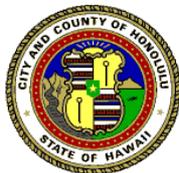


ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2005-5**

**I. Case Summary**

The manager of a [facility type] secured an unwarranted advantage for certain employees by implementing, without authorization, an overtime incentive plan intended to improve employee morale and operating efficiency at the [facility type]. The plan allowed 13 employees to earn \$57,000 in unauthorized overtime pay over a 5-month period in violation of Section 11-104, Revised Charter of Honolulu (RCH). The manager knew or should have known that he did not have authority to implement the incentive plan. After reviewing the relevant mitigating and aggravating circumstances, the Honolulu Ethics Commission recommends that the manager be suspended from employment without pay for a period not less than 5 and not more than 10 workdays. The Commission makes other recommendations regarding management and record-keeping problems in the department.

**II. Factual Background**

On May 17, 2004, the Honolulu Ethics Commission (Commission) received a third-party request for advice regarding whether [name] "Manager" had violated the standards of conduct in his position as a supervisor at the [facility name] "Facility," operated by the [department name]. The third-party request claimed that Manager, without the proper authority, made a change from normal operations by approving excess overtime for truck drivers and equipment operators who worked at the Facility.

Manager received a Notice of Possible Violations of the Standards of Conduct from the Commission on or about January 25, 2005. He initially asked for a hearing in this matter, but recently withdrew the request. The Commission, therefore, is authorized to render an opinion based on the information available to it. *See*, Section 3-6.7(c), Revised Ordinances of Honolulu (ROH).<sup>[1]</sup>

[Purpose of Facility]. The rubbish is temporarily stored before it is compacted by the equipment operators and loaded onto a trailer that is hauled by truck for disposal, usually to [facility type]. Manager was the [position title] from [date] until [date], when he was promoted to the [position title].<sup>[2]</sup> Manager was responsible for overall operations at Facility.

The written [title] (Work Guidelines) governed overtime for truck drivers and equipment operators working at Facility.<sup>[3]</sup> The Work Guidelines required that truck drivers and equipment operators remove 4 truckloads of refuse from the Facility to complete a normal 8-hour workday. Drivers and operators were eligible for two overtime hours for five loads of refuse removed and for four hours of overtime for six loads of refuse removed.<sup>[4]</sup> Manager reviewed and recorded the amount of overtime earned by employees under the Work Guidelines.

According to Manager and his immediate supervisor, [name] "Immediate Supervisor,"<sup>[5]</sup> near the end of [date] the morale for the drivers and operators had become low and they were physically and mentally "burnt out." The constant influx of refuse and a shortage of drivers pressured the operators and drivers to prepare and haul 5 or 6 loads per day on a consistent basis. The result was a relatively high number of down loads and increasing absenteeism.

Manager discussed the low morale and inefficiency with representatives of the operators and drivers. According to Manager, they told him that incentives such as increased overtime had been used in the past, although he noted they were vague about the details of the past incentives.

Beginning on [date], Manager introduced an incentive plan that continued through [date], a period of 5 months. Manager reduced from 4 to 3 the number of truckloads of refuse required to be removed by truck drivers and equipment operators to complete a normal workday. By reducing the loads that needed to be removed in order to complete an 8-hour shift, drivers and operators became eligible for two hours overtime for four loads removed and four hours of overtime for five loads removed.

Manager agreed to increase overtime on the condition that the drivers and operators would raise the average weight of the loads to 18 net tons. Thus, the incentive plan was intended to (a) improve morale by allowing truck drivers and equipment operators to obtain more

overtime, and (b) to increase Facility operating efficiency by increasing the total amount of refuse removed from the station.

The incentive plan had two effects on pay and workload. First, a driver or operator who only finished 3 loads had completed a full day's work, in contrast to the 4 trips required under the Work Guidelines. Second, overtime was available for the fourth and fifth loads, as opposed to the fifth and sixth loads hauled under the Work Guidelines. At the time he restructured the overtime, Manager knew it would result in overtime exceeding that allowed under the Work Guidelines.

It is undisputed that Manager made the workload change without consultation or approval of any of his departmental supervisors. Immediate Supervisor said that such a change would require approval from the [name of division] Division Chief. Supervisor did not seek the advice of the managers from other [similar facilities]. None of his supervisors suggested that he had the discretion to change the basic pay structure at Facility.

Manager stated that he did not bring the idea of the incentive plan to his Immediate Supervisor's attention because "I thought I could handle it. I thought – it was going to be a trial period and I wanted to see how it would work." Interview of Manager, [date]. Later in his interview, he stated:

Well, originally it was to be for three weeks and then it got extended and then it got extended and then it kind of snowballed and it just kept going.

I agonized over it. I was trying to figure out a way to get back the way we were supposed to be set up but the results were outstanding and I was trying to get results. *Id.*

Also in his interview Manager admitted that ". . .to be perfectly frank, I didn't think about getting [Immediate Supervisor's] blessing on it or anything. I was just trying to take care of business in-house and do what we had to do. I failed to consult my superiors on it." *Id.*

Had Manager inquired of his superiors, he would have been informed that the last significant change to the Facility work requirements resulted in the Work Guidelines. Also, he would have learned that the affected employees, the Facility manager at the time, Immediate Supervisor and the Division Chief had negotiated the Work Guidelines.

As the incentive plan took hold, morale improved as shown by the lower number of down loads claimed during the 5-month period. Also, the average

net tons per truckload increased, thereby increasing the total amount of rubbish hauled from Facility. Unfortunately, when the plan was stopped, down loads climbed above and refuse tonnage removed fell below pre-incentive plan levels. Several months after the incentive plan was stopped, Immediate Supervisor created a cost-benefit analysis which calculated that the cost of paying the excess overtime for the operators and drivers was most likely offset by the increased amount of refuse removed from Facility during the 5-month time frame.

From [date] through [date], Manager personally approved overtime for truck drivers and equipment operators employed at Facility knowing the overtime was in excess of the overtime allowed under the Work Guidelines. As a result, 13 truck drivers and equipment operators at Facility received approximately 2,472 overtime hours in excess of that permitted under the Work Guidelines. The excess overtime hours resulted in approximately \$57,393 being paid to the truck drivers and equipment operators that would not have been paid had the Work Guidelines been followed.

The Division Chief informed Commission staff that the reduction in workload described above was not approved, authorized or ratified by the department or any of its officers or employees with power to approve, authorize or ratify such a plan. In his [date] reprimand letter to Manager, the Chief explained:

As [position title], you were responsible for the overall production of the facility. This entailed overseeing operations and periodically implementing changes in operations, adjustments to work schedules, revisions of duties and other necessary changes to attain and maintain optimum efficiency. Such changes, however, require prior review and approval by your supervisor, especially if there is a cost implication such as increased overtime, or a work practice adjustment that may require union consultation. Your unauthorized action could have been avoided if you had fully communicated your intentions with (*sic*) your supervisor before effecting the change.

The official position description for Manager's position corroborates the Chief's conclusions that Manager did not have authority to introduce the incentive plan. The position description states that Manager, "**[w]ith the approval of his supervisor,**

implements changes in operations, shifts in schedules, revisions in duties and other necessary changes to attain and maintain optimum efficiency." (Emphasis added.)

There are other unusual circumstances in this case. First, Manager's superiors were unaware of the increased overtime plan for 5 months at least in part because Manager failed to bring it to their attention. In his interview, Immediate Supervisor said he first learned of the plan on [date] when he followed up on the Commission's inquiry about overtime practices. On that date, he asked Manager about any overtime increase and was informed about the incentive plan. Immediate Supervisor ordered the plan terminated immediately. Neither Manager nor Immediate Supervisor mentioned the incentive plan during their first interview with Commission staff on [date]. They only referred to overtime as it was allowed under the Work Guidelines.

Second, Manager was the supervisor responsible for placing the overtime data into the city's computerized payroll system. He approved the overtime and then his subordinate, [position title], logged the approved overtime into the payroll system. As a result, the incentive plan was implemented through a system where excess overtime did not trigger a review by Manager's superiors. Without the request in this case, it is unknown how long the overtime incentive would have gone undetected.

Third, the incentive plan resulted in a [action] filed by the operators and drivers claiming that they are permanently entitled to the reduced workday/increased overtime.

Fourth, Manager was promoted to [position title] effective [date], the day before the overtime plan was stopped. The Commission staff interviewed Immediate Supervisor and the other members of the promotion panel. Each stated that Manager was not asked about and did not mention the incentive practices used at the Facility during his interview.

Fifth, Commission staff spent many hours reviewing records to determine if the overtime paid to the operators and drivers was justified based on the loads hauled. It became evident that the paperwork used to support claims for overtime (especially the information on the [facility type] Daily Worksheets) sometimes did not exist but, more often, was incomplete for purposes of verifying overtime.

Finally, based on the statements of those involved in the negotiations, the Work Guidelines reflected the basic agreement regarding work requirements and overtime between [the department] and the Facility operators and drivers. However, although reduced to writing in the Work Guidelines, there is no memorandum of understanding between the city and the union representing the affected employees.

### **III. Analysis**

Public resources may only be used for properly authorized government expenditures. *See*, Advisory Opinion No. 2001-1 (March 15, 2001) (Councilmember who used city paid staff for political fundraising violated ethics laws) and Advisory Opinion No. 2005-4 (July 18, 2005) (Mayor may use public funds to publish book because Mayor is authorized to communicate with public on city projects, programs and policies). This policy is based on RCH Section 11-104:

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.

An officer or employee who knows or should have known that he does not have authority to award overtime or to reduce the work required for an 8-hour shift is in violation of RCH Section 11-104.

#### **A. The incentive plan**

The issue, then, is whether at the time he acted Manager was authorized or had a reasonable belief that he was authorized to implement the incentive plan. If so, he would not be in violation of RCH Section 11-104. *See*, Advisory Opinion No. 2004-7 (June 22, 2004) (Mayor and department heads did not violate RCH Section 11-104 because they neither knew nor should have known that their photographs would be used to endorse products or retailers). A review of the circumstances should help answer this question.

On the one hand, staff interviewed an operator and a driver who represented the operators and drivers in discussions about increased overtime with Manager before the incentive plan was introduced. They believe that Manager had the authority to implement the plan because he was the supervisor

and he acted on behalf of management. In addition, the operator noted that the prior Facility supervisor had done a time-in-motion study that showed that transferring 3 loads of refuse required 8 hours, thereby justifying the reduction in loads and increase in overtime.

On the other hand, Manager's superiors and position description did not accord him the authority to increase overtime and/or reduce the normal workday requirements. According to the position description and the reprimand letter, to do so required the approval of his supervisors. Manager knew that his plan was contrary to the Work Guidelines. In his interviews, Manager did not refer to any discussion with his supervisors that would suggest that he possessed such discretion. If he had investigated the vague information about the claimed past incentives, he would have learned that the Work Guidelines were created only after intense discussions between managers at and above his level and the operators and drivers.

Manager stated that he did not consider talking to Immediate Supervisor about the plan initially because he was focused on improving the operations at the Facility. He admitted that he did not even consider whether he had authority. As the plan proved effective, he "agonized" over it, which suggests that he knew his actions were unauthorized.

Finally, although Manager had only been the supervisor at the Facility for 1 year when he started the incentive plan, his experience as a truck driver and equipment operator in the Division for the previous 12 years should have made him aware that upper-level city management, not middle managers, set the terms of public employment.

Despite the conclusions of those who benefited from the incentives, a reasonable supervisor would have known that he did not have the power to implement the incentive plan. Manager had no basis to believe he had such authority and, therefore, his conduct violated RCH Section 11-104. He used his position, without proper authority, to reduce the amount of work required to complete an 8-hour day and increase the amount of overtime his subordinates received. The equipment operators and truck drivers under his supervision benefited from his action by receiving unauthorized overtime of about \$4,400 on average. Notwithstanding that the increased overtime was intended to and did in fact improve morale and operating efficiency at the Facility, Manager used his position to obtain a significant unauthorized financial benefit to the operators and drivers.

Further, Manager's failure to inform his superiors about the incentive plan for over five months compounded the violation of RCH Section 11-104.

**B. Manager's promotion**

The timing of Manager's promotion to [position title] just before the incentive plan was stopped raises a concern that he may have used the improved morale and operating efficiency at the Facility to bolster his chance for promotion in violation of RCH Section 11-104.

Immediate Supervisor and the members of the promotion panel stated that the operations at the Facility were not discussed and were not a factor in the promotion. Accordingly, there is insufficient evidence to find that Manager's promotion resulted from the changed work requirements at the Facility.

**IV. Recommendations to the department**

Whenever the Commission finds a breach of the standards of conduct, it is mandated to make recommendations for discipline and other appropriate action. RCH Section 11-107 and ROH Section 3-8.5.<sup>[6]</sup> Based on the facts and analysis above, the Commission makes the following recommendations:

**1. Manager should receive a suspension without pay.**

In recommending discipline, the Commission weighs the aggravating and mitigating circumstances of the case. *See*, Advisory Opinion No. 2005-2 (February 2, 2005) (a city manager received a two-week suspension without pay for selecting family members for and rewarding campaign workers with city contracts even though the contracted work was carried out satisfactorily).

Aggravating factors in this case include:

- a. There are ample reasons demonstrating that Manager knew or should have known the work changes were not within his discretion to make. In fact, it appears Manager at first did not even consider whether he had the requisite authority.
- b. Manager compounded the violation by failing over the course of 5 months to notify any supervisor of the incentive plan until Immediate Supervisor questioned him about it. Manager failed to inform the Commission staff of the incentive plan during his first

interview. Manager's conduct showed that, if no one asked, he was not going to tell anyone about the incentive plan. Without the complaint, it is unknown how long the unauthorized overtime would have continued.

- c. His failure to ask permission and his long silence resulted in unauthorized overtime of about \$57,000.
- d. There are potentially significant long-term repercussions from the incentive plan. First, morale and efficiency sank below pre-incentive plan levels after the incentives were stopped, thereby exacerbating the problems Manager intended to improve with the incentive plan. Second, the truck drivers and equipment operators at the Facility now believe they are entitled to the reduced workload/increased overtime on a permanent basis and have filed a [action] to that end.
- e. Manager failed to keep verifiable records showing the amount of overtime that each equipment operator and truck driver was entitled to on each workday. This made determining the amount of unauthorized overtime difficult and time consuming. Without verification, other unauthorized pay could occur.

Mitigating factors include:

- a. Without evidence to the contrary, we accept Manager's statement that he introduced the incentive plan to improve morale and operating efficiency. The plan was successful in these goals up to the time it was terminated.
- b. After the fact, Immediate Supervisor concluded that Manager's overtime plan was likely justified on a cost-benefit basis because of the rubbish removed was commensurate with the cost of the unauthorized overtime. Therefore, the taxpayers presumably received a benefit in service commensurate with the unauthorized overtime pay.

On balance, the Commission finds that the misconduct in this case calls for more serious discipline than a letter of reprimand. The Commission is especially concerned about the precedent that would be set by permitting a manager, who clearly has no authority, to unilaterally modify the work requirements and pay structure without following the reasonable and proper management procedures. Based on the foregoing factors, the Commission recommends a suspension without pay for at least 5 and no more than 10 workdays. The Commission is mindful that the department may need to weigh

various factors in its decision-making and, therefore, recommends a range of time.

**2. The department should seek legal advice whether it may discipline Manager.**

The letter of reprimand appears based on the same general conduct as the recommended suspension. The Commission is aware that a suspension after a reprimand for the same misconduct may trigger an argument that Manager may not be disciplined twice for the same misconduct. However, the letter does not discuss Manager's 5-month long failure to inform his supervisors of the unauthorized incentive plan, which may be considered a separate ethics violation. [Department] should seek the advice of counsel rather than make this determination alone.

**3. The department should review the role of management and make appropriate changes.**

The supervisory network apparently did not detect the incentive plan even though overtime for 13 operators and drivers increased by over 2,400 hours and \$57,000 in the 5-month period. ENV should conduct a management review to determine whether Manager's actions should have been known to his superiors, and if so, to take appropriate action to prevent a recurrence.

Also, [department] should work with the Internal Audit Division of the Department of Budget and Fiscal Services to modify the payroll reporting process to ensure that the information recorded for payroll purposes may be audited and verified.

Finally, the department should evaluate whether the Work Guidelines for the Facility should be reduced to a memorandum of understanding so both management and the employees have a clear statement of their respective rights and responsibilities.

These systemic problems facilitated Manager's misconduct. The process whereby Manager could change the overtime requirements, have his subordinate enter the unauthorized overtime in to the city's payroll system and not trigger a review by his supervisors should be of significant concern to the department. It would be unfortunate if these issues were allowed to slip away unresolved.

The appointing authority must inform the Commission within 15 days as to the action deemed necessary based on the recommendations. *See*, RCH Section 11-107 and ROH Section 3-6.5(e).

Dated: October 27, 2005

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ROBIN DAVID LIU, CHAIRPERSON  
Ethics Commission

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<sup>[1]</sup> 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.

<sup>[2]</sup> Prior to his supervisory role [employment history].

<sup>[3]</sup> The Work Guidelines became effective in the mid-1990s. The Work Guidelines do not mention overtime for equipment operators. However, apparently because the equipment operators load the trailers, they were considered an integral part of the refuse hauling operations. As a result, equipment operators were given overtime on the same basis as truck drivers.

<sup>[4]</sup> "Down loads" are also included as loads removed. A "down load" is a load that could not be removed from Facility because of a mechanical breakdown of Facility equipment that was not the fault of an employee. For example, if a load could not be removed because the truck had a flat tire, the truck driver and equipment operator would be credited for the load as if it had been hauled away.

<sup>[5]</sup> Manager would have reported to the [position title], but the position was unfilled during the relevant time. Thus, Manager reported to his next higher supervisor.

<sup>[6]</sup> RCH Section 11-107 states:

The commission shall recommend appropriate disciplinary action against officers and employees found to have violated the standards of conduct established by this article of the charter or by ordinance. The appointing authority shall promptly notify the commission of the action taken on the recommendation.

ROH Section 3-8.5 states:

(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 Sections 11-101 through 11-105 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.