

**Hilo, Hawaii  
Tuesday, May 16, 2006**

**The regular meeting of the Civil Service Commission, County of Hawaii, was held in the conference room of the Department of Civil Service, 101 Pauahi Street, Suite 2, Hilo, Hawaii, on Tuesday, May 16, 2006.**

**Present:**

**Mr. G. Rick Robinson, Chair  
Mr. Clifford Kaminaka, Vice Chair  
Mr. Joel Cohen, Member  
Mr. Michael R. Ben, Director of Personnel  
Mr. Michael J. Udovic, Deputy Corporation Counsel  
Ms. Velma Y. Menezes, Secretary-Reporter**

**Excused:**

**Ms. Kaliko Chun, Member**

**Chair Robinson called the meeting to order at 9:30 a.m.**

**MINUTES OF APRIL 18, 2006**

**MOTION: Vice Chair Kaminaka moved that the minutes of April 18, 2006 be approved as circulated. The motion was seconded by Mr. Cohen and unanimously carried.**

**COMMUNICATIONS**

**A) Communication No. 06-05, dated April 10, 2006, from Myles Y. Miyasato, Chair, Cost of Government Commission, requesting input on County operations and services.**

**Mr. Ben reported that with staff's input, a response from Civil Service was prepared and submitted to the Cost of Government Commission. One item that was submitted to the Cost of Government Commission was to be more efficient in terms of energy usage, which the department is already implementing.**

**Chair Robinson asked about the item on privatization.**

**Mr. Ben reported that they didn't see how privatization would help the department. The department already privatizes certain services such as drug testing, EAP, and some workers' comp, but other than that they didn't expand to say that it would be more efficient, because for them it's implementing laws. Normally, for example, the hiring process can be contracted out, but because public laws are involved, it requires a level of expertise. Therefore, for Civil Service, they didn't expand upon that subject matter. He doesn't know if other departments will, but he's sure that it will be brought up when the Cost of Government Commission actually starts working on it.**

**B) Communication No. 06-06, dated April 26, 2006, from Lincoln S. T. Ashida, Corporation Counsel, regarding a reminder on campaign restrictions for County officials and employees.**

**Chair Robinson asked whether the campaign restrictions apply to them, as Commission members.**

**Mr. Ben stated that he thinks it does when they are here in the capacity as Commission members.**

**Chair Robinson noted there was something about resigning if a person is on a commission and runs for office and is elected.**

**Mr. Ben stated that it's when a person is elected that he/she must resign. The same applies to employees as well. An employee can always run, on his/her own time, but not on County premises. The employee can take leave for that purpose, if necessary. However, once the person is elected, that person must resign.**

**MOTION: Vice Chair Kaminaka moved that Communication Nos. 06-05 and 06-06 be received and filed. The motion was seconded by Mr. Cohen and unanimously carried.**

**C) Communication No. 06-07, received April 12, 2006, from Molly M. Turner, appealing the Department of Civil Service's decision that she did not meet the minimum qualification requirements for the Victim/Witness Counselor I recruitment.**

**Mr. Ben reported having received a withdrawal of Ms. Turner's appeal.**

**Mr. Udovic noted that Ms. Turner filed a separate document of withdrawal in addition to the appeal, and it should be noted as part of the appeal file.**

**Chair Robinson noted Ms. Turner's statement that she had been re-evaluated and was granted the right to take the written test, which she did on April 27. She was told that if she passed, her application would be forwarded to South Kona Prosecutor's Office for the Victim/Witness Counselor, and hopefully she would get an interview.**

**The appeal was noted as being withdrawn, and Ms. Menezes was asked to acknowledge the withdrawal.**

### **UNFINISHED BUSINESS**

**A) Schedule workshop for a discussion on the annual evaluation of Director of Personnel for the period ending June 2006.**

**Chair Robinson asked that it be scheduled in conjunction with the Commission's next meeting.**

**Mr. Cohen stated that his prior concern was the timing, as well as the timeframe of the evaluation, and fitting it in to their project so that when they finished with what they create, they can**

then move on to the process without further delays. They need to look at the long term and also do the workshop, which he thinks may require a couple of hours. As far as timing, which includes sending the evaluation to the different departments, and having them complete it, they should perhaps allow at least 60 days for that process to take place with another 30 days for the Commission to evaluate what was returned.

Because this is a long term process, Mr. Cohen suggested waiting until the fifth Commissioner comes on board before holding the workshop. Perhaps it could be postponed no later than July or August.

Mr. Ben suggested putting it on the July calendar, as the Commission can always defer it again.

**MOTION:** Mr. Cohen moved to postpone action on the workshop to the Commission's July meeting or until the fifth Commissioner is appointed. The motion was seconded by Mr. Kaminaka and unanimously carried.

### DIRECTOR'S REPORT

Mr. Ben reported the following:

1) Civil Service went through its budget review. Subsequent to the budget review, the department had been prodded, and thereby agreed, to submit a request for three new positions. The administration approved it, and it's currently in the new budget that's being proposed to Council. There were some 40 plus additional positions being requested in the new budget. Mr. Ben thinks a lot of them are administrative positions that aren't taken care of when times are crunched. Now that there's some money, they're recognizing the need to provide relief for all those support type services. For Mr. Ben's department, they are requesting another human resource professional, a paraprofessional, and another clerk.

**2) The County Band is being converted to civil service, which the Tribune Herald is making an issue of. As Mr. Ben explained to the reporter, the band had been exempt from civil service for the longest time, and he has never believed that they should be exempt from civil service. However, until this administration, he's never had the backing to proceed with making the conversion. When Mr. Ben brought the situation to Mayor Kim's attention, his response was that if it's a requirement of law, then it needs to be done. Because of the equal pay for equal work provisions of the law, they're increasing the band members' compensation by equating a lot of the positions to the positions in the Royal Hawaiian Band, who are civil service. That's what the equal pay, equal work law is about. If there's a position that does this kind of work in another jurisdiction, then the pay should be equal. Therefore, for certain band members, they were able to equate the duties and responsibilities to be similar if not identical, and they're paying them as such; but for the other band members who are not, they've developed a compensation plan that recognizes career growth and some basic compensation philosophies. The end result is that every band member is getting a pay increase; and the way it's set up, it amounts to a 12% pay increase in accordance with the County's compensation rules.**

**Mr. Cohen asked whether the legislative aide positions fit in with the classification and pay system or are determined by Council.**

**Mr. Ben responded that those positions are determined by the Council. They're all exempt positions. There is a specific provision in law that says Council hires are all exempt from civil service.**

**Along with that, there also needs to be some Charter changes to clear up language in the Charter, as there's a provision in it that says they're exempt from civil service. However, it technically doesn't hold water because it was determined by a State Supreme Court decision that State civil service law trumps the Charter. The civil service law also trumps any other local ordinance. Because there's that exemption in the State law, the band should be civil service. Therefore, a Charter change is being made for that purpose.**

**3) Mr. Ben is also proposing Charter changes to change the title of the Civil Service Commission to Merit Appeals Board because basically that's the Commission's function now. It's also to recognize what occurred in the civil service reform where the Commission was done away with and changed or converted to a Merit Appeals Board. It couldn't change the County's Charter provisions that still maintain the Civil Service Commission, so what the civil service law said was that the counties may use a Civil Service Commission as its Merit Appeals Board. During the legal process, Mr. Ben inquired into who makes the designation and found that it was him, which he felt to be a bit of a conflict; therefore, he proposed a Charter change to change the name from the Commission to Merit Appeals Board.**

**It's also proposed that the name of the Department of Civil Service be changed to the Department of Human Resources, as well as other related changes. The name change to the Department of Human Resources is the state of the art term now.**

**4) Negotiations are starting up again. All contracts expire June 30, 2007. They've already had one bargaining session with the Fire Fighters union. Mr. Ben will not be taking any spokesperson's roles this year.**

**Mr. Cohen requested clarification on how negotiations work, as each island has its different needs.**

**Mr. Ben explained that they are what is called a multi-employer bargaining, which means all the white collar employees throughout the State and the counties belong in one bargaining unit. The same goes for blue collar workers, and for Police and Fire. They're all in one statewide bargaining unit. The law sets up a multi-employer bargaining, so all the employers have to bargain together with the union. Oftentimes the County's needs don't get met because they are overruled by the State and one other jurisdiction based on the voting scheme that's provided by law. To address that, in the civil service reform, they recognized that the counties can negotiate separately on its own needs, which they have done in certain instances, for example, with mileage. When**

**the gas prices hit, they negotiated and increased the County's mileage reimbursement with the union. Everybody else followed suit thereafter.**

**Chair Robinson asked about the County following the IRS guidelines for mileage reimbursement.**

**Mr. Ben stated that they now follow IRS guidelines. They used to negotiate a separate amount, but when the IRS rate went up because of the gas situation, they approached the union about going with the IRS rate and making it fluctuate with the current rate.**

**In summary, the counties can now negotiate separate issues. They could never do that before, which meant a lot of their concerns could never get negotiated and they were stuck with whatever the big decision was.**

**Chair Robinson noted that there was nothing in the monthly activity report about workers' comp.**

**Mr. Ben explained that it could be because the division head had been on vacation when the report was done.**

**Chair Robinson asked about the amount of County claims, as that was always a big concern of theirs. He would like to see a graph of what things were when Civil Service took over as opposed to what it's like today.**

## **NEXT MEETING DATE**

**Because there were no appeals filed and no pending business, the Commission decided to skip its June meeting and schedule its next meeting for July 18 at 9:30 a.m.**

**The Commission discussed what action to take if an appeal was filed in the interim and whether the Chair could schedule the appeal.**

**Mr. Ben stated that he believes the Commission rules allow the Chair to take care of administrative matters, so it may fall under the category of administrative matters.**

**Mr. Udovic stated that he would have no objections to having the other Commission members give the Chair the right to schedule with everyone's concurrence.**

**The Commission decided that in the event an appeal is filed before the next meeting the Chair can schedule the appeal.**

**The Commission recessed at 10:10 a.m.**

Hilo, Hawaii  
Tuesday, May 16, 2006

**APPEAL HEARING – TROY FAMILAR - WHETHER OR NOT  
THERE WERE VIOLATIONS OF ANY CIVIL SERVICE LAWS,  
RULES, OR REGULATIONS IN THE APPELLANT’S TERMINATION  
FROM THE DEPARTMENT OF ENVIRONMENTAL  
MANAGEMENT.**

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**Present:**

**Mr. G. Rick Robinson, Chair  
Mr. Clifford Kaminaka, Vice Chair  
Mr. Joel Cohen, Member  
Mr. Julian White, Deputy Attorney General  
Ms. Suellen Tanoue, Clerk III  
Ms. Velma Y. Menezes, Secretary-Reporter**

**Others Present:**

**Mr. Michael J. Udovic, Deputy Corporation Counsel  
Ms. June Rabago, Hawaii Division Director, UPW  
Mr. Troy Familiar, Appellant**

**The following exhibits were entered into the record:**

<b>Appellant’s Exhibit A</b>	<b>-</b>	<b>Letter dated March 31, 2006</b>
<b>Appellant’s Exhibit B</b>	<b>-</b>	<b>§§76-27 &amp; 76-41, HRS</b>
<b>Appellant’s Exhibit C</b>	<b>-</b>	<b>§3-38, Probationary appointment</b>
<b>Employer’s Exhibit 1</b>	<b>-</b>	<b>Complaint Form</b>
<b>Employer’s Exhibit 2</b>	<b>-</b>	<b>Probationary Periods</b>
<b>Employer’s Exhibit 3</b>	<b>-</b>	<b>Record of Incident</b>

**The following witnesses were sworn in and testified:**

**Troy Familiar, Appellant**

**Margaret Almada, Personnel Management Specialist, DEM  
Nelson Ho, Deputy Director of Department of Environmental  
Management**

**Chair Robinson called the hearing to order at 10:25 a.m.**

**Mr. Udovic stated the following regarding Chair Robinson's questions on whether there were any questions or disputes concerning the Commission's jurisdiction over this matter.**

**He doesn't believe the Commission has jurisdiction over matters concerning itself with whether or not an employee met performance standards for a probationary term. Furthermore, civil service rules require that internal complaint procedures be exhausted before an appeal is filed with the Merit Appeals Board, and there is no evidence that an internal complaint was filed.**

**Mr. Udovic reiterated his objection that the Merit Appeals Board doesn't have jurisdiction over probationary employees with the new probationary standards, and that internal complaints must be filed before a complaint is filed with the Merit Appeals Board.**

**MOTION: Mr. Cohen moved that the Commission convene into an executive session to consult with counsel. The motion was seconded by Mr. Kaminaka and unanimously carried.**

**The Commission convened into an executive session at 10:30 a.m. and reconvened at 10:39 a.m.**

**Chair Robinson asked Mr. Familiar whether he was notified of his appeal rights or due process upon termination either verbally or in written form.**

**Mr. Familiar responded in the negative. He stated that he talked to one of his supervisors, who actually called him and asked why he didn't come to them. Mr. Familiar told the supervisor that he came to the Civil Service Commission. He was told to come to the Civil Service Commission and file an appeal. The supervisor**

**said “okay, good, that’s what you’re supposed to do.” That’s why Mr. Familiar just came straight here (to the Commission’s office) and filed the paper.**

**Chair Robinson asked Mr. Udovic what he’s citing for lack of jurisdiction.**

**Mr. Udovic responded that he’s citing §76-42, internal complaint procedures, section d, which states that the internal complaint procedures shall be exhausted before an appeal is filed with the Merit Appeals Board.**

**Chair Robinson noted that Mr. Familiar stated that he was advised by his supervisor to come to the Civil Service Commission.**

**Mr. Udovic disagreed, stating that what Mr. Familiar said was that they asked him why he didn’t come to them, and he said he went to the appeals board. The supervisor said fine, but Mr. Familiar never said that he was told to go to the employer.**

**Mr. Familiar reiterated that “they” called him and asked him why he didn’t go to them. He was informed by other people to go to the Civil Service Commission, and his supervisor told him that’s what he’s supposed to do. If he didn’t go to them, he was supposed to come here (to the Commission).**

**Chair Robinson asked Mr. Familiar whether he was ever told to file an internal complaint, either verbally or in writing.**

**Mr. Familiar responded that he doesn’t know what “internal” is, and he wasn’t aware of it. He was just told to come here and wait and see what happens after he files the appeal.**

**MOTION: Mr. Cohen moved for an executive session to consult with counsel. The motion was seconded by Mr. Kaminaka and unanimously carried.**

**The Commission convened into an executive session at 10:37 a.m. and reconvened at 10:44 a.m.**

**Chair Robinson announced that the Commission considered Mr. Udovic's position about the Merit Appeals Board not having jurisdiction. They referenced Mr. Udovic's citation, and it's the Commission's decision to proceed and hear the appeal of Mr. Familiar at this time.**

**Ms. Rabago requested a copy of a letter that was sent to Mr. Familiar containing some things that he apparently had been accused of doing.**

**Mr. Familiar stated that he had received the letter about four or five days ago. He thought he had it in his car, but he was in a rush to get to Hilo and apparently forgot it.**

**Mr. Udovic stated that he believes Ms. Rabago is referring to the pre-hearing statement which was filed by the Office of the Corporation Counsel. If Ms. Rabago needs a copy, Mr. Udovic would suggest that the hearing be rescheduled so that she has a chance to review it. There are some matters in there she will probably need to address. Mr. Udovic had sent it to Mr. Familiar. He did not know that Mr. Familiar was represented by someone at that time.**

**Chair Robinson asked Ms. Rabago to review the copy of the pre-hearing statement, and they would proceed today.**

**Ms. Rabago asked for a recess to review it.**

**The Commission recessed at 10:48 a.m. to allow Ms. Rabago time to review the pre-hearing statement and reconvened at 10:53 a.m.**

**The hearing proceeded as scheduled, as Ms. Rabago had the opportunity to review the pre-hearing statement and was ready to proceed.**

**Ms. Rabago stated the following in her opening statement:**

**They believe that Mr. Familiar has been let go without just and proper cause. Mr. Udovic will say that just and proper cause**

**doesn't apply, but they believe that the employer in this case should be following §76-41(b) and §76-41(c), which require that the test of steps 1 through 7 be completed in reaching a decision based on a failure of the employee to meet performance requirements. They don't believe the employer did that.**

**In §76-41(b), an appointing authority may release an employee from the employee's position if the employee fails to meet performance requirements of the employee's position under the following conditions: 1) the evaluation process and its consequences were discussed with the employee. They don't believe that was done. From what Ms. Rabago understands, Mr. Familiar has not even received a JPR. Usually there's a three-month JPR given to say the employee is not meeting performance requirements.**

**2) the employee was made aware of the employee's current job description and job related performance requirements. Ms. Rabago believes that was done by the employer. Mr. Familiar knows what his job is.**

**3) the evaluation procedures were observed, including providing the employee the opportunity to meet, discuss, and rebut the performance evaluation apprising the employee of the consequences of failure to meet performance requirements. They don't believe that was done.**

**4) the evaluation was fair and objective. Ms. Rabago doesn't believe that is true in this case. The employee was not provided performance feedback during the evaluation period, and was not offered in-service remedial training to improve and meet performance requirements.**

**(Number 5 was not brought up.)**

**6) the evaluation was applied without discrimination. They believe there are underlying factors as to why Mr. Familiar is not employed right now with the County.**

**7) prior to the end of the evaluation period that the employee's being considered for discharge due to failure to meet performance requirements the feasibility of transferring or demoting the employee to another position for which the employee qualifies was considered. Ms. Rabago doesn't believe the employer did that.**

**These rules apply as provided under 76-41(c)(2), the performance judge, or the Merit Appeals Board, as the case may be, shall use the conditions in subsection b, which Ms. Rabago just referred to, as tests in reaching a decision on whether the employer's action based on a failure by the employee to meet performance requirements of the employee's position was with or without merit. It's Ms. Rabago's position that the employer did not do this.**

**In his opening statement, Mr. Udovic stated the following:**

**He would suggest that §76-41 does not apply in this particular situation because it involves a performance of employees who are in the civil service. Subsection "a" requires that. Mr. Familiar was not a member of the civil service. He was a probationary employee of the County of Hawaii; and §76-41 and the requirements under subsections 1 through 7 are not applicable. Mr. Familiar was a probationary employee. The point of a probationary employee is to determine whether initial hires meet the requirements of the employer.**

**The evidence will show that there were a number of incidents and matters which occurred during the probationary period. Mr. Familiar had problems with his driving, with violence in the workplace, with his relationships with fellow co-workers. The applicable provisions of the civil service law as they relate to the matters which Ms. Rabago has outlined are not applicable. Mr. Familiar was a probationary employee and was discharged prior to the term of his probationary period ending.**

**Ms. Rabago stated that in regards to the pre-hearing statement from Mr. Udovic, on January 25, 2006, a complaint was received from a citizen. Mr. Familiar has never been provided a**

copy of that complaint, but they do not dispute that Mike Deniz did eventually talk with him about it. On February 16, Mr. Familiar met with Bobby Gonsalves and Mike Deniz at the Kona baseyard, and they did speak of it. There was nothing in written form given to Mr. Familiar, and that was the last that he had heard of it. Mr. Familiar has been driving trucks for quite some time, and he's aware of the public's perception, that they may think they're being tailgated, and she's sure that Mr. Familiar took the proper steps to be more aware of whether or not he's tailgating somebody.

The pre-hearing statement says that on February 16, he was also counseled about an incident that allegedly occurred in the men's room about kicking a hole in the wall. Mr. Familiar has denied kicking a hole in the wall. Ms. Rabago doesn't believe any witnesses ever came forward to say he kicked the hole in the wall. On February 16, there was actually no discussion about the hole in the wall. The discussion on that day was in regards to some of his co-workers saying he had a negative attitude. Mr. Familiar has, during his probationary period, experienced some personal upheavals and has been quiet at work on occasion. Being quiet and not being talkative does not mean that you have a negative attitude. And this is what was expressed to Mike Deniz and Bobby Gonsalves on that day.

On March 11, Mike Deniz says he witnessed the Appellant driving recklessly and damaging the rim and a tire on a truck. Mike Deniz never spoke to him about that until just prior to him leaving service. On March 11, he was never approached by Mike Deniz. If there was damage to a rim and a tire, no work order or any kind of letter was given to Mr. Familiar regarding what occurred on that day as far as damaging a rim and a tire; and Mr. Familiar is not aware that he ever did damage a tire and a rim.

On March 12 again, Mike Deniz spoke with him about being angry and not speaking to fellow operators. Again, Mr. Familiar has had some personal upheavals in his life during these past few months, and he has been quiet at work. Again, being quiet and not being talkative and joking with your co-workers does not mean you are angry.

**On March 12, a citizen reported that the Appellant was operating a truck tractor in a reckless manner. We have had no copy of that citizen report, when it occurred, or how it occurred, or what is a reckless manner. Mr. Familiar has been operating equipment for some time, and he does not know what occurred on that day. No one spoke to him about any kind of a reckless manner of driving.**

**Basically, Ms. Rabago believes she's addressed each point in Mr. Udovic's pre-hearing statement. She believes that Mr. Udovic is incorrect when he says that the Merit Appeals Board does not have authority over this case, because this is not a grievable issue under the civil service reform. It does not go to a performance judge. A grievance is not filed; however, the internal complaint procedure up to the Merit Appeals Board is the process, and she believes §76-41 is clear regarding tests and reaching a decision on the employer's action based on a failure of an employee to meet performance requirements. Tests 1 through 7 are applicable.**

**§76-27 of the rules says all employees appointed to civil service positions shall constitute the membership of civil service albeit they do not become permanent until after they complete their initial probationary period. It's fairly clear to Ms. Rabago that the evaluation process and the consequences were not discussed with the employee. He has nothing in writing; he has not had a JPR given to him telling him that he's not doing well. They had a conversation on February 16 and March 12, and based on that they let him go.**

**The employee was made aware of the current job description. He knows his job. He has a history of operating equipment as well as driving a truck. "Evaluation procedures were observed." Ms. Rabago doesn't believe that's true. There was no evaluation given to him. There was no opportunity to meet and discuss and rebut performance evaluation. They sat down and told him their side of the story, but as he said, he didn't kick a hole in the men's room. As far as tailgating, that was behavior that he was not aware of but was more mindful to correct and make sure he wasn't. In Kona, the roads are narrow. The perception might be that someone's driving too close.**

**“The evaluation was fair and objective.” Ms. Rabago can’t see how this evaluation was fair and objective when there was nothing given to Mr. Familiar about the concerns. There’s nothing in writing, there’s no evaluation. He hasn’t had an opportunity to ask what he could do to improve, which goes into number 5. If there’s a problem, offer him training or at least give him the tools to succeed. That’s an order for the employee to improve and meet the performance requirements. Don’t set somebody up for failure. Set them up to succeed. If there was a problem for six months that they were holding back and not telling Mr. Familiar about, they set him up for failure and not success. To Ms. Rabago, this requirement is to provide the employee an opportunity to improve and meet performance requirements. That was not done by the County.**

**Ms. Rabago believes that this evaluation was also about discrimination. There is a case of discrimination in this case in that Mr. Familiar has a brother who was employed with the County, but is no longer employed by the County. The problems with the brother should not reflect on Mr. Familiar, but she believes that it has played a part in this proceeding. Shortly after his brother left employment, Mr. Familiar received his notice that he was discharged.**

**Regarding #7, no evaluation was done. They just told him of the allegations that he was driving too close and someone said he was operating a tractor trailer in a reckless manner. The letter that was given to him just said the initial probationary period is considered to be an integral part of the recruitment and evaluation process, and his performance has not been of a satisfactory level.**

**In presenting her case, Ms. Rabago called upon Mr. Familiar, who testified on the alleged incidents. Mr. Familiar was cross-examined by Mr. Udovic and questioned by the Commission. Refer to tape recording for further testimony.**

**The Commission convened into an executive session at 11:35 a.m. to consult with counsel and reconvened at 11:42 a.m.**

**In presenting his case, Mr. Udovic called upon Margaret Almada, who testified on the complaint received from a member of the public regarding the Appellant and the rules on probationary period. Ms. Almada was cross-examined by Ms. Rabago and questioned by the Commission. Refer to tape recording for further testimony.**

**Mr. Udovic called upon Nelson Ho, who testified on the alleged complaints, the Appellant's work performance, the purpose of the probationary period, and the decision to terminate the Appellant. Mr. Ho was cross-examined by Ms. Rabago and questioned by the Commission. Refer to tape recording for further testimony.**

**The Commission recessed at 12:20 p.m. to allow staff time to retrieve and make copies of §3-38 of the Civil Service Rules and Regulations pursuant to Ms. Rabago's request that it be submitted as evidence (Appellant's Exhibit C). The hearing reconvened at 12:28 p.m.**

**Ms. Rabago stated the following in closing:**

**She'd like to refer the Commission to 3-38(b)(1). An employee must meet performance requirements of the position as measured by a formal performance appraisal in order to successfully complete initial probation period. In this case, it has not been done, and she believes that there are other options open to the employer when those steps have not been taken, and they fall under 3-38(3)(c) where the probationary period may be extended for further evaluation of the employee's ability to successfully perform the duties of the position. Basically, this is the civil service rule that is followed by the County of Hawaii for probationary appointments, and she believes in this case they have not followed their own rules.**

**Ms. Rabago did speak with Mike Dworsky on April 6. Mike Dworsky is the Chief of the Solid Waste Division. She asked him about what was going on and talked to him about the internal complaint procedure. It was at that time that he said everyone's mind was made up and that to go into the informal process of the**

**internal complaint procedure was not required. He didn't think anybody was going to change their mind, and he said to go ahead and file at the Merit Appeals level. This is not unheard of in her dealings with Mr. Dworsky, in that they had a prior case in Kona in the Solid Waste Division where someone did not pass their probationary period, and she was given the same direction from Mr. Dworsky in that case. However, that party did not choose to appeal.**

**Ms. Rabago believes this case is properly before the Civil Service Commission acting as the Merit Appeals Board, and she believes they should be hiring Mr. Familiar back into his position. They were premature in their termination of his probationary appointment.**

**In closing, Mr. Udovic stated that following:**

**He would remind this Commission that the only evidence before the Commission is the testimony of Mr. Familiar as well as the testimony of Mr. Ho and Ms. Almada. Any of the comments or statements made by Ms. Rabago or him is not evidence before the Commission. The only evidence is the sworn testimony. Therefore, any of the statements made by Ms. Rabago in the very beginning of this matter are not evidence and the Commission cannot consider them as such.**

**What the Commission is being asked to consider is whether or not Mr. Familiar successfully completed his probationary period. The whole point of a probationary period is to determine whether or not new employees meet the job requirements of the employer. They're given a six-month period of time for them to evaluate while they're on the job to make sure their work habits are appropriate, to make sure that they're able to operate equipment satisfactorily, etc.**

**There were two citizen complaints which were filed against Mr. Familiar. These weren't even complaints specifically from fellow employees. These were external complaints filed by citizens who directly related to Mr. Familiar's ability to operate a ten-ton piece of equipment safely. He has to be able to do that**

**satisfactorily. An employee also has to interact with fellow workers properly and not get involved in incidences of workplace violence.**

**The real tragedy is that the Commission is being asked to second guess what the department did in evaluating whether or not Mr. Familiar is an adequate employee. He's not a member of the civil service, so the same rules and regulations which apply to members of the civil service do not apply to Mr. Familiar.**

**In looking at the sections that were quoted and admitted, §76-41, it talks about performance appraisal systems. It says there shall be established and maintained performance appraisal systems for the purpose of evaluating the performance of employees in the civil service. Those standards do not apply to Mr. Familiar. He was not a member of the civil service at that time. He was a probationary employee who had not been admitted into the civil service. Therefore, the same rules and regulations or the same guarantees of due process and procedural aspects, etc., do not apply to probationary employees. It's there in the statute, and they can't apply those same standards to probationary employees.**

**This is a probationary employee about whom Mr. Ho received a complaint on March 29, 2006. He began an investigation of what Mr. Familiar's work relationship was. Two days later, on March 31, Mr. Familiar was discharged. They got the information together, they determined that he wasn't a safe driver, that they didn't want him operating a piece of equipment and causing harm to other people, and they decided to discharge him. He just didn't pass his probation.**

**Ms. Rabago stated the following in rebuttal:**

**She believes that §3-38 that was introduced as Exhibit C states in subsection "a" that all civil service appointments which are at least the duration of the initial probationary period shall be filled by probationary appointment applies to Mr. Familiar. She believes that as a probationary appointment, Mr. Familiar is afforded the opportunity to meet the performance requirement measured by a formal performance appraisal.**

**She believes that §76-41 is relevant in this case. §76-41 says the performance judge, or merit appeals board as the case may be, shall use the conditions in subsection b as a test in reaching a decision on whether or not this is with or without merit. This is the process to judge whether the decision to let a probationary employee go was with or without merit. If there were no procedures at all to follow, the day before anybody's probation is up, they can be let go with no reason whatsoever. She doesn't believe that is the intent of the Hawaii Revised Statutes, and she doesn't believe that is the intent of the merit principle or the intent of the civil service rules. Everyone should be given an opportunity to succeed and to be set up for success and not failure.**

**Mr. Udovic responded that the performance appraisal system deals with employees who are substandard employees and who have met civil service status. The requirements are there in §76-41 to apply to those people who are members of the civil service and how they are to be treated. They do not apply to people who are not members of the civil service.**

**Ms. Rabago stated that she has to refer to §3-38 of the civil service rules, section 1. A formal performance appraisal is set up to address the situations of whether or not someone is qualified for the position, and this was not done.**

**MOTION: Mr. Kaminaka moved for an executive session to consult with counsel. The motion was seconded by Mr. Cohen and unanimously carried.**

**The Commission convened into an executive session at 12:39 p.m. and reconvened at 12:53 p.m.**

**The Commission entered into deliberations:**

**Mr. Kaminaka stated that in hearing the testimony from the Appellant and Mr. Udovic, it's his opinion that Mr. Familiar was not determined to be an employee, because he was still serving a probationary period. However, he believes that pursuant to §3-38**

**on probationary periods, Mr. Familiar should have been provided an evaluation.**

**Mr. Kaminaka recommended that both parties consider a settlement of some sort allowing Mr. Familiar to go back and be given an opportunity to show the County that he can be a worthy employee over a three-month probationary period. During that period, he can be given feedback, and at the end of the third month, the employer can make a decision on whether to hire him as a permanent employee or not.**

**Mr. Cohen stated that on one side of the coin Mr. Familiar was provided with orientation materials and information. He too is concerned about the evaluation process as such that he thinks the employer does have a responsibility to communicate things in writing to the employee during the probationary period. Going back to the other side of the coin, Mr. Cohen is concerned about issues of safety, which is a very important, and Mr. Familiar is driving around with ten tons. Regardless of the situation, if the department receives comments from a citizen saying that it was dangerous, they all have to pretty much believe that the citizen is correct. They can't challenge that.**

**Mr. Cohen is also concerned about interpersonal relationships with fellow workers. That's an important ingredient because the employee is representing the County of Hawaii. This is a critical ingredient in the job, and Mr. Familiar has to be very conscious of it. Mr. Familiar also has to be very, very careful, certainly during his probationary period, because he doesn't have the same rights as a permanent employee.**

**Mr. Cohen further stated that he would go along with the motion of an extension to Mr. Familiar's probationary period for a limited amount of time under close supervision.**

**Chair Robinson stated that for him, in reviewing this case with the evidence that was introduced, he's bothered by the fact that Mr. Familiar was never given any kind of written evaluation of the three-month period and that he was not provided with copies**

of the complaints that had been issued. Like Mr. Cohen, he is very concerned about the breaking of rules and driving too fast.

They don't take lightly their discussion regarding continuing the probationary period, and he knows that by the same token if they do continue the probationary period, Mr. Familiar would be back in a situation that might make his life even more difficult. Consideration for extending the probationary period would include providing counseling, if needed, providing working with Mr. Familiar on improving his driving skills, or attending safety courses. The County has to do a better job of documenting what its relationship is with Mr. Familiar and what kind of instructions or help have been given. Therefore, he would agree with a three-month probationary period extension.

**MOTION:** Mr. Kaminaka moved that Mr. Familiar be afforded an opportunity to be provided with a three-month probationary period starting today and that he be provided with an evaluation throughout the three-month probationary period in written form by his supervisor. The County can then make a decision on whether to hire him as a permanent employee at the end of the probationary period.

Mr. Cohen asked Mr. White about the timeframe of the extension of the probationary period.

Mr. White responded that it was the Commission's consensus that it should be for a consecutive three-month period, so whenever Mr. Familiar does start, that would be the first day of the three-month period.

Mr. Cohen stated that it's very critical that there be very close documentation if they're going to do this, so he would certainly include in the motion that if it were a three-month period of time that there be mandatory meetings with Mr. Familiar's immediate supervisor. They should be well documented, no later than 30 or 60 days, or as appropriate, depending on situations.

**Chair Robinson asked Mr. Familiar whether he would be willing to go back into that situation again if they extended his probation for a three-month period.**

**Mr. Familiar responded that it's a hard question to answer. It's hard for him to say right now, because a lot of the things said about him weren't even true. He'd be putting himself back in the predicament where there's a chance for more allegations to be made against him.**

**Mr. Udovic stated that he has some concerns. The employer has the right to file an appeal to this decision as well. The Commission needs a written order on this particular case, and he doesn't think the Commission is prepared to make a written order today. They need minutes of the proceedings to do that, but if they do, Mr. Udovic may have to file a prohibitive practice complaint.**

**Ms. Rabago requested a five-minute recess with Mr. Familiar.**

**The Commission recessed at 1:05 p.m. and reconvened at 1:10 p.m.**

**Mr. Familiar stated that if that's how he can get back with the County, that sounds good to him. However, he can't return immediately. He's currently employed with Hawaiian Dredging.**

**Mr. White stated that it won't be happening right away anyway. He will have to get a summary of today's proceedings first and will need to prepare a findings of fact, conclusions of law, and send it to the Chair, who may or may not agree with it. He's unsure how long that process will take.**

**After the findings are signed by the Chair, then Mr. Udovic will be seriously looking at the possibility or probability of filing an appeal. That may also delay when Mr. Familiar can return.**

**Mr. Kaminaka withdrew his motion and submitted an amended motion as follows:**

**MOTION: Mr. Kaminaka moved that Mr. Familiar's probation be extended for a three-month period under appropriate supervision with evaluations on his performance, with the starting date as determined by the administrative process. The motion was seconded by Mr. Cohen and unanimously carried.**

**Ms. Rabago asked that Mr. Familiar be given at least two weeks notice so that he can give adequate notice to his current employer.**

**ADJOURNMENT**

**The hearing adjourned at 1:15 p.m.**

**Respectfully submitted,**

**Secretary, Civil Service Commission**

**APPROVED:**

**G. Rick Robinson  
Chair**

**vym**