

Hilo, Hawaii
Monday, August 22, 2005

**APPEAL HEARING – PETER BOUCHER – WHETHER OR NOT
THERE WERE VIOLATIONS OF ANY CIVIL SERVICE LAWS,
RULES, OR REGULATIONS IN ANDREW LEVIN'S DENIAL OF
THE APPELLANT'S APPEAL OF THE DISCIPLINARY ACTION
TAKEN BY BARBARA BELL, DIRECTOR, DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT.**

Present:

**Ms. Jeanne E. Yagi, Chairperson
Mr. Clifford Kaminaka, Vice Chair
Ms. Kaliko Chun, Member
Mr. Joel Cohen, Member
Mr. Ryan Roylo, Deputy Attorney General
Ms. Sandra H. Hamano, Clerk III
Ms. Sue Tanoue, Clerk III**

Also Present:

**Mr. Peter Boucher, Appellant
Mr. Ted Hong, Attorney for Appellant
Mr. Harry Freitas, Deputy Corporation Counsel
Mrs. Claudia Wilcox Boucher**

The following witnesses were sworn in and testified:

**Ms. Candace Pua, Department of Environmental Management
Mr. Andrew Levin, Executive Director, Mayor's Office
Ms. Margaret Almada, Personnel Management Specialist
Ms. Barbara Bell, Director, Dept. of Environmental Mgmt.**

Chairperson Yagi called the hearing to order at 9:40 a.m.

**Mr. Boucher was cross-examined by Mr. Freitas and re-
directed by Mr. Hong on exhibits 3, 4, 5, his JPR, and position**

description. Mr. Boucher was also questioned by Commissioners. Refer to tape recording for testimony.

Mr. Hong called upon Ms. Candace Pua who testified on working relationships and communication policies in the Department of Environmental Management.

Mr. Hong informed the Commission for the record that he had planned on calling Michael Ben to testify, but because Mr. Ben was not able to attend, Mr. Hong had submitted written questions to him. Mr. Hong presented the Commission with the written questions and the responses from Mr. Ben.

Mr. Hong called upon Mr. Andrew Levin who testified on the circumstances in the disciplinary action and decision process with respect to the Appellant's complaint. Mr. Levin was cross-examined by Mr. Freitas, questioned by the Commission, and re-examined by Mr. Hong. Refer to tape recording for testimony.

The Commission recessed at 12:15 p.m. for lunch and reconvened at 12:45 p.m.

In presenting his case, Mr. Freitas called upon Ms. Margaret Almada who testified on the Department of Environmental Management's internal complaint procedure and personnel matters regarding Mr. Boucher. Ms. Almada was cross-examined by Mr. Hong, re-examined by Mr. Freitas, and re-crossed by Mr. Hong. Refer to tape recording for testimony.

Mr. Freitas called upon Ms. Barbara Bell who testified on her working relationship with Mr. Boucher, the internal complaint procedure, Mr. Boucher's JPR, and the circumstances regarding the one-day suspension. Ms. Bell was cross-examined by Mr. Hong and questioned by the Commission. Refer to tape recording for testimony.

MOTION: Ms. Chun moved to convene into an executive session for legal advice from counsel. The motion was seconded by Mr. Kaminaka and unanimously

carried.

The Commission convened into an executive session at 2:49 p.m. and reconvened into the hearing at 2:55 p.m.

Chairperson Yagi announced that the continuation of the hearing will be held on Thursday, September 1, 2005, at 9:30 a.m.

The hearing recessed at 3:14 p.m.

Hilo, Hawaii
Monday, September 12, 2005

APPEAL HEARING – PETER BOUCHER – WHETHER OR NOT THERE WERE VIOLATIONS OF ANY CIVIL SERVICE LAWS, RULES, OR REGULATIONS IN ANDREW LEVIN'S DENIAL OF THE APPELLANT'S APPEAL OF THE DISCIPLINARY ACTION TAKEN BY BARBARA BELL, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL MANAGEMENT.

Present:

**Ms. Jeanne E. Yagi, Chairperson
Mr. Clifford Kaminaka, Vice Chair
Ms. Kaliko Chun, Member
Mr. Ryan Roylo, Deputy Attorney General
Ms. Sandra H. Hamano, Clerk III
Ms. Velma Y. Menezes, Secretary-Reporter**

Excused:

Mr. Joel Cohen, Member

Also Present:

**Mr. Peter Boucher, Appellant
Mr. Ted Hong, Attorney for Appellant
Mr. Harry Freitas, Deputy Corporation Counsel
Mrs. Claudia Wilcox Boucher**

Chairperson Yagi called the hearing to order at 10:38 a.m. with the continuation of Ms. Bell's testimony. Refer to tape recording for testimony.

In his closing statement, Mr. Hong stated the following:

The Commission has to consider §76-47e and make the determination whether or not the action taken by the County was substantiated in any material respect. The question that the

Commission has to answer is whether the County had just cause to suspend Mr. Boucher.

If the Commission looks at the written testimony submitted by Mr. Ben, he said that the standard for which disciplinary action can be taken against excluded management like Mr. Boucher would be just cause. Mr. Levin testified that he used just cause in reviewing Mr. Boucher's suspension, and Ms. Bell said she also used the just cause standard although she couldn't recall any of the elements of what just cause is.

The County has not defined what just cause is. The only evidence on the record for the Commission's consideration is the definition of just cause that the Appellant submitted, which is found in Appellant's Exhibit 12. That exhibit lists seven factors that the Commission should consider.

One is did management adequately warn the employee of the consequences of his conduct? The authors of Exhibit 12 note that there must have been actual oral or written communication of the rules of penalties to the employee. At no time were there any written or oral communications from Ms. Bell to the employees that sending out letters to homeowners about sewer connections as a representative of the department's director was unacceptable. In fact, the evidence shows that it was a standard operating procedure that allowed Mr. Boucher to submit those kinds of letters. Mr. Hong stated that he highlighted the language of all those different letters in his argument, and he highlighted the sentence specifically.

Mr. Hong also pointed out that in terms of the standard operating procedure, Galen Kuba, who was the acting director, testified that those kinds of letters are perfectly permissible because they were talking about operational, not departmental or policy, issues and there was no reason to route those letters to the department director.

The County's response on this particular point is being consistent and Mr. Boucher should have known better. Knowing better is not a legitimate or sufficient management technique. It

doesn't even work in Mr. Hong's life with his wife. In any relationship, one cannot assume that the other person should know better, whether in a personal or professional relationship; and if a person is going to require somebody to know better, they should at least have a common frame of reference. The evidence shows that neither Ms. Bell nor Mr. Boucher have a common frame of reference, unlike Mr. Kuba who has that kind of experience that understands the department and how it works, and understands the duties and responsibilities of the department. He has a common frame of reference with Mr. Boucher, and he testified that in his opinion sending out those kind of letters was perfectly permissible.

Did Management investigate before administering discipline? Management should investigate whether the employee did in fact violate a rule or order before the decision to discipline is made. In this case there was no evidence that Ms. Bell conducted any investigation. Had she conducted an investigation, her file would have pulled up all these other letters that were sent out by Mr. Boucher on the department's behalf. If she was armed with those other letters, she could have gone to Mr. Boucher to ask what was going on, seeing a pattern of letters going out. She could have headed this off at the pass, but she didn't. She immediately jumped to a one-day suspension for Mr. Boucher.

Was the investigation fair and objective? There was no investigation so obviously it wasn't fair or objective.

Did the investigation produce substantial evidence of proof or guilt? There is no evidence of proof or guilt. If anything, the evidence points to a pattern of inconsistent and sometimes contradictory management policies by the department. The evidence shows Mr. Boucher sending out these types of letters for a number of years. The letters only instruct homeowners what to do. At no time did the deputy director inform Mr. Boucher that sending out these kinds of letters were no longer acceptable. Now issues have come up that they were never aware that these letters were going out, and that's the whole purpose of the third element which talks about conducting an investigation. As Mr. Hong pointed out, they weren't aware that if they had conducted an

investigation they would be aware that these letters were going out and they could have addressed the particular issue at that point.

Were the rules, orders, and penalties applied evenly and without discrimination to all employees? If management had been lax in enforcing its rules in the past, it cannot suddenly reverse its course and begin to crack down without warning employees well in advance. Clearly that's what happened here. They are changing the rules but they are not telling people what the change is. All they are doing is taking it out on Mr. Boucher. If they had told Mr. Boucher that they are not going to accept these letters any more and that he has to stop sending out these letters, he would have stopped. There is nothing to indicate in the record, even though there is a personality conflict between Mr. Boucher and Ms. Bell, that Mr. Boucher is completely insubordinate. So had they done this, and had they warn the employees, none of this would have happened.

Was the penalty reasonably related to the seriousness of the events and record? A trivial proven offense does not merit harsh discipline unless the employee has a record of being found guilty of the same offense a number of times in the past. Mr. Boucher, the record shows, has never had any disciplinary action throughout his career with the County. Although Ms. Bell recognizes there is a personality conflict, she still sends out letters praising Mr. Boucher's work and his professionalism, as in Exhibit 19 where she praises his professionalism and his hard work. Moreover, in her testimony she stated she never gave him a verbal or written reprimand. Her testimony was very long and drawn out. Mr. Hong asked her to show him where, in those letters, she used the word reprimand. She admitted that none of the memos had the word reprimand in it. But again it falls back on he should have known that this was a reprimand.

Additionally, the progressive discipline doctrine basically says you climb the ladder with respect to discipline. It starts with reprimands, then suspensions, then larger suspensions, and finally termination. In this particular case although Ms. Bell admitted that she was following the doctrine of progressive discipline even if she couldn't show any written reprimands, oral

reprimands, or reprimands of any kind, she just jumped to suspension. Mr. Hong submits that she failed to follow the doctrine of progressive discipline.

Finally, there was no just cause to suspend Mr. Boucher. There is nothing to substantiate the action taken by the department. Mr. Hong is asking that the Commission reinstate Mr. Boucher, award him back pay, as well as attorney's fees and costs. In addition, they would like the Merits Appeal Board to consider another alternative which is under the Unit 13, HGEA Collective Bargaining Agreement, that states an employee can be put on educational sabbatical, which means he receives half pay, but he doesn't report to work specifically. He does go to take classes and furthers his education in the field, which is within the employer's discretion. For all those reasons, they ask again the Commission to overturn this particular suspension.

Mr. Freitas stated the following in his closing arguments:

He agrees with Mr. Hong on only one portion and that is that the Commission is bound by HRS 76-47 to determine whether or not this appeal should be upheld or not.

Basically, under that section it says if the board finds that the reasons for the action are not substantiated in any material respect then the board shall order the employee reinstated without pay. However, if the board finds that the reasons are only partially substantiated the board shall sustain the action of the appointing authority. The board also has the authority to do whatever they want basically. It can modify the ordinance by statute.

As far as just and proper cause, just because Mr. Hong submits something as evidence, it doesn't mean that that applies to this case. The board needs to make that determination. Mr. Freitas is not going to tell the board that those are not terms that are used for just and proper cause because they are, but they are normally terms that are used in union matters or arbitration matters.

Mr. Boucher is not a union member. Mr. Boucher is an EM-7 and falls in a different category. There are no guidelines when it comes to EM-7s because there is nobody above him except the director and the deputy director. Mr. Boucher has written many letters, but he didn't have the authority to say that he is under the authority of the director when he didn't even check with the director. She's new there and had been there for a couple of years at that time. Also, Mr. Boucher knew that this was a controversial matter. It took four years to get that ordinance changed.

Mr. Freitas doesn't think the Commission is bound by the just and proper cause that's listed in the evidence. Did Mr. Boucher have notice? Yes. The County's position is that the Exhibit 2 in their documents talks about the media policy and basically says that if someone is talking to the media, that person has to make sure the rules are being followed and that everything works out well. Writing a letter to the public, to Mr. Freitas, is the same thing because the media is the public, so he believes that these things overlap.

Is there an actual letter that says written reprimand? Mr. Freitas says no. There isn't a letter that actually says written reprimand but in looking at all of the letters in the exhibits, Ms. Bell does communicate her expectations. One of her expectations, as outlined in Exhibit 4, is that Mr. Boucher have timely communications with what's going on and that he be aware of the public's perception of the division. Not only does Ms. Bell tell him that in July 2003, she gives him another expectations letter in July 2004 with the same thing. In those letters, she refers to instances of unacceptable behavior. Now there is nothing on this letter that says written reprimand but again Mr. Freitas is going to say that Mr. Boucher doesn't fall into the normal category. He's an EM-7. In both of those expectation letters Ms. Bell is pointing out things that should have been done or were done improperly and should have been done differently. To Mr. Freitas, those are written reprimands.

Sometime during all of this the DHHL problem comes up. There are emails on that, and Mr. Boucher knows that it's a controversial issue. He basically says that he is wiping his hands of

it, you handle it, I'm out of here, and Ms. Bell takes over from there. This ordinance was a controversial issue. Everyone knew that. Mr. Boucher wrote the letter anyway, and that was wrong. He got disciplined. Was that progressive discipline? Yes, because he got the written reprimands. The next thing after written reprimands is a one-day suspension or maybe more depending on the degree of it. Ms. Bell chose to give Mr. Boucher a one-day suspension. Mr. Freitas believes the appointing authority's position is substantiated--if not completely substantiated then definitely partially substantiated.

As far as the award that Mr. Hong is requesting, the Commission does have the authority to give Mr. Boucher back pay. The Commission does not have the authority to give him cost and fees. Mr. Freitas doesn't see that anywhere in the HRS. If Mr. Hong can point that out to him, then he will gladly consider that, but Mr. Freitas' position right now is that he doesn't have the right to those things.

Mr. Freitas also thinks it is very clear that what is going on when Mr. Boucher says that he wants a sabbatical until this administration is out basically shows he doesn't get along with these people. He only wants to be out of his position and that's with pay until this administration is out, then he wants to come right back in. Mr. Freitas told the board at the beginning of the hearing that this is something they should mediate, because looking at everything that's going on Mr. Freitas just sees more things coming up the road. Unfortunately, the board chose not to do that. At this point the board may have to just go through its ruling and however it decides, the County will abide by it per statute.

Mr. Hong stated the following in rebuttal:

The Commission has a choice in terms of theories of the case. The Commission has a choice in terms of what to follow with respect to the law. He thinks the County's position is irresponsible. One of the things they can agree upon is this is a work place that in terms of outsiders looking in there is all this conflict that is going on. In cases of conflict, it is imperative that

the employer make clear what the rules and responsibilities are. The County's response to this is irresponsible in two ways. The first is that Mr. Freitas is suggesting to the Commission that regardless of the law, regardless of the standards, that the Commission just pull something out of the air in terms of deciding whether or not the County's actions in terms of just cause were substantiated. Mr. Hong submits that if the Commission does that, the Commission would be essentially be forcing not only Mr. Boucher but other employees in his position as excluded management to appeal those kinds of decisions by the merit appeals board because in terms of any action by the employer, in terms of any action by a reviewing agency or board, it has to be tied to certain guidelines, certain standards such as those in Exhibit 16 that the employer has to follow.

In Exhibit 16, Mr. Ben was asked what is the standard the employers have used as a matter of practice in policy to discipline excluded management employees like Mr. Boucher (just cause, cause, or at will). His response was that rules have provided that regular employees could be disciplined for just cause. With respect to discharge, rules provided that discharge could be done for the good of the service. While the rules on this matter no longer exist, Act 253, Session Laws 2000, preserve these for our regular employees; i.e., today the requirement remains that regular employees may be suspended for just cause and regular employees may be discharged for the good of the service. For clarification, Mr. Ben writes that regular employees are employees in civil service positions who have completed their initial probationary period. Mr. Boucher is a regular employee. He is an employee in a civil service position who has completed his initial probationary period.

The other point that Mr. Hong thinks the County is irresponsible in making is that for some reason they feel that once a person becomes a certain level of employee that that person should basically know better. Mr. Hong submits that regardless of where we are, whatever we do professionally, it's never a matter of should have known better or reading another person's mind. There must be clear guidelines, and it flows from a mission statement. It flows from goals and objectives, tasks, policies,

guidelines. It has to be done that way so everybody is on the same page. It's like a team, in terms of basketball or any kind of other event, that if you have a common goal of what to do with everybody understanding what their roles are, what they need to do. Expecting somebody to know better or reading somebody else's mind in terms of what they are requiring or what they are anticipating or what they want is always a mistake regardless of circumstances in personal or professional environments. That is why in terms of what's happened here, it's irresponsible to come before the merit appeals board and suggest that employees of a certain manager level have to know better or should know better or they should be able to read people's minds. The point is not that they should know better. The point is that management, beginning with the administration, has to make its goals clear, its objectives clear, its policies clear; and in this case they weren't. That's why they are asking the board to overturn the suspension.

The Commission entered into deliberations.

MOTION: Mr. Kaminaka moved to convene into an executive session to consult with legal counsel. The motion was seconded by Ms. Chun and unanimously carried.

The Commission convened into an executive session at 11:30 a.m. and reconvened to the hearing at 11:58 a.m.

The Commission recessed at 11:59 a.m. for a lunch break and reconvened into deliberations at 12:33 p.m.

Ms. Chun stated that she feels the appointing authority did substantiate their case. Mr. Boucher could have done a great deal more in educating and preparing the public. The letter to the citizens was lacking in explanation.

Chairperson Yagi reminded the Commission that it's their responsibility to take what is put in front of them by the appealing individual, and at the same time the information that is put in front of them by the responding agency. None of them are attorneys or professional human resource persons so they have to

use their best judgment based on their life experiences and what they know of the law as has been reflected by the attorneys in this case. Anything that gives them a feeling that "this is" or "this is not" should be substantiated for the good of the record and for the good of the appealing individual to understand why. That goes a long way not only to substantiate a reason for leaning toward one decision to another, but it also gives instructions which is a service they can provide.

Mr. Kaminaka stated that for himself, he looks at the black and white and sees what the law says, and it's clear. When it's a gray area, he just has to make a judgment call thinking down the line about motive, reasons, etc. In the private sector, when he hires people, he always asks his employees whether they know how to follow instructions because those are the kinds of employees they want. He tells his boss that he follows instructions very well provided the instructions are very clear. If the instructions are not clear, he can make a lot of mistakes.

Putting himself in Mr. Boucher's shoes, it's obvious that Mr. Boucher did not have proper instructions. There was no delegation policy in place. He had done the letter before and had always cited the director's authority, and that is what he is going to continue to do. On the other hand, Mr. Boucher has the intelligence to know that on something like this, he has to use good judgment and determine what kind of reaction he's going to get from sending those letters out. It only takes one person to say "I don't agree" even though he sends out three hundred. All he had to do was call Ms. Bell and tell her that he'd be sending out the letters, asking for her thoughts. When Mr. Kaminaka has a letter that may provoke a reaction from a person, he usually runs it through his manager. He doesn't have to take the suggestions, as long as the manager knows about it.

Chairperson Yagi asked the commissioners whether, based on the record that is in evidence, they believe that there was information given to Mr. Boucher and whether it met its purpose.

Mr. Kaminaka responded in the negative. He didn't think Mr. Boucher was provided the information on guidance, but he could have handled it differently.

Ms. Chun stated that she thought an effort was made; however, the dislike for Ms. Bell was evident. Mr. Boucher felt that she was not qualified to be his boss, so he wasn't going to listen to anything. He thought he knew better, and everybody should listen to him. Ms. Chun believes he was going to find fault with whatever she said to him.

Mr. Kaminaka commented that there is some merit in what Ms. Chun said because in Ms. Bell's letter to Mr. Boucher, she was enlisting his cooperation. When workers are thinkers, they get a lot more accomplished.

Chairperson Yagi referred to County's exhibits 1, 2, 3, and 4. Those exhibits show an effort by the department to correct, and whether or not it was accepted by all employees is not the issue. The issue for her is what happened with the September 29, 2004 letter. If she were in the position of authority, she would have to demand a high alert level of how the public is going to take it. On the issue of whether the bonus was discretionary or not, it appeared that the discretionary power was from county to county, and the County of Hawaii determined that the bonus would be paid.

Ms. Chun stated that Ms. Bell thought the bonus was mandatory, although Mr. Boucher thought otherwise.

Mr. Kaminaka noted that Mr. Hong had pointed out that Mr. Boucher had not had adequate warning regarding the rules. He wasn't forewarned. Mr. Kaminaka believed, however, that the July 16 letter in exhibit 4 should have been a yellow light raising up some red flags. It doesn't say that it's a letter of reprimand, however. Mr. Kaminaka would also be very concerned if he got an appraisal such as in exhibit 5.

The only thing Mr. Kaminaka feels uncomfortable with is that the letters do not show the specific consequences. All of a sudden

he gets a letter saying he's suspended for one day. If people know what the consequences are beforehand, they'd be more careful in their actions.

Ms. Yagi noted that at a few other incidents followed the 2004 incident. The difficulty Mr. Kaminaka is talking about is the absence of a notice of a specific consequence. Ms. Yagi stated a need to ask their legal counsel a question.

MOTION: Ms. Chun moved to convene into an executive session to consult with legal counsel. The motion was seconded by Mr. Kaminaka and unanimously carried.

The Commission convened into an executive session at 1:02 p.m. and reconvened at 1:10 p.m.

MOTION: Ms. Chun moved that the appeal be denied. The motion was seconded by Mr. Kaminaka and unanimously carried.

The Commission recessed at 1:12 p.m. and reconvened at 1:20 p.m. into its regular meeting.

Chairperson Yagi noted that the Commission still needed to take up the Director's Report as unfinished business from the last meeting.

DIRECTOR'S REPORT

Mr. Ben reported the following:

1) The Mayor's position on the Kamehameha School issue is that it's not government's place to be supporting something like this; therefore, he will not be jumping on the bandwagon. It's a matter for the courts to decide.

2) The new chairperson for the Kauai Civil Service Commission is Rick Haviland, Jr. The vice chairperson is Suzanne

Aguiar, and the other members are Norman Akita, Gordon Yee, and Roland Sagum III.

3) It appears that the Governor is not inclined to appoint a new chief negotiator until after the election. Marie Laderta, who is heading both DHRD and the Office of Collective Bargaining has admitted that she has no knowledge of human resources. Her background is in torts. She will be depending a lot on her division chiefs to bring her on board.

4) Mr. Ben is taking the initiative to increase mileage allowance for County employees from 37.5 cents to 40.5 cents or at the highest contract rate. He will have to negotiate with the Union but doesn't expect any opposition.

NEXT MEETING DATE

The Commission scheduled its next meeting for October 18, 2005 at 9:30 a.m.

ADJOURNMENT

The meeting adjourned at 1:32 p.m.

Submitted by,

Secretary, Civil Service Commission

APPROVED:

**Jeanne E. Yagi
Chairperson**

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