 weeks for a supervisor at a rubbish transfer station who gave truck drivers and other subordinates unauthorized overtime. In that case, according to the supervisor's department, the public received a benefit commensurate with the excess earnings because the employees substantially improved their trash hauling performance. Again, there was no proven personal benefit to the supervisor. If the Commission's recommendation had been followed, the supervisor probably would have lost about \$1,500 to \$3,000.

In contrast to the cases above, Councilmember Tam's careless or intentional misconduct resulted in financial loss to the city and personal gain for him, his family members and associates. To be consistent with the Commission's precedent and to avoid creating a double standard between the penalties imposed on supervisory employees as opposed to elected officials, a fine is warranted.

The stipulation calls for the Commission to accept \$2,000 of the total \$13,700 as a civil fine. The Commission concludes this is a reasonable amount under the circumstances.

VI. Conclusion and recommendations

A. The Commission understands that staff would have sought repayment from Councilmember staff in an amount of about \$14,500 based on its investigation. However, a settlement reflects that there are difficulties in the presentation of any case and there is a significant savings to the city in avoiding a contested case hearing. It is reasonable under the circumstances for Councilmember Tam pay the city a total \$13, 700, including \$2,000 as a civil fine. The stipulation is approved. The claims contained in the Notice of Possible Violation against Councilmember Tam are dismissed.

B. Councilmember Tam will cease any conduct inconsistent with this advisory opinion. The stipulation does not cover the period after the end of FY 2009. Therefore, all expenditures charged to the ACA from and after July 1, 2009 shall comply with the standards set forth in this opinion.

C. The Council should determine what, if any, disciplinary action to take against Councilmember Tam.

D. The Council should clarify the ACA Policy to narrow and better define the categories of expenses that are permitted. In addition, the Council should adopt a process to examine reimbursement requests that will ensure that there is a valid government purpose and an auditable justification for each requested reimbursement. This should include a process by which a reimbursement request may be denied. The Commission stands ready to work with the Council on specific changes to the ACA Policy.

E. Pursuant to ROH Section 3-6.5(e),¹⁶ the Council should inform the Commission within 15 days of the action it deems necessary in this case.

Dated: March 3, 2010

By: /S/
SUSAN S. HEITZMAN, Vice Chairperson

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¹⁶ **Sec. 3-6.5 Requirements applicable to the rendering of opinions.**

(e) After an opinion has been rendered, the commission shall notify the appointing authority of the officer or employee involved or the council in the case of elected officials, of its decision and shall recommend appropriate disciplinary action against officers and employees found to have violated standards of conduct established by the revised charter or by ordinance. The appointing authority or the council shall take whatever action is deemed necessary, and report the action taken to the commission within 15 days after receiving the decision and recommendation of the commission. The disclosures of conflicts of interests as provided in Revised Charter Section 11-103 shall be made matters of public record at any time that such conflict becomes apparent.