

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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ADVISORY OPINION NO. 2013-4

I. SUMMARY

A councilmember has a duty to fully disclose in writing a conflict of interest at the time the conflict first becomes apparent. The written disclosure must be made public before any vote on the proposal. Failure to disclose the conflict of interest or to make the disclosure public before any vote on the proposal is a violation of Revised Charter of Honolulu (RCH) Section 11-103.

Councilmember Ann Kobayashi introduced Bill 41 (2012), which would change the real property tax liability for credit unions. As a councilmember, she had the duty to represent her constituents independently and objectively regarding Bill 41. At the time she introduced Bill 41, she was also a director of wholly-owned subsidiaries of Aloha Pacific Federal Credit Union. In her role as a director, she was obligated to manage the affairs of the subsidiaries in the best interests of the parent company and its shareholders. Her duty as a director created a business activity and financial interest conflict of interest that she failed to disclose as required under RCH Sec. 11-103.

She was required to disclose the conflict of interest no later than when she introduced the bill at Council because the conflict should have been apparent to her at that time.

Councilmember Kobayashi admits her violation and agrees to pay a civil fine of \$500.

II. FACTS

The Honolulu Ethics Commission (Commission) received a complaint that Councilmember Ann Kobayashi had a conflict of interest concerning Bill 41 (2012). The bill, if enacted into law, would require credit unions to pay one-half of the assessed value of real property in taxes owed to the city. Bill 41 was introduced at Council by Councilmember Kobayashi on April 19, 2012 and she voted on the bill on April 20, 2012 at first reading where it passed.

Beginning in 2000 and over the next thirteen years, Councilmember Kobayashi was an unpaid member of the boards of directors of several wholly-owned subsidiaries of Aloha Pacific Federal Credit Union (Aloha Pacific). The real property tax payments of Aloha Pacific would

have been affected if Bill 41 became law. At the same time as she was a director of the subsidiaries, she was also the councilmember for District 5. Councilmember Kobayashi did not file a written disclosure of conflict of interest regarding her position as director of Aloha Pacific's subsidiaries.

The Commission found probable cause of a violation of the ethics laws and transmitted a Notice of Alleged Violation of the Standards of Conduct (Notice) to Councilmember Kobayashi, to which she replied. The parties negotiated a settlement, which was approved by the Commission at its April 19, 2013 meeting. In the settlement Councilmember Kobayashi agreed to the facts alleged in the Notice, to pay a civil fine of \$500, and to forego any appeal of the Commission's advisory opinion.

III. DISCUSSION

A director of a wholly-owned subsidiary is obligated to manage the affairs of the subsidiary in the best interests of the parent company and its shareholders. See Anardarko Petroleum Corp. v. Panhandle eastern Corp., 545 A.2d 1171, 1174 (Del. 1988). As a result, Councilmember Kobayashi had a duty to carry out her responsibilities to support Aloha Pacific's best interests -- including the real property tax issue contained in Bill 41 before Council. As a councilmember, she also had a duty to independently and objectively review and vote on Bill 41 on behalf of the interests of her constituents and the public generally. Her directorship created a business activity¹ and financial interest² conflict with her city duties under RCH Sec. 11-102.1(c).³

A reasonable person could question Councilmember Kobayashi's impartiality as a councilmember because of her business activity and financial interest with Aloha Pacific. The possibility -- or the reasonable appearance -- of impairment through conflicting loyalties is sufficient to establish a violation. See e.g., Advisory Opinion No. 2001-06 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)). This is not to suggest that Councilmember Kobayashi intended to aide the credit union regarding the real property tax issues, but the standard for a violation does not require such intent.

¹ Revised Ordinances of Honolulu (ROH) Section 3-8.1 states "Business" means and includes (1) a corporation; (2) a partnership; (3) a sole proprietorship; (4) institutions; (5) trusts; (6) foundations; or (7) any other individual or organization carrying on a business, whether or not operated for profit.

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

³ **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.

Because she had a conflict of interest, Councilmember Kobayashi was required to disclose the conflict in writing when the conflict became apparent.⁴ She failed to do so and thereby violated RCH Sec. 11-103.

This is not the first time the Commission has had to enforce this section of the revised Charter against councilmembers. In Advisory Opinion No. 2011-1, the Commission imposed a civil fine on Councilmember Todd Apo and stated:

Section 11-103 . . . requires that a conflict of interest must be fully disclosed in writing by each city officer and employee when the conflict first becomes apparent. The law applies to councilmembers as they carry out their duties, such as reviewing and voting on legislation. If legislation creates a conflict of interest for the councilmember introducing the measure, the Commission expects that in most cases the conflict would be apparent at the time the legislation is being drafted. In such cases, the disclosure must be made immediately and no later than the introduction of the measure. For bills or resolutions that are introduced by others, a councilmember must file the conflict disclosure when the conflict is first apparent, but no later than before the first vote by the councilmember on the measure. (Emphasis added.)

This opinion was transmitted to each councilmember, including Councilmember Kobayashi, with a cover letter dated March 23, 2011. The opinion and the cover letter explained that RCH Sec. 11-103 mandates disclosure no later than the time of introduction where the councilmember who introduces the proposal has a conflict of interest in the proposal. Councilmember Kobayashi knew or should have known when she was required to disclose her conflict based on receipt of the opinion and the letter.

The dual safeguards against acting on conflicts of interest – disclosure and recusal -- do not apply to councilmembers. Councilmembers, as opposed to all other elected or appointed city officers and employees, are exempt from having to recuse themselves where they have a conflict of interest in legislation.⁵ Without the protection of recusal, there is a heightened public need for disclosure of personal and private interests by councilmembers to disclose conflicts of interest at

⁴ 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 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.

⁵ Section 3-107. Organization of Council; Officers; Rules; Meetings; Employees –
1. . . . All councilmembers shall have the right to vote in the council at all times. . . .

the earliest opportunity. For an official to hold off making a disclosure until just before a vote limits the public's opportunity to respond and take action regarding proposals that may be affected by private interests. See Advisory Opinion Nos. and 2011-1 and 2007-1.

IV. CIVIL FINE

The Commission examines a number of exacerbating and mitigating factors in determining whether to impose a civil fine and, if so, the amount.⁶ The Commission agrees that \$500 is reasonable under the circumstances of this case. There is no evidence that Councilmember Kobayashi intended to subvert the disclosure process and it is a single violation regarding a bill that did not advance. When the failure to disclose was brought to her attention,

⁶ **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 shall include officers of the board of water supply and the Honolulu Authority for Rapid Transportation and "exempt employee" means all employees of the executive and legislative branches of the City and County of Honolulu and all full-time employees of the board of water supply and the Honolulu Authority for Rapid Transportation who are exempt from civil service pursuant to revised charter Sections 6-1103(a)-(d), (i) and (k) 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;
 - (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.

Councilmember Kobayashi immediately resigned from her position at the Aloha Pacific subsidiaries and filed her conflict disclosure. She has admitted the violation.

The Commission, however, had specifically notified each councilmember not only by publishing Advisory Opinion No. 2011-1, but also by explaining what is required of a councilmember who introduces a measure in which he or she has a conflict of interest. Councilmember Kobayashi's failure to follow the opinion and letter warrants the civil fine.

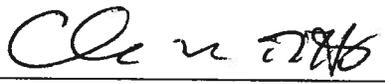
V. CONCLUSION

The Commission has approved and adopted the stipulation between the parties wherein the parties have agreed that Councilmember Kobayashi shall pay \$500 to the city.

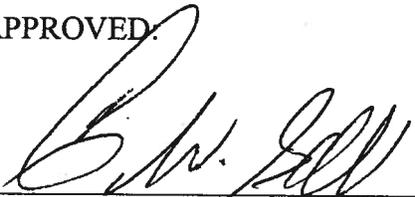
This opinion will be made public without redaction 10 calendar days after the opinion is transmitted to pursuant to the Commission's Policy and Procedure for Release and Publication of Formal Advisory Opinions.

The Commission does not believe that discipline by the Council is warranted in this case.

APPROVED AS TO FORM AND LEGALITY:

 8/19/13

CHARLES W. TOTTO Dated
Attorney for Complainant

APPROVED:
 8/19/13

CHARLES W. GALL, Chair Dated
Honolulu Ethics Commission