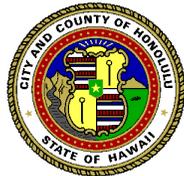


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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

KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

Date and Place: December 16, 2015
Standard Financial Plaza
Conference Room, Suite 211
-and-
371 Alae Road
Kula, Maui, HI 96790

Present: Katy Chen, Esq., Chair
Michael Lilly, Esq., Vice Chair
(Skype – Telephone-Video Conference Call)
Stephen Silva, Commissioner
Hon. Riki Amano (ret.), Commissioner
Hon. Victoria Marks (ret), Commissioner
Hon. Allene Suemori (ret), Commissioner
Charles W. Totto, Executive Director and Legal Counsel (EDLC)
William “Bill” Shanafelt, Investigator III
Geoffrey Kam, Deputy Corporation Counsel, Department of the
Corporation Counsel (COR)
Lynne Matusow, Member of the Public

Absent: Stanford Yuen, P.E., Commissioner
Laurie A. Wong, Associate Legal Counsel (ALC)

Stenographer: Lisa P. Parker, Legal Clerk III
Kristine Bigornia, Legal Clerk I

MINUTES OF THE DECEMBER 16, 2015 OPEN SESSION MEETING

I. CALL TO ORDER

The Ethics Commission members had received a copy of the Open Session Memo, dated December 14, 2015. Chair Chen called the meeting to order at 11:34 a.m.

The EDLC presented a lei and an “Award of Recognition” from the Mayor to Chair Chen, whose term ends on December 31, 2015, and thanked her for her service on the Commission. She appreciated the gesture.

The EDLC announced that this was her last meeting for this Commission.

Commissioner Silva asked if Chair Chen had to stay until there’s a replacement and if there’s holdover. The EDLC responded that the Chair didn’t need to stay on, and that her holding over is an option. Chair Chen stated that she would finish her term and then move on.

II. NEW BUSINESS

A. Motion to Approve the Open Session Minutes of November 18, 2015 Meeting.

Vice Chair Lilly moved to approve the open session minutes of November 18, 2015 meeting. Commissioner Amano seconded the motion. All were in favor, and the motion carried.

B. Nomination and Vote for Chair and Vice Chair for Calendar Year 2016.
Explanation of Holdover Process.

Before proceeding, Commissioner Amano stated that she was involved in a prior election and that it was by ballot. She continued that per the resource guide, elections are to be held on January 1, and pursuant to what will happen after Chair Chen’s and Vice Chair Lilly’s terms, she expressed that having the elections at this time would be untimely and asked that the election be deferred.

Commissioner Amano also mentioned that pursuant to Lynne Matusow’s email, a secret ballot was inappropriate. The EDLC responded that he contacted OIP and they confirmed that it was inappropriate to have a secret ballot, and that the election should be an open nomination. Commissioner Amano then asked that the procedure be amended.

Commissioner Amano requested that the elections be tabled until next month.

The EDLC asked Vice Chair Lilly if he planned to be a holdover, and the Vice Chair responded that he would holdover until they decide to renew his Commission or appoint a new Commissioner

Commissioner Marks moved to table the election until the January meeting. Commissioner Suemori seconded the motion. All were in favor, and the motion carried.

The EDLC briefly explained the holdover process and that it was up to Chair Chen and Vice Chair Lilly to decide if she/he will continue as a commissioner until replaced by the Mayor. The EDLC informed the Commission that no information has been received about replacements .

Commissioner Amano asked if there was anything that the Chair needed to hold over, and the EDLC responded she just needs to attend the meetings.

Commissioner Amano encouraged Chair Chen to continue attending the meetings, and further stated that the Commission was at a critical time, and since they've operated as a team, she was concerned about the two commissioners leaving, since they were integral to the team.

C. Executive Director and Legal Counsel's Administrative Report.

The EDLC passed out an additional handout to the Commission and asked for any comments or questions. He continued that he wanted to be sure to list a number of items that had been discussed in the last few months and didn't want those items to fall behind.

Chair Chen interjected a reminder of the January 20 and February 17, 2016 meetings.

Chair Chen then asked the EDLC if he had anything to highlight in his report, or on the additional items, and the EDLC had none. Chair Chen asked the Commission if there were any questions regarding the report and since there were none, there was no further discussion.

1. Reminder of January 20 and February 17, 2016 Commission Meetings.
2. General Statistics for Requests for Advice and Complaints.
3. Current Fiscal Year Budget Issues.
4. Fiscal Year 2017 Operating Budget Issues.
5. Ethics Training Program.
6. Staff Priorities for Fiscal Years 2016 - 2017

D. For Discussion: Contested Case Pre-Hearing and Hearing Procedures.

Commissioner Amano affirmed that she raised questions regarding this item. She stated that she was confused about how to go forward and what's open to the public and what is not. She explained that she did inquire with Deputy Kam about the requirements of other Commissions in the State.

The EDLC responded regarding the non-public nature of the contested hearing process. The neighbor island ethics commissions appear to have their contested hearings in open session. I conferring with OIP, OIP confirmed the neighbor islands' procedures were not correct under the Open Records Law. The EDLC informed the Commission that this issue can be revisited, since it was about 12 years ago when he discussed it with OIP.

Commissioner Amano asked the EDLC for confirmation that, according to OIP, all meetings and hearings regarding personnel matters have to be heard in secret. The EDLC confirmed that personnel matters are considered to be within the HRS Sec. 92F-13(1), “unwarranted invasions of personal privacy.” Ethics complaints are considered personnel matters under the Open Records Law.

The EDLC stated that the State Ethics Commission’s (SEC) approach is that once a charge is filed in a misconduct case, i.e., once probable cause is found, then the pleadings become public. The EDLC continued that he had asked OIP and the SEC why the SEC does not follow the Open Records Law regarding complaint hearings. He stated that the SEC has a separate statute that it believes takes precedence over the Open Records Law. OIP’s position is that the Open Records Law takes precedence because it reads “any law to the contrary notwithstanding...”. The EDLC concluded that he would be willing to check further and would ask for a brief opinion from OIP, so that the Commission would know whether misconduct hearings should be public or non-public. Commissioner Amano asked that the discussion continue since it would shed further light on some of the process issues and challenges, like with the filing of documents, etc. She continued that there needs to be more clarity and procedures need to be consistent and fair. For example, she is concerned that there is no “neutral” place where filings are filed.

The EDLC agreed, and stated that it was hard to manage the filing of documents because of small office. The EDLC informed the Commission that he plans to discuss the questions with Ms. Shinmura from ODC and the State Ethics Commission.

Commissioner Suemori added that she thought contested case hearings were under the HRS, Chapter 91, and , if that was the case, then logically it would state that, “employer-employee labor lawsuits are confidential.” Commissioner Suemori suggested getting an opinion on the matter.

Commissioner Amano replied that she didn’t mind tabling the matter, but didn’t want it to be lost.

Commissioner Marks asked to keep the matter on the agenda, and to put it under “old business.” The EDLC and Commissioners Amano and Suemori agreed.

Commissioner Amano informed everyone that she will be meeting with someone in Hilo and will find out about their procedures.

E. For Discussion: Potential Amendments to Commission’s Rules of Procedure.

Chair Chen informed the Commission of the four items for discussion, and Commissioner Amano responded that all of the items needed to be discussed in total and recommended that the matters be put under “old business” for the next session, since they continue to learn more.

The EDLC agreed and stated that in terms of discovery or use of subpoenas, back in September, he had been able to go through the arbitration and mediation rules to look at what the Hawaii Civil Rights Commission, the SEC, etc., does.

Commissioner Marks announced that they were discussing contested case pre-hearing and hearing procedures and thought that there were testimonies submitted regarding that topic.

A member from the public, Lynne Matusow, testified on two items. The first item had already been addressed, that the election of chair and vice chair may not be by secret ballot. The second item was that she asked that a rule on mandatory Sunshine Law Training be included under ROH Section 3-12.2.

Commissioner Amano and Chair Chen thanked Ms. Matusow for her testimony.

Chair Chen stated that the Commission seemed to be all in agreement to get additional information on Items 1 through 3, and since Ms. Matusow testified on Item 4, asked the Commission if there were any other items for discussion.

Commissioner Amano stated that the Commission did inquire about Sunshine Law Training. The EDLC confirmed and stated that the person in charge at the Mayor's office had been on sick leave for quite a while, and it's unknown when he would return, so the other alternative is to have Deputy Kam or the EDLC conduct Sunshine Law training. Commissioner Amano then asked if someone from OIP could conduct the training since the training comes out of OIP.

Ms. Matusow responded that there is a video program on OIP's website and on occasion OIP will conduct the training and if there's room they'll invite City people, only if there's a massive training for State people.

Commissioner Suemori preferred to have in-person training rather than video training, and the EDLC responded that he would check with various offices.

Commissioner Amano informed the Commission that her husband is employed at OIP as a part-time staff attorney and stated that her husband must have notified his office that she's on the Ethics Commission, so there will be internal OIP protections from any conflict of interest.

Chair Chen stated she had some difficulties on the Rules of Procedure link, since it "no longer existed." The EDLC responded that the link worked after it was uploaded, but that he would check on it again.

F. For Discussion: Potential Changes to the Commission's Guidelines on Gifts.

The EDLC passed out hard copies of the Guidelines on Gifts (Revised April 21, 2004) to the Commission.

Chair Chen asked if there was anything in particular to change in the 2004 gift guidelines.

Commissioner Silva asked if they needed to do different guidelines. The EDLC responded that they could do a refinement and maybe add in certain areas or do a review, as well as re-do everything, since he thought they were lengthy. Commissioner Suemori agreed.

The EDLC continued that there were some specific areas, like the gifts from lobbyists, which seemed to have arisen because of particular issues, and that he could offer the Commission some ideas when adding a section for the lobbyists.

Commissioner Suemori asked if they could follow a red-line draft like the Legislature. Commissioner Suemori continued that the recommendations would be explained in the margins as to why you made those recommendations with pros and cons, and the EDLC agreed.

Chair Chen responded that it's not necessary to revise, but it needed additional clarification.

Commissioner Suemori asked if the Commission had been doing things that were not covered in the Gift Guidelines, such as how gifts, such as meals, would be valued and if there's a rule about more than one person present at the same meal. The EDLC responded that he would have to research it.

Commissioner Suemori instructed the EDLC to list the positions that the Commission would want to take and to make sure the Commission is consistent, and the EDLC agreed.

The EDLC continued that he agreed with Chair Chen that most of the changes to the four issues would be additional changes, since many of the issues came up in a recent case.

Chair Chen responded that the Commission had advised on issues, such as Item 2 (describing how gifts such as meals will be valued when more than one person is present). The EDLC replied and confirmed that it was informal advice.

Commissioner Suemori asked if informal advice was given, and the EDLC confirmed that the Commission hasn't taken a formal position..

Commissioner Silva stated that in order to be simple, it should be "zero" gifts, per his prior business background. He continued that if there are "zero" gifts, then there would be no problem, and all lobbyists would be required to only meet in their office with whoever they're trying to entertain in order to influence and, therefore, since the meeting would be in their office, their staff would become witnesses to what was being transpired.

The EDLC responded that in talking with the lobbyists in the last few cases, some of them have a "no cup of coffee" rule (with any Councilmember or Legislator). Others and probably most do not follow that rule. The EDLC continued that in 2002 when they wanted to change the rule, there was a debate on whether there should be a "no cup of coffee" rule, and the problems countered with the culture and gifts, but one wouldn't be able to even give a "Gift of Aloha," something with a low value. It was then decided that there would be two approaches to

the gift laws, i.e., (1) a prohibition on accepting anything which a reasonable person could infer was offered to influence and (2) the \$200 gift cap. Commissioner Silva stated that lobbyists should report gift giving. The EDLC further continued that there is no requirement for gift reporting and the lobbyists' law has not been amended since 1978, except in 2005 when it was transferred from the City Council to the Ethics Commission.

Commissioner Silva stated with regard to gifts to councilmembers, if it's disclosed publicly by the councilmember, he/she can vote on a matter that affects the interest of the donor. The EDLC replied, only if they disclose a "conflict of interest."

Chair Chen asked if the lobbyists were subject to the same general gift rule.

Commissioners Silva and Marks replied that the lobbyists were not subjected to the same rule. Commissioner Marks remarked that basically there is nothing on the lobbying law to prevent gifts. The EDLC agreed that the Commission has no law under which to pursue lobbyists for gifts, creating one would be another option.

Chair Chen stated that a distinction between a lobbyist and any person is the nature of their profession and that their appearance of impropriety is stronger for a lobbyist.

The EDLC replied that the definition of lobbyist is "a person being paid to influence the policy making of the council or administration," which could create an inference that a gift from a lobbyist is offered to either reward or influence.

Commissioner Silva stated that in previous cases, lobbyists were willing to give their records and that if we were to go after lobbyists, they would "clam-up."

The EDLC responded that the lobbyists were subpoenaed so they have a legal obligation to produce their records.

Chair Chen stated that two approaches may be taken: the first approach is "interpreting existing rules on how it may apply," and the second is actually "instituting new rules."

Commissioner Marks responded that some of the rules are statutory.

The EDLC responded that the Gift Guidelines were to help both the City employees and the lobbyists understand what they should or should not do, but the Commission may depart from guidelines when warranted.

Commissioner Suemori responded that the guidelines are basically clarifying statements of how to read those sections of the Charter and revised Ordinances.

Commissioner Suemori further stated that she is unclear if the guidelines even have any kind of authority, so whether the Commission should make any changes, they would still need to go back to the law. Commissioner Suemori understood, however she further stated that it's

twelve pages of policy that basically has no authority other than just thoughts on an interpretation of the Ordinance.

Commissioner Suemori asked if ROH Sections 8.7 and 8.8 had been interpreted by any courts or by the City. The EDLC couldn't confirm but equates guidelines to be like a policy.

Commissioner Marks agreed and stated that there's only a footnote that mentions one of the provisions. Commissioner Marks responded that there should be references to the law. Commissioner Marks further stated that no one would read 12 pages and if the intent is to give employees the knowledge so they can avoid problems, proposed a one-page bullet-point, and on any fiscal year, nothing over \$200 in the aggregate.

Commissioner Marks further stated that in her point of view, a quarterly newsletter, one-page with bullet-points, can be sent out to all City employees. Chair Chen agreed that having a one-page guideline is a great reference tool, but finds the 12-page guidelines helpful because it gave examples, since she encountered precise problems that were referenced. Commissioner Marks responded that the guidelines could be posted on the web page.

Chair Chen explained that Gift Guidelines interpretation the laws and for a typical person it would be very practical.

[Lost Skype connection with Vice Chair Lilly.]

Commissioner Marks made a motion that she would ask the Commission, through staff, put out a quarterly newsletter that is one-page, provided to all City employees, and Commissioner Amano seconded.

Commissioner Marks stated it would be for any topic and that one would be on gifts, with a one-page bullet-point, then pick another topic for the next quarter.

[Skype connection with Vice Chair Lilly was back on.]

Commissioner Marks asked for a vote on the motion, and Commissioner Suemori called for the question.

Chair Chen then asked if the Commission had the capacity to channel and distribute the newsletter, and the EDLC replied that staff could do an email blast to each department which is then transmitted to the employees. Chair Chen asked who would be determining the content, and Commissioner Marks replied that the content can be determined by either the Commission or Staff. The EDLC agreed to have staff do the newsletter and then provide the Commission with a draft.

Chair Chen asked if the guidelines go to every new City employee, and the EDLC explained that it can be viewed on the website, and for the new employee orientation there's

discussion about gifts. There is more detailed gift training during the “all employee” ethics training, and in supervisors’, elected officials’ and cabinet training.

Commissioner Marks moved to have the Commission, through Staff, put out a quarterly newsletter on one-page, and to provide it to all City employees. Commissioner Amano seconded. All were in favor, and the motion carried.

Commissioner Amano requested to have continued discussions on the guidelines under old business since the EDLC wanted to discuss substantive matters, and perhaps with authorities, and the EDLC confirmed. The EDLC added that the Feds have similar rules with their Code of Federal Regulation (“CFR”), which goes through examples, including meanings of certain sections.

Chair Chen asked for a motion to exit open session and to enter executive session. Commissioner Amano so moved and Commissioner Suemori seconded. All were in favor, and the motion carried.

III. EXECUTIVE SESSION SUMMARY . (The following agenda items will be reviewed in executive session pursuant to Section 92-5(a)(2), Hawaii Revised Statutes (HRS), to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of the matters affecting privacy will be involved; HRS Section 92-5(a)(4), to consult with the Commission’s attorney on questions and issues pertaining to the Commission’s powers, duties, privileges, immunities and liabilities; or HRS Section 92-5(a)(8) to deliberate or make a decision upon a matter that requires consideration of information that must be kept confidential pursuant to state or federal law or court order.)

A. Motion to Approve the Executive Session Minutes of the November 18, 2015 Meeting. (Pursuant to HRS Secs. 92-5(a)(2), (a)(4) and (a)(8).)

Commissioner Marks moved to approve the November 18, 2015 executive session minutes. Commissioner Suemori seconded. All were in favor, and the motion carried.

B. Presentation by Deputy Corporation Counsel Derek Mayeshiro Regarding Doe & Roe v. Honolulu Ethics Commission; Decision by Circuit Court Regarding the Commission’s Motion to Dismiss the Complaint for Lack of Jurisdiction. (Pursuant to HRS Secs. 92-5(a)(2), (a)(4) and (a)(8).)

Chair Chen reported that the Commission heard Deputy Mayeshiro’s presentation.

C. For Discussion: Pursuant to HRS Sec. 92-5(a)(2) Regarding the Hire, Evaluation, Dismissal, or Discipline of an Officer or Employee to Consider the Independent Investigator’s Report of Commission Office Conditions, Including Management, Personnel and Procedures. (Also, pursuant to HRS Secs. 92-5(a)(4) and (a)(8).)

Staff was excused for this item during the executive session.

Commissioner Marks moved to hire a private investigator to look into other existing ethics complaints. Commissioner Suemori seconded, all were in favor, and the motion carried.

Commissioner Amano asked for confirmation on the operating budget and asked the EDLC about the FY15-16 in hiring an additional investigator. The EDLC responded that it was not for a full-time employee, but there were funds available. Commissioner Amano asked for the available amount, and the EDLC responded that he did not know the exact amount available.

Commissioner Suemori moved that the FY2016 budget reflect that the sums would be expended for two (2) contracts that had already been approved and that the remaining balance be set aside for an outside contract investigator for the other existing ethics complaints that are now before the Commission.

Commissioner Marks asked for amendment of Commissioner Suemori's motion that no investigator be hired.

Chair Chen amended the motion and moved that the budget reflect that the consultant and outside services funds would be set and used for the two (2) approved contracts and to hire a special investigator, within the budget, and that funds are not to be expended to hire anyone on a temporary hire or other basis and that only the Commission can hire another investigator. Commissioner Amano seconded the motion and all were in favor, with the exception of Vice Chair Lilly, who voted "nay."

IV. ADJOURNMENT

Commissioner Amano moved to adjourn the meeting. Commissioner Suemori seconded. All were in favor, and the motion carried.

The meeting adjourned at approximately 2:45 p.m.