

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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October 31, 2012

**Advisory Opinion No. 2012-7**

**I. Summary**

The Honolulu Ethics Commission (Commission) approves and adopts a Stipulation between the Commission staff and the attorneys for former Honolulu Police Department (HPD) Deputy Chief Delbert Tatsuyama. The Stipulation settles a claim that Mr. Tatsuyama violated Revised Charter of Honolulu (RCH) Section 11-104 by using his position as deputy chief to request HPD to provide officers, services, facilities and equipment for the preferential treatment of a Cub Scout Pack (Pack) in which his son was a member.

Deputy Chief Tatsuyama stated that, at the time of conduct, he did not intend to misuse his position to obtain special treatment for the Pack, but he now realizes that his conduct may reasonably have been seen to constitute unlawful special treatment. He agrees to pay a civil fine equal to the amount spent in overtime pay by HPD associated with the special treatment, \$2,673.49.

**II. Alleged Facts<sup>1</sup>**

“Say Hi” events are presentations made to public groups by HPD of its services including keiki identification, tours of HPD facilities, bicycle safety and other programs. HPD uses Say Hi events for community relations and educational purposes.

There is no prohibition by HPD against its officers asking for Say Hi events. Normally, Say Hi events are requested online by the public and HPD personnel, reviewed by a patrol officer in Community Affairs Division (CAD) and then distributed to the requisite commands.

Until January 2011, the Pack had only asked for and participated in a Bicycle Safety Rodeo with HPD. After being told this by the Pack leader, then-Deputy Chief (DC) Tatsuyama,<sup>2</sup> whose son was a member of the Pack, decided to ask HPD for additional services, equipment and displays for a Say Hi event for the Pack.

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<sup>1</sup> Because the Commission adopted the settlement of the claims in the Notice, this advisory opinion is based on Commission staff's investigation and the allegations stated in the Notice.

<sup>2</sup> DC Tatsuyama retired from HPD in December 2011. Because the events involved in the case occurred before he left the force, we refer to him by his rank at the time.

On January 11, 2011, DC Tatsuyama submitted an email request to his immediate subordinate, [Witness 1],<sup>3</sup> using his HPD position title and email and telephone contacts.<sup>4</sup> He asked for a Say Hi event to be held Sunday, February 13, 2011. DC Tatsuyama noted in his email that “the ideal location” for the event would be HPD’s Ke Kula Makai Training Academy grounds. Witness 1 informed Commission staff that the Academy grounds are closed on weekends and this was the first request for a Say Hi event where the Academy would have to be opened on a weekend.<sup>5</sup> DC Tatsuyama also wanted the Special Services Division (SSD) officers to showcase the HPD helicopter, bomb disposal robots and bomb truck, the bearcat (an armored vehicle) and a demonstration by the Canine Unit. He asked for Bicycle Details from Districts 1 and 6 to create a Bicycle Safety Rodeo to teach bike safety. The event was scheduled for 2½ hours.

Witness 1 responded by email on the same day: “How important is this group? We would have to pay lots of overtime.” DC Tatsuyama replied by email: “Work schedule adjustment if feasible.”

After a command staff meeting on January 12, DC Tatsuyama told [Witness 2] that he needed the Academy grounds and a classroom to be open for the Say Hi event. Witness 2 arranged for an officer to do so while on overtime because the Academy was closed on weekends.

On January 18, Witness 1 sent out the requests to the various divisions responsible for providing services and personnel to the Say Hi presentation. Under HPD practice, each division commander determines whether the division will participate in a Say Hi event. SSD’s regular work days are during weekdays. Weekend work for SSD requires either paying overtime or rearranging the officers’ schedules during the work week to make up for the time spent on weekend duty.

Sometime between January 18 and 22, [Witness 3], telephoned DC Tatsuyama to discuss the Say Hi event. Witness 3 explained to him that Witness 3 would authorize overtime pay to the SSD officers for their weekend work. Witness 3 also told DC Tatsuyama that he/she had recently turned down requests from scout groups asking for SSD participation because of the relatively small size of the groups. Witness 3 was concerned that the SSD officers and other scouts would think it unfair that SSD’s personnel and equipment were made available for DC Tatsuyama’s Say Hi event, but not for others. To remove the overtime issue, Witness 3 asked if the event date could be changed from the weekend, but DC Tatsuyama only suggested another Sunday. In response to Witness 3’s comments, DC Tatsuyama continued with his request for SSD’s full participation in the Sunday event.<sup>6</sup> DC Tatsuyama did not “order” Witness 3 to have SSD participate, but Witness 3 felt he could not turn down DC Tatsuyama’s requests without possibly exposing himself to ramifications to his work at HPD and his career. So, he/she complied with his superior officer’s wishes.<sup>7</sup>

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<sup>3</sup> Brackets “[ ]” indicate redactions made pursuant to Hawaii Revised Statutes Chapter 92F..

<sup>4</sup> Per Witness 1’s March 2, 2011 interview, DC Tatsuyama had been his/her immediate supervisor through 2010.

<sup>5</sup> Id.

<sup>6</sup> Interviews of Witness 3 on February 8 and March 30, 2012.

<sup>7</sup> Id.

A review of Say Hi event requests for SSD's services and equipment shows that SSD had participated in very few Say Hi events prior to the February 13 event. Furthermore, SSD became involved only when the event was likely to attract hundreds of people thereby justifying the expense. For example, in late 2010 SSD provided demonstrations on the weekend for the Children and Youth Day at the state capitol where about 10,000 people were expected. SSD also participated at the Monsanto Farms Health and Safety Fair where about 400 were expected. SSD had declined two Scout requests in September 2010 where about 160 and 300 participants, respectively, were expected. The reasons for declining those events were the relatively small size of the groups and the fact that the events were scheduled on SSD's day off.

A total of 50 children and parents were anticipated for DC Tatsuyama's event. In fact, 26 HPD officers were present at DC Tatsuyama's Sunday Say Hi event, including 9 from SSD with their equipment and dogs. 28 Cub Scouts and 27 parents attended, including DC Tatsuyama.

For operational and morale reasons, Witness 3 determined to pay overtime to the SSD officers involved, amounting to \$2,532.77. The overtime was approved by Witness 3's supervisors. Overtime for the Academy officer was approximately \$140.72, for a total of \$2,673.49 in overtime pay expended for the event.

On April 25, 2012 the Commission found probable cause that DC Chief Tatsuyama had violated RCH Section 11-104.<sup>8</sup> The Commission instructed its staff to transmit a Notice of Alleged Violation of the Standards of Conduct (Notice). The Notice was sent to DC Tatsuyama on May 2, 2012.

DC Tatsuyama, through his attorneys, Even Shirley and Michel Okazaki, responded on August 7, 2012. DC Tatsuyama states he did not intend to misuse his position for the unwarranted benefit of the Pack. In looking back, however, he understands he should have been more sensitive to the scheduling challenges the Sunday Say Hi event presented, his status then as the senior of the two deputy chiefs and that his son was a member of the Pack. Because of these factors he understands that his conduct could be reasonably viewed as preferential treatment. He also states that neither he nor his son received anything of benefit beyond attending the event. He would handle the situation differently if he could do it over again. He prides himself on 30 years of honesty and integrity at HPD and apologizes for any misunderstanding he caused. The Commission staff and counsel for DC Tatsuyama stipulated to resolve the matter, in which DC Tatsuyama agreed to reimburse the city for the overtime expenses incurred by HPD for the Say Hi event. The Commission approved the stipulation on October 31, 2012.

### **III. Discussion**

RCH Sec. 11-104 prohibits the use of city resources to obtain special treatment for any person that is not available to every one. A core purpose of RCH Sec. 11-104 is to prevent

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<sup>8</sup> **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.

favoritism and to ensure fair treatment by city officers and employees in carrying out their responsibilities.

The Commission's standard for deciding favorable treatment in violation of RCH Sec. 11-104 is whether a reasonable person would conclude that the officer or employee knew or should have known that his or her conduct would give special treatment to someone over the treatment afforded others. Advisory Opinion No. 2004-7. In that case the Commission found that:

In general, a city employee or officer violates the ethics laws if he or she *knew or should have known* that his or her conduct would constitute a violation. See Advisory Opinion No. 306 (June 16, 2000) (deputy corporation counsel's use of official corporation counsel stationery for a personal letter supporting a nominee for a state board violated RCH § 11-104 notwithstanding the fact that the deputy claimed he "failed to think about the personal nature of the letter at the time [he] signed it."). The subjective intent (or lack thereof) to violate the ethics laws goes to the seriousness or degree of the violation and is a factor to be taken into account in determining the appropriate penalty to be imposed; it is not a required element of an ethics violation. (Emphasis in original.)

Under these circumstances, DC Tatsuyama knew or should have known that he was asking for favored treatment. DC Tatsuyama's request for a Say Hi event for the Pack was not within the normal procedures of making such a request. DC Tatsuyama approached his immediate subordinate, Witness 1, to request the event. Witness 1 then sent the request to the other division heads for scheduling and response, sometimes at command meetings. DC Tatsuyama made a request that would provide the Pack with a demonstration of some of HPD's most sophisticated and interesting services and equipment -- helicopter, armored vehicle, bomb robots, bomb truck and Canine unit -- along with two Bicycle Details. He knew the Pack had never had such an impressive display from HPD. On the day he made the request, he was immediately notified that his Say Hi event would require "lots of overtime." The need for overtime was made clearer still by Witness 3 in his/her telephone discussion with DC Tatsuyama, as was the fact that SSD had turned down similar scout requests in the recent past. Yet, DC Tatsuyama persisted in having the event as he planned it, regardless of cost to HPD and the taxpayers. DC Tatsuyama also asked for an unprecedented opening of the Training Academy on a Sunday.

DC Tatsuyama did not explicitly order any subordinates to participate, but did take an active role in arranging and overseeing the Say Hi request. However, when the Chief or Deputy Chief of Police makes a work-related request to a subordinate officer there is a real concern that the request will be treated tantamount to an order. In other words, high rank brings with it the possibility of inherent coercion of the lower ranks. This concern is heightened by HPD's policy that "[c]ooperation between the ranks and units of the department is essential for effective law enforcement. Therefore all officers and civilian employees are strictly charged with establishing and maintaining a high level of cooperation."<sup>9</sup>

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<sup>9</sup> HPD Standards of Conduct, Article VII.B.2.

We note that DC Tatsuyama could have taken a different approach to obtain the Say Hi event. He could have had the Pack leader request the event, and removed himself from the request and approval process. This would have minimized the likelihood of special treatment being at issue because of his actions. Also, DC Tatsuyama could have changed his request when he learned that similar requests had been turned down in the past or when informed that SSD would pay overtime.

Under these circumstances, DC Tatsuyama violated RCH Sec. 11-104 because he used his city position and other city resources to obtain the participation of HPD officers, equipment, facilities and overtime pay for the Say Hi event in a manner constituting preferential treatment to those who attended the event.

### **III. Imposition of a civil fine**

The Commission evaluates the totality of the circumstances to determine whether a fine should be imposed for an ethics violation and the amount of the fine pursuant to ROH Sec. 3-8.5(d)(2).<sup>10</sup> The criteria include, but are not limited to: the nature and seriousness of the violation, the duration of the violation, whether the violation was negligent or intentional, and whether the respondent had prior notice that the conduct was prohibited. All factors are examined in the context of the facts of the particular case.

As described above there were trigger points when DC Tatsuyama should have reevaluated his role in the process. The first was when he requested the specific services and location outside normal channels and was immediately informed of the overtime that would be required. Later the overtime was confirmed and he was told that similar events had been denied by SSD for such small groups. This was another point at which DC Tatsuyama should have realized he was asking for his son's Pack to receive favored treatment from HPD, especially SSD. In his position as second in command, he should have been even more sensitive to his subordinates' duty to cooperate. A reasonable subordinate would perceive Number 2's<sup>11</sup> "request" as tantamount to an "order," even if that word were not used.

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<sup>10</sup> Section 3-8.5. Violation Penalty --

(d)(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;
- (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.

<sup>11</sup> DC Tatsuyama was commonly referred to by this name.

With the greater authority of command, comes higher responsibility to know the ethics laws and greater consequences for failing to follow them. Therefore, the seriousness of the misconduct is amplified because it was carried out by HPD's second in command. The public reasonably expects that such high ranking officers are aware of the prohibition against using one's city position to obtain preferential treatment. His failure to recognize that he appeared to be seeking special treatment and to take corrective action demonstrates at least a negligent approach to the process used to create the Say Hi event. HPD expended a significant amount of money (over \$2,600) in complying with his desires for the event.

As to mitigating circumstances, DC Tatsuyama's violation only relates to one event that occurred over a 1-month period. To his credit, DC Tatsuyama has been cooperative and truthful in his response to the investigation. The Commission does not believe that he intended to abuse his authority, but should have been more circumspect about how his request would affect his subordinates and HPD. There is no intent to conceal, deceive or mislead his conduct from the investigation. We also note that he offered to reimburse the city for the extra cost in overtime resulting from his conduct.

The Commission agrees with staff and DC Tatsuyama's counsel that the reimbursement of overtime is reasonable under the circumstances.

#### **IV. Identification of DC Tatsuyama in the published opinion**

Under Revised Ordinance of Honolulu Sec. 3-6.3(k),<sup>12</sup> the Commission may disclose the identity of an ethics law violator if doing so is in accordance with the state open records law, Chapter 92F, Hawaii Revised Statutes (HRS). A government record, such as a formal advisory opinion, may not be disclosed if disclosure would constitute a "clearly unwarranted invasion of personal privacy." HRS Sec. 92F-13(1). Yet, disclosure of a government record does not constitute a "clearly unwarranted invasion of personal privacy" if the public interest in disclosure outweighs the privacy interest of the individual. Public interest in disclosure includes official information that sheds light on the conduct of government officials (DC Tatsuyama's and HPD's) and on an agency's (the Commission's) performance of its statutory duties.

Office of Information Practices Opinion Letter No. 10-03 sets forth several factors to determine whether the employee's privacy interest in maintaining confidentiality is outweighed by the public interest in identifying the violator. The five essential criteria are discussed below:

1. The rank of the government employee: DC Tatsuyama was second in command of the police department, one of the most important agencies charged with the protection and welfare of the public. Furthermore, the Hawaii Supreme Court has noted that government officials with significant discretionary or fiscal power, as opposed to officials without

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<sup>12</sup> Section 3-6.3. Powers, duties and functions.

(k) The commission may disclose the name of any officer or employee who has been determined by the commission, following investigation and a hearing or opportunity for a hearing, to have violated any of the provisions of Article 8 of this chapter or of Article XI of the revised charter in accordance with HRS Chapter 92F.

2. such power, may reasonably expect that their private information may be revealed to the public. *Nakano v. Matayoshi*, 68 Haw. 141 (1985) (financial statements of high-level government official may be publicly disclosed even though other officials' statements are protected from disclosure).
3. The degree of wrongdoing and strength of evidence against the employee: The wrongdoing is exacerbated by DC Tatsuyama's rank. The facts are not contested.
4. The availability of other means to obtain the information: There is no other means for the public to find out if DC Tatsuyama violated RCH Sec. 11-104.
5. Whether the information sought sheds light on government activity: Identifying DC Tatsuyama would show how he misinterpreted his duty to avoid preferential treatment for himself and others.
6. Whether the information is related to a government job function, or is of a personal nature: The information in this case is related to how DC Tatsuyama's personal interest interfered with his and HPD's official duties.

We find that each factor weighs in favor of disclosure of DC Tatsuyama's identity in this advisory opinion.

**V. Conclusions and recommendations**

A. The civil fine against DC Tatsuyama in the amount of \$2,673.49 is deemed reasonable under the circumstances. The claims stated in the Notice shall be dismissed with prejudice upon proof of payment to the city treasury of \$2,673.49.

B. The advisory opinion will disclose DC Tatsuyama's identity and conduct. Under the Commission's Opinion Policy,<sup>13</sup> he will be given notice and a copy of the opinion 10 days before the opinion is published. Witness names will be redacted.

DATED: October 31, 2012

APPROVED:

APPROVED AS TO FORM:

/s/Charles W. Gall  
 CHARLES W. GALL, CHAIR  
 Honolulu Ethics Commission

/s/Charles W. Tutto  
 CHARLES W. TOTTO  
 Executive Director and Legal Counsel

<sup>13</sup><http://www1.honolulu.gov/ethics/policy+and+procedure+for+release+and+publication+of+formal+advisory+opinions.htm>