

THE ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

CHARLES W. TOTTO,	)	Case No.: EC No. 12-186
	)	
Complainant,	)	ADVISORY OPINION NO. 2014-4;
	)	ATTACHMENT A
vs.	)	
	)	
[RESPONDENT],	)	
for Violation of Section 11-104 of the Revised	)	
Charter of Honolulu [MISUSE OF CITY	)	
RESOURCES],	)	
	)	
Respondent.	)	
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ADVISORY OPINION NO. 2014-4

Pursuant to §3-6.3(b), Revised Ordinances of Honolulu (“ROH”), the Honolulu Ethics Commission (the “Commission”) shall render advisory opinions in circumstances where there is alleged to be a conflict of interest or unethical conduct on the part of any employee or officer of the city within the scope of the revised charter and ROH, Chapter 3, Article 8.

This matter arises out of [RESPONDENT’S] conduct related to selection of a consultant to provide consulting services related to the merger of [CITY DEPARTMENT 1] and [CITY DEPARTMENT 2].

I. BACKGROUND

1. [RESPONDENT] is a former [EMPLOYEE] of [CITY DEPARTMENT 1].

2. Complainant Charles W. Tutto (“Complainant”) is the Commission’s Executive Director and Legal Counsel and, pursuant to Rule 5.9(b), Rules of Procedure, Honolulu Ethics Commission, is designated by the Commission as the Complainant in this proceeding.

3. This matter was assigned for hearing to Hearing Officer Dale W. Lee, Esq. and formal hearing was held on October 22 and 23, 2013.

4. At the Formal Hearing, the Hearings Officer considered exhibits received into evidence, witness testimony, and the records and files in the case.

5. On December 31, 2013, the Hearings Officer filed his Hearings Officer’s Findings of Fact, Conclusions of Law and Recommended Disposition of Notice of Alleged Violations.

6. On January 15, 2014, Complainant filed his Exceptions to Hearing Officer’s Report and Recommendations.

7. On January 30, 2014, Respondent filed his Brief Opposing Complainant Charles W. Tutto’s Exceptions to Hearings Officer’s Report and Recommendations filed January 15, 2014.

8. The Commission’s hearing on the Hearings Officer’s report was originally scheduled for February 19, 2014, but was continued to March 17, 2014 pursuant to stipulation of the parties.

9. The Commission heard the matter on March 17, 2014.

**B. COMMISSION’S FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Commission, following deliberations, determined to adopt the Hearings Officer’s Findings of Fact and Conclusions of Law, except as otherwise stated herein. A copy

of the Hearings Officer's Findings of Fact and Conclusions of Law are attached hereto and incorporated herein as Attachment A.

2. The Commission clarifies that the applicable standard used in determining whether or not there has been an ethical violation is whether a reasonable person would know or should know that the conduct in question was an ethical violation.

3. Applying the standard of whether a reasonable person would know or should know that the conduct in question was an ethical violation, the Commission accepts the Hearings Officer's conclusion that Complainant did not prove by a preponderance of the evidence that Respondent violated Section 11-104 of the Revised Charter of Honolulu in his capacity as Chairman of the Selection Committee convened to recommend a Consultant to the City and County of Honolulu Department of Budget and Fiscal Services.

C. DECISION

1. Based on the foregoing, the Commission accepts the Hearings Officer's recommendation and DISMISSES this matter.

2. The Commission, however, also believes that the City has an obligation to ensure that persons serving on selection committees receive guidelines and instruction necessary so that the selection committee members understand the exact process and procedures that they are to follow, or which are available to them, for scoring and selecting a vendor under a Request for Qualifications. It does not appear that this was done in this case. The Commission therefore recommends the appropriate City agency take steps to ensure that persons serving on selection committees receive guidelines and instruction necessary so that the selection committee members understand the exact process and procedures that they are to follow, or which are available to them, for scoring and selecting a vendor under a Request for



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Case No.: EC No. 12-186  
ADVISORY OPINION;  
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HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND RECOMMENDED DISPOSITION  
OF NOTICE OF ALLEGED VIOLATIONS

DALE W. LEE, ESQ.  
[ADDRESS]  
Telephone: []  
E-mail: []  
Hearing Officer

HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND RECOMMENDED DISPOSITION  
OF NOTICE OF ALLEGED VIOLATIONS

A Hearing to address the merits of a Notice of Alleged Violations brought in Charles Totto, Complainant vs. [RESPONDENT], (hereinafter "Complainant" and "Respondent," respectively) was held on October 22 and 23, 2013. This Hearing Officer was selected by the parties to render a recommended disposition addressing the merits of Complainant's Notice of Alleged Violations dated September 12, 2012.

Complainant alleged that Respondent violated Section 11-104 of the Revised Charter of Honolulu in the course of the selection of a consultant to provide consulting services related to the merger of [DEPARTMENT 1] and [DEPARTMENT 2] under [DEPARTMENT 1's] administration ("Consultant's contract").

In particular, Complainant alleged that in his capacity as Chairman of a Selection Panel tasked with selecting that consultant, Respondent used his position to afford consultant candidate [CANDIDATE 1] "an unwarranted second chance" which ultimately resulted in the Consultant's contract being awarded to it, when a second consultant candidate, [CANDIDATE 2] should have been determined to be the rightful awardee.

Complainant, who attended the Hearing, was represented by Laurie A. Wong, Associate Legal Counsel. Respondent, who also attended the Hearing, was represented by Lyle S. Hosoda, Esq. and Addison D. Bonner, Esq.

This Hearing Officer received and considered Exhibits (over 110 in all), and considered and weighed the credibility of all witness testimony presented by Complainant and the Respondent, supplemented by additional Exhibits presented at the Hearing, and the records and files of this case.

In consideration of all of the above, this Hearing Officer makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

If any of these finding are deemed conclusions of law they shall be construed as such.

1. Pursuant to a [PANEL] recommendation that a consultant be selected to review and comment on the feasibility of a proposed merger of [DEPARTMENT 1] and [DEPARTMENT 2], a Selection Committee ("Selection Committee") was formed to recommend a Consultant to the City and County of Honolulu Department of Budget & Fiscal Services.

2. Respondent was appointed Chairman of the Committee. [COMMITTEE MEMBER 2] served as a 2nd Committee Member. [COMMITTEE MEMBER 3] served as a 3rd Member of the Committee.

3. All Selection Committee Members served *gratis*, in public service.

4. Submittals from the following consultant candidates were received and reviewed by the Selection Committee at a Candidate Review Meeting held on June 18, 2010: [CANDIDATE 3], [CANDIDATE 4], [CANDIDATE 2] and [CANDIDATE 1].

5. Candidate submissions were solicited through a Request for Qualifications (RFQ) issued by the Department of Budget & Fiscal Services.

6. Neither before, during, nor after its deliberations did the Selection Committee receive instructions or directives from the City and County Budget & Financial Services Department (or any other governmental or administrative body) as to how, what, or which selection procedure or methodology was to be used by it.

7. Neither before, during, nor after its deliberations, other than to individually assign a numerical score to the candidate submissions, did the Selection Committee discuss or agree

upon a procedure, process or methodology for the ranking of the candidate submissions for recommendation to the Department of Budget & Fiscal Services.

8. As of June 18, 2010 the City and County Budget & Financial Services Department did not have any established policies, written or otherwise, governing or providing, direction as to how, what, or which selection procedure or methodology was to be used by the Selection Committee.

9. The Department of Budget & Fiscal Services recognized any of several selection methods which could have been used with scores assigned by Committee Members including individual independently scored Total Sum (for each of several weighted factors and Ordinal Scoring (assigned weights)).

10. At the Candidate Review Meeting on June 18, 2010, the Selection Committee Members engaged in discussion and evaluation of the candidate submissions and thereafter individually assigned scores to the several candidates on Score Sheet Templates.

11. Committee Members were unaware of the numerical scores assigned by each other, but were aware, based upon discussion, of individual preferences for the candidates.

12. [COMMITTEE MEMBER 2] ranked [CANDIDATE 2] first, on the strength of a numerical score of 31, ranked [CANDIDATE 1] second on the strength of a numerical score of 26 and ranked [CANDIDATE 3] third with a score of 25.

13. Respondent ranked [CANDIDATE 1] (sic) first (sic), on the strength of a numerical score of 35, ranked [CANDIDATE 1] second (sic) on the strength of a numerical score of 38 and ranked [CANDIDATE 3] third with a score of 30.

14. [COMMITTEE MEMBER 3] ranked [CANDIDATE 2] and [CANDIDATE 1] as tied, with a numerical score of 39, each and ranked [CANDIDATE 3] third with a score of 32.

15. Simple mathematical comparison of the several candidates' numerical scores showed [CANDIDATE 2's] total of 105, [CANDIDATE 1's] total of 103 and [CANDIDATE 3's] of 89. There was no "numerical tie" based on scores.

16. In terms of preferred candidate, however, there was a "tie," or deadlock amongst the three selection committee members as follows:

[COMMITTEE MEMBER 2] ranked [CANDIDATE 2] first.

Respondent ranked [CANDIDATE 1] first.

[COMMITTEE MEMBER 3] ranked [CANDIDATE 1] and [CANDIDATE 2] as tied.

17. The resulting candidate ranking was [CANDIDATE 2] 1 1/2 votes, [CANDIDATE 1] 1 1/2 votes and [CANDIDATE 3] 0 votes.

18. Respondent as Committee Chairman understood that the "tie" between candidates [CANDIDATE 2] & [CANDIDATE 1] "could not be," and needed to be broken.

19. Respondent's interpretation that a tie existed between candidates [CANDIDATE 2] and [CANDIDATE 1] was reasonable and according to [EXPERT WITNESS] of the Purchasing Division of the City and County of Honolulu Department of Budget and Fiscal Services, such would have been a correct determination if one of several approved scoring methodologies, the "ordinal," had been used by the Selection Committee.

20. Respondent asked [COMMITTEE MEMBER 3] to re-evaluate his scores and to resubmit them. [COMMITTEE MEMBER 3] did so, and in the process re-scored [CANDIDATE 2] slightly below [CANDIDATE 1].

21. Whether on the strength of advice obtained following a phone inquiry to the Purchasing Division, or independently, Respondent sought a re-evaluation of [COMMITTEE MEMBER 3's] scores - that of his own and [COMMITTEE MEMBER 2] being in candor, not susceptible to change. This Hearing Officer finds no fault in that determination.

22. There were questions raised at the hearing as to whether [COMMITTEE MEMBER 3] initially expressed reservations with his vote and sought an opportunity to re-evaluate his scores, and/or whether Respondent initiated contact with [COMMITTEE MEMBER 3] to request his re-evaluation. In weighing the evidence, this Hearing Officer notes the conceded ambiguity as to the selection process to be followed and that Respondent in his capacity as Committee Chairman perceived a "tie" between candidates [CANDIDATE 2] and [CANDIDATE 1]. This Hearing Officer accepts as reasonable, both Respondent's perception and his determination to request [COMMITTEE MEMBER 3] to re-evaluate his scores as a procedure to resolve the tie.

23. Notwithstanding disagreement with the genesis of Respondent's request for re-evaluation, however, Respondent's testimony that he did not direct, or encourage, or seek to impose upon [COMMITTEE MEMBER 3's] re-evaluation in favor of one candidate or the other was confirmed by [COMMITTEE MEMBER 3] in both an investigation level Declaration and in his oral testimony provided at the Hearing.

24. Whether Respondent in fact, placed a phone call to the Budget and Financial Services Division, or not, and whether advice was received or not, were hotly contested at the Hearing. This Hearing Officer is persuaded by "apparent authority" imbued to individuals answering phones at the Purchasing Division from whom Respondent says he received advice as to what to do with the "tie." Testimony by Respondent that he received some advice, whether correct or not, is accepted as credible.

25. Advice received, if in fact received, does not substantially impact this Hearing Officer's view of the recommended disposition of the Notice of Violation, because the proposed "fix" that Respondent adopted was outwardly objective, neutral and non-directive.

26. To borrow from the Complainant's theme, the proposed "fix" that Respondent implemented provided a necessary "second chance" for *both* [CANDIDATE 2] *and* [CANDIDATE 1].

27. That [COMMITTEE MEMBER 3] re-evaluated his score to reduce [CANDIDATE 2's] score was [COMMITTEE MEMBER 3's] decision alone, and his independent prerogative.

28. If selection by the Selection Committee was to have been made solely based upon mathematical addition of assigned scores, yielding a Total Score, and such procedure had been clearly communicated as an expectation or required process, this Hearing Officer would be persuaded that an "unwarranted second chance" was afforded to [CANDIDATE 1]. But, as said hereinabove, nowhere in testimony or in any of the Exhibits is anything supporting the suggestion found. There's the rub.

29. This Hearing Officer's interpretation of the foregoing is that the Selection Committee Chaired by Respondent was to resolve the unanticipated "tie" score on its own accord, as the nature of the services sought were not susceptible to being split as might be possible in cases where ties might be found.

30. This Hearing Officer accepts as reasonable, credible and in good faith, Respondent's determination to resolve the tie between candidates [CANDIDATE 2] and [CANDIDATE 1] as he did.

31. Respondent articulated in arguing a preliminary Summary Judgment Motion (which was denied) that at the Candidate Review Meeting the Selection Committee Members left their Score Sheet in the possession of Respondent in his capacity as Committee Chairman. All were unaware of the numerical scores assigned by each to the several

candidates, and were similarly unaware of the total of the scores for the candidates. This Hearing Officer finds that scenario to be accurate.

32. This being the case, it is clear that were Respondent of a mind to ensure [CANDIDATE 1] was improperly selected, he had every opportunity to simply add a point or two to his individual Score Sheet for [CANDIDATE 1] or conversely, to deduct a point or two from his Score Sheet for [Candidate 2] as Respondent was in sole possession of all Score Sheets. There is no evidence that he did so.

33. This Hearing Officer finds that the machinations that Complainant posits as evidence of Respondent's ethical violation to give an "unwarranted second chance to [CANDIDATE 1]" are, based upon the totality of the circumstances and credible evidence, consistent with the good faith that Respondent asserts accompanied his efforts to discharge his duties.

### **CONCLUSIONS OF LAW**

If any of these conclusions are deemed finding of fact they shall be construed as such.

1. The mandates found in RCH 11-104 and the requirement that strict devotion and adherence to its terms are demanded of [RESPONDENT].
2. The City and County of Honolulu owed an equally strict duty to clothe Respondent (and those placed in positions such as he found himself in this case) with sufficient edification, instructions, directives, and/or guidance to allow him to fulfill his duties as Selection Committee Chairman.
3. The City and County of Honolulu failed to clothe Respondent (and those placed in positions such as he found himself in this case) with sufficient edification, instructions, directives, and/or guidance to allow him to fulfill his duties as Selection Committee Chairman.

4. The Notice of Violations flowed from unstated, unclear and ambiguous expectations as to how Respondent was to discharge his duties as Selection Committee Chairman which the City and County of Honolulu was obliged to provide to Respondent, The City and County of Honolulu did not discharge this duty to Respondent.

5. Absent good and sufficient edification, instructions, directives, and/or guidance provided to Respondent by the City and County of Honolulu as to whether a specific selection methodology was required to be used, Respondent was unequipped to serve as Chairman of a Selection Committee.

6. Further, absent good and sufficient edification, instructions, directives, and/or guidance provided to Respondent by the City and County of Honolulu as to how an unexpected perceived "tie" between two candidates ranked as equal was to be resolved when the selection of but one candidate could be accepted, Respondent was unequipped to serve as Chairman of a Selection Committee.

7. As a result, both the ensuing investigation and Notice of Violations which this Hearing Officer finds were undertaken and pursued in good faith by the Executive Director and Staff of the Commission, were unwittingly tainted from the start.

8. There is a fundamental unfairness with the allegation that Respondent misused his position in resolving the tie, absent clear standards that would declare one of two tied candidates as the "awardee."

9. This Hearing Officer rejects the suggestion that Respondent be held to adhere to unstated standards which were concededly not communicated, or even existent.

10. Based upon the totality of the circumstances and the evidence presented and considered, this Hearing Officer concludes that Complainant did not prove by a preponderance of the evidence that Respondent violated Section 11-104 of the Revised Charter of Honolulu in his capacity

as Chairman of the Selection Committee convened to recommend a Consultant to the City and County of Honolulu Department of Budget & Fiscal Services.

**RECOMMENDED DISPOSITION OF COMPLAINT**

For the reasons set forth above, this Hearing Officer recommends the Honolulu Ethics Commission DISMISS the Complainant's Notice of Alleged Violations dated September 12, 2012 and relieve and release [RESPONDENT] of any and all alleged liability for violation of RCH 11-104 (Misuse of City Resources).

DATED: Honolulu, Hawai'i, December 31, 2013.

Respectfully submitted,

[SIGNATURE]

DALE W. LEE  
Hearing Officer