

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR &
LEGAL COUNSEL

Advisory Opinion No. 2013-1

I. Summary

The Honolulu Ethics Commission (Commission) approves an agreement between the Commission staff and the attorney for Albert Tufono, former Deputy Director, Department of Parks and Recreation (DPR). The agreement settles claims alleging that Mr. Tufono violated Section 11-104, Revised Charter of Honolulu (RCH), by using his City position, City time and/or City email account to request and obtain the use of DPR park facilities from DPR subordinates for his benefit, and that of his family.

The terms of the agreement include that Mr. Tufono admits to having misused his City position. Mr. Tufono also agrees to pay \$2,000 as a civil fine, upon payment of which all claims will be dismissed with prejudice.

II. Alleged Facts¹

The Commission received a complaint that Albert Tufono, Deputy Director, DPR, used his City position to obtain special treatment for him and his family members. Mr. Tufono allegedly submitted at least 10 email requests to DPR park recreation directors for permits assigning and scheduling gyms and ball fields at City parks to sports teams and leagues he coached, teams his sons played on, and a hula halau in which his daughter was a student. He was successful in obtaining the fields and gyms in most cases. In one email he bypassed the DPR chain of command and asked a park maintenance employee who was a personal friend to dump dirt for a baseball diamond that his son would soon be playing on.

City-owned parks and recreation facilities are made available for City-sponsored and private sports teams, leagues and other recreational use. The normal process to request facility

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

use is for one of the team or league officials to contact the recreation director at the desired park. They would discuss options for days and times when the facilities are available. Because most of the requests ask for the same days and times each week for several weeks, the demand usually outstrips the availability of park facilities. Also, there is a priority for City-sponsored leagues, teams, tournaments and events. As a result, individual recreation directors create waiting lists for their park's use. The list helps the recreation directors assign teams in a first-come-first-served priority.

In his interview with Commission staff, Mr. Tufono admitted that he knew he was prohibited from using his City position to obtain park facilities for him or his family. He attributed this knowledge partly to prior state government ethics training over several years. He also attended City ethics training on March 18, 2011. Although disputed by Mr. Tufono, one of his subordinates stated that, soon after Mr. Tufono started in his position in February 2011, he specifically asked Mr. Tufono not to contact DPR staff to request park facility usage for teams that he or his family was affiliated with. A deputy from Corporation Counsel similarly advised Mr. Tufono in April, 2011. Furthermore, the DPR Director warned Mr. Tufono twice against contacting DPR staff to obtain ball fields or gyms for his personal purposes. According to Mr. Tufono, the DPR Director's first notice occurred in the May to July 2011 period, and again on March 16, 2012. In both discussions, the Director explained that making such requests made it look that Mr. Tufono was seeking preferential treatment based on his City position.

Despite knowing that his conduct was prohibited, the warnings from a DPR staff member and the Deputy Corporation Counsel, and the DPR Director's order, Mr. Tufono failed to modify his conduct and continued to request field and gym assignments for his personal benefit. He only discontinued his practice after the second directive to cease from the DPR Director.

The Commission found probable cause of a violation on January 7, 2013 and a Notice of Alleged Violation of the Standards of Conduct (Notice) was transmitted to Mr. Tufono through his counsel on January 18, 2013. Mr. Tufono left City employment on February 14, 2013.

III. Question

Based on the facts above, did Mr. Tufono violate RCH Sec. 11-104 by using City resources for his personal benefit?

IV. Analysis

RCH Sec.11-104² covers two types of potential ethical violations. First, City work time, position, equipment, or other resources may not be used for non-City purposes. Second, an officer or employee may not use City resources to obtain preferential treatment for anyone.

2 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.

See, the Commission's Guidelines on the Use of City Resources, available at <http://www1.honolulu.gov/ethics/guidelinesonuseofcityresources.htm>.

The Commission's standard for deciding a violation under 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 either result in a misuse of public resources for non-government purposes or afford special treatment to someone compared to the treatment afforded others. Advisory Opinion No. 2004-7.

The standard prohibiting the use of City position for personal benefit has been articulated in several Commission advisory opinions. Most recently, in Advisory Opinion No. 2012-7, the Commission found that a deputy chief of the Honolulu Police Department (HPD) misused his City position by personally requesting an HPD-sponsored event on behalf of his son's Cub Scout Pack. The deputy chief did not follow the normal request process and contacted command officers to supply sophisticated displays and services during overtime, even though he had been informed that other similar scout groups had recently been denied such services. The Commission was concerned that personal requests from a high level official to subordinates are inherently coercive because subordinates will do whatever can be done to accommodate the request. In addition, the Commission noted that the request should have been made through HPD's normal process by someone not within HPD, such as the pack leader.

The facts in Mr. Tufono's case are similar to those in Advisory Opinion No. 2012-7. Here, the second highest officer within DPR repeatedly used his position to make special requests to subordinates to obtain park use permits for the benefit of the teams he coached, or his sons played on or the halau that his daughter danced for. No other member of the public could take advantage of the access to DPR staff and facilities that Mr. Tufono was able to because of his City position. The normal process to obtain field or gym use was for the coach or team representative to make permit arrangements through the recreation director. There is no reason why this process should not have been followed. It would have prevented Mr. Tufono's breach of the ethics law and it would have removed the incentive for special treatment created in the DPR staff by the Deputy Director's requests.

V. 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 Revised Ordinances of Honolulu (ROH) Sec. 3-8.5(d)(2). 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.

The most significant aggravating factor in this case is that Mr. Tufono knew throughout that requesting and obtaining DPR fields and gyms in his role as Deputy Director was prohibited. In addition, he had been directed by the DPR Director and a Deputy Corporation Counsel not to request the DPR services for him or his family. Yet, despite his knowledge and the warnings, he persisted in his course of action for a year. He took no action to correct his misconduct until the second directive from the director in March 2012. Thus, the Commission concludes that Mr.

Tufono's misconduct was intentional. Furthermore, Mr. Tufono is the second highest officer in DPR and should have been setting a positive, rather than a negative, example of ethical behavior.

The Commission finds that the civil fine of \$2,000 is reasonable under the circumstances.

VI. Identification of Mr. Tufono in the Published Opinion

Under ROH Sec. 3-6.3(k), 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. The public interest in disclosure includes official information that sheds light on the conduct of government officials (that is, Mr. Tufono's and DPR's employees' conduct) and on the performance of the Commission's and DPR's 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: Mr. Tufono was the second highest ranking departmental officer, with the requisite duty to follow the ethics laws. The Hawaii Supreme Court has noted that government officials with significant discretionary or fiscal power, as opposed to officials without such power, may reasonably expect that their private information may be revealed to the public. See, 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). The Commission relied in part on the rank of the respondent to reach the decision to disclose his name and conduct in Advisory Opinion No. 2012-7.
2. The degree of wrongdoing and strength of evidence against the employee: The evidence that Mr. Tufono used his City position for preferential treatment is not contested. Also, his wrongdoing is exacerbated by his knowledge that he was both violating the law and his Director's orders.
3. The availability of other means to obtain the information: There is no other means for the public to find out if Mr. Tufono violated RCH Sec. 11-104.
4. Whether the information sought sheds light on government activity: Identifying Mr. Tufono would show how he failed to follow his acknowledged duty as a government officer to avoid preferential treatment for him and his family.

5. 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 Mr. Tufono's personal interests interfered with his and DPR's official duties.

We find that each factor weighs in favor of disclosure of Mr. Tufono's identity and misconduct in this advisory opinion.

VII. Conclusions

- A. The civil fine against Mr. Tufono in the amount of \$2,000.00 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 \$2,000 by Mr. Tufono.
- B. The advisory opinion will disclose Mr. Tufono's identity and conduct. Under the Commission's Opinion Policy, he will be given notice and a copy of the opinion 10 days before the opinion is published. Witness names will be redacted.
- C. Because Mr. Tufono has left City service, the Commission will not make a recommendation as to what discipline, if any, should be imposed on him.

APPROVED:

/s/ Charles W. Gall
CHARLES W. GALL, Chair

Dated: March 13, 2013

APPROVED AS TO FORM:

/S/
CHARLES W. TOTTO, Executive Director
and Legal Counsel

Dated: March 13, 2013