

Hilo, Hawaii
Tuesday, October 28, 2003

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, October 28, 2003.

Present:

Ms. Diana Kahler, Vice Chair
Ms. Kaliko Chun, Member
Mr. Clifford Kaminaka, Member
Mr. Clarence Souza, Member
Mr. Mike Kagami, Deputy Corporation Counsel
Ms. Velma Y. Menezes, Secretary-Reporter
Mr. Rodney Kaido, Deputy Director of Personnel
Ms. Suellen Tanoue, Clerk

Excused:

Ms. Jeanne Yagi, Chair

Vice Chair Kahler called the meeting to order at 9:30 a.m.

MINUTES OF July 29, 2003 and September 16, 2003

MOTION: Mr. Souza moved that the minutes of July 29, 2003 be approved as circulated. The motion was seconded by Mr. Kaminaka and unaminously carried.

MOTION: Mr. Souza moved that the minutes of September 16, 2003 be approved as circulated. The motion was seconded by Mr. Kaminaka and unaminously carried.

COMMUNICATIONS

A) Communication No. 03-20, dated August 14, 2003, from Lincoln S. T. Ashida, Corporation Counsel regarding further clarification of opinion from Office of Information Practices regarding executive meetings.

MOTION: Mr. Souza moved that Communication No. 03-20 be received and filed. The motion was seconded by Mr. Kaminaka and unanimously carried.

B) Communication No. 03-21, dated October 6, 2003, from Dudley Akama, Deputy Corporation Counsel, requesting a continuance of Myrleen Kaloi's appeal hearing scheduled for October 28, 2003.

C) Communication No. 03-22, received October 16, 2003, from Myrleen K. Kaloi, regarding Objections to Written Request for Continuance Dated October 6, 2003; Certificate of Service.

D) Communication No. 03-23, dated October 17, 2003, to Mr. Harry Freitas, Deputy Corporation Counsel, and Ms. Myrleen K. Kaloi, from Jeanne E. Yagi, Chairperson, Civil Service Commission, denying the continuance in Ms. Kaloi's appeal hearing.

The above communications were considered simultaneously as they pertained to the same matter.

MOTION: Mr. Souza moved that Communication Nos. 03-21, 03-22, and 03-23 be received and filed. The motion was seconded by Mr. Kaminaka and unanimously carried.

UNFINISHED BUSINESS

A) Performance Evaluation Procedures for Annual Evaluation of Director of Personnel

Vice Chairperson Kahler recalled that at the last meeting the Commission had discussed including staff, cabinet, and the outside in the target group of people to participate in the evaluation.

Mr. Souza agreed that basically the people involved with the director in his daily job performance should be included. The County Council should be excluded; however, those who are directly involved with the director in negotiations should be included, as well as the Mayor and other cabinet heads.

Mr. Kaminaka noted that the questions should be objective, focusing on performance. The personal, subjective questions should not be a part of the evaluation questions.

Mr. Kaminaka commented that the manager's job is a lonely, difficult job. If an area of concern is brought up in the evaluation process, the Commission could make suggestions for improvement. But other than to interview the director's subordinates, the Commission really has no idea how to evaluate the director himself.

Vice Chairperson Kahler noted that the Commission will work with Mr. Ben in developing an instrument to use.

Mr. Kaminaka informed the Commission that his department conducts a survey every year. It is strictly voluntary. After the survey, they all get together and talk about the results of the survey. The managers are included. If a certain area is below par, they discuss it and try to find ways to improve on those areas. Mr. Kaminaka stated that he would be happy to share that information with the Commission. It contains very objective questions.

Mr. Souza commented that that is a good way of saying everyone should be working as one in getting the department ahead.

EXECUTIVE SESSION

A) Attorney/Client Privileged Communication Dated October 5, 2003.

MOTION: Mr. Souza moved to convene into an executive session. The motion was seconded by Mr. Kaminaka and unanimously carried.

The Commission convened into an executive session at 9:52 a.m. and reconvened at 10:04 a.m.

MOTION: Ms. Chun moved that the attorney/client communication dated October 5, 2003 be received and filed. The motion was seconded by Mr. Souza and unanimously carried.

DIRECTOR'S REPORT

Mr. Kaido reported the following:

1) Negotiations with HGEA units is ongoing. It appears as though arbitration will commence in January of 2004.

2) The Employee of the Year Awards was held on Friday, October 24. There were nineteen nominees. Diane Shiro of Public Works was selected Manager of the Year, George Ikeda of the Department of Parks and Recreation was Supervisor of the Year, and Amy Miyao from the Police Department was selected the Employee of the Year.

NEXT MEETING DATE

**The Commission scheduled its next meeting for
November 18, 2003 at 9:30 a.m.**

The Commission recessed at 10:06 a.m.

**Tuesday, Oct. 28, 2003
Hilo, Hawaii**

**APPEAL HEARING – MYRLEEN K. KALOI – WHETHER OR NOT
THERE WERE VIOLATIONS OF ANY CIVIL SERVICE LAWS, RULES,
OR REGULATIONS IN THE APPELLANT’S TERMINATION FROM
THE DEPARTMENT OF THE CORPORATION COUNSEL.**

Present:

**Ms. Diana Kahler, Vice Chair
Ms. Kaliko Chun, Member
Mr. Clifford Kaminaka, Member
Mr. Clarence Souza, Member
Ms. Sarah Hirakami, Deputy Attorney General
Ms. Suellen Tanoue, Clerk III
Ms. Velma Y. Menezes, Secretary-Reporter**

Also Present:

**Ms. Myrleen K. Kaloi, Appellant
Mr. Robert Crudele, Attorney for Appellant
Mr. Harry Freitas, Deputy Corporation Counsel**

The following exhibits were entered into the record:

**Appellant’s Exhibit 1 - Memorandum dated April 30, 2004 to
Myrleen Kaloi, Legal Clerk III, from
Lincoln S. T. Ashida, written Notice
of Termination**

**Appellant’s Exhibit 2A -Performance Report dated
August 31, 2000 for the period of
June 1, 2000, through August 31,
2000**

- Appellant's Exhibit 2B- Performance Report dated November 30, 2000 for the period of September 1, 2000, through November 30, 2000**
- Appellant's Exhibit 2C- Performance Report dated September 20, 2001 for the period of September 1, 2000, through February 28, 2001**
- Appellant's Exhibit 2D- Performance Report dated June 4, 2002 for the period of June 1, 2001, through May 31, 2002**
- Appellant's Exhibit 3 - Memorandum dated June 10, 2002, from Lincoln S. T. Ashida, regarding Evaluation-June 1, 2001 through May 31, 2002**
- Appellant's Exhibit 4 - Memorandum dated February 7, 2003, from Lincoln S. T. Ashida, regarding Written Reprimand**
- Appellant's Exhibit 5 - Memorandum dated February 8, 2003, from Myrleen K. Kaloi, regarding Written Reprimand dated February 7, 2003**
- Appellant's Exhibit 6 - Memorandum dated February 20, 2003, from Lincoln S. T. Ashida, regarding Written Reprimand dated February 7, 2003**
- Appellant's Exhibit 7- Letter dated November 27, 2000 from Ted H. S. Hong, untitled**
- Appellant's Exhibit 8 - Myrleen K. Kaloi's List for Training with Office of the Corporation Counsel**

- Appellant's Exhibit 9 - Myrleen Kaloi's Activity Sheet for February 3, 2003**
- Appellant's Exhibit 10- Myrleen Kaloi's Activity Sheet for February 4, 2003**
- Appellant's Exhibit 11- Myrleen Kaloi's Activity Sheet for February 5, 2003**
- Appellant's Exhibit 12- Myrleen Kaloi's Activity Sheet for February 6, 2003**
- Appellant's Exhibit 13- Myrleen Kaloi's Activity Sheet for February 7, 2003**
- Appellant's Exhibit 14- Myrleen Kaloi's Activity Sheet for February 10, 2003**
- Appellant's Exhibit 15- Myrleen Kaloi's Activity Sheet for February 11, 2003**
- Appellant's Exhibit 16- Myrleen Kaloi's Activity Sheet for February 14, 2003**
- Appellant's Exhibit 17- Myrleen Kaloi's Activity Sheet for February 24, 2003**
- Appellee's Exhibit 1 - Application dated December 5, 1992**
- Appellee's Exhibit 2 - Memorandum dated April 28, 2000, from Ted H. S. Hong, request for Recruitment, Legal Clerk III**
- Appellee's Exhibit 3 - Reallocation Notice dated May 24, 2000**
- Appellee's Exhibit 4 - Memorandum dated May 31, 2000, from Ted H. S. Hong, to All**

Attorneys & Staff

- Appellee's Exhibit 5 - Confidential-Personnel Information dated May 30, 2000, From Ted H. S. Hong, to Richard D. Wurdeman, regarding Interview Process for Clerk Stenographer Position (#2933)**
- Appellee's Exhibit 6 - Payroll Certification dated June 2, 2000**
- Appellee's Exhibit 7 - Reallocation Notice dated October 27, 2000**
- Appellee's Exhibit 8 - Payroll Certification dated November 3, 2000**
- Appellee's Exhibit 9 - Job Performance Report dated August 31, 2000**
- Appellee's Exhibit 10- Job Performance Report dated November 30, 2000**
- Appellee's Exhibit 11- Job Performance Report dated September 20, 2001**
- Appellee's Exhibit 12- Letter dated November 27, 2000, from Ted H. S. Hong, to Myrleen Kaloi**
- Appellee's Exhibit 13- Memorandum dated August 12, 2001, from Myrleen, to Lincoln, regarding Smith v Koiku Civil No. 01-106K (with attachments)**
- Appellee's Exhibit 14- Email dated December 19, 2001, from Myrleen Kaloi, to Frances Cambra and Keaka Orpilla, Regarding Inquiries to Pat O'Toole and Craig Masuda**

- Appellee's Exhibit 15-** Memorandum dated January 14, 2002, from de Ette, to Myrle regarding Tax Deeds-Addition Corrections
- Appellee's Exhibit 16-** Memorandum dated January 18, 2002, from de Ette, to Myrle regarding Tax Deeds (with attachments)
- Appellee's Exhibit 17-** Email dated January 30, 2002, from Craig Masuda, to Myra Ochi and Lincoln Ashida
- Appellee's Exhibit 18-** Memorandum dated March 13, 2002 (with attachments)
- Appellee's Exhibit 19-** Memorandum dated March 14, 2002, from Myra, to Myrle regarding Opening Files (with attachments)
- Appellee's Exhibit 20-** Email dated March 21, 2002, from Craig Masuda, to Myra Ochi
- Appellee's Exhibit 21-** Memorandum dated March 21, 2002
- Appellee's Exhibit 22-** Memorandum dated July 3, 2002
- Appellee's Exhibit 23-** Memorandum dated July 8, 2002, from Myrle to Myra and
Memorandum dated July 8, 2002, from Myra to Myrle
- Appellee's Exhibit 24-** Memorandum dated July 15, 2002, from Myra to Myrle, regarding reassignment of work request dated July 12, 2002 from Mike Kagami and
Memorandum dated July 15, 2002,

from Myrle to Myra (with attachments)

- Appellee's Exhibit 25-** Email dated January 27, 2003, from Craig Masuda to Cathy Hall, regarding transfer of calls
- Appellee's Exhibit 26-** Email dated February 23, 2003, from Kathy Garson, to Myrle Kaloi, regarding Springer with reply to Kathy Garson from Myrle Kaloi dated February 24, 2003 and forwarded to Cathy Hall from Myrle Kaloi dated February 24, 2003
- Appellee's Exhibit 27-** Memorandum dated February 25, 2003 (with attachments)
- Appellee's Exhibit 28-** Email dated February 26, 2003, from Myrle Kaloi, to Cathy Hall regarding reply to Myrle Kaloi from Cathy Hall dated February 26, 2003 and reply back to Cathy Hall from Myrle Kaloi dated February 26, 2003
- Appellee's Exhibit 29-** Memorandum dated February 25, 2003
- Appellee's Exhibit 30-** Seminar/Conference Evaluation Form dated September 18, 2002 for Mistake-Free Grammar & Proofreading seminar
- Appellee's Exhibit 31-** Seminar/Conference Evaluation Form dated March 6, 2003, for Internal Communication

- Appellee's Exhibit 32- Seminar/Conference Evaluation Form dated February 6 & 9, 2001, for Word Perfect Training Classes, Level I & II**
- Appellee's Exhibit 33- Conference and Employee Development and Training Record for The 2001 Honolulu Conference for Administrative Professionals**
- Appellee's Exhibit 34- Position Description Form for Position No. 2933 dated December 19, 2002**
- Appellee's Exhibit 35- Position Description Form for Position No. 2933 dated October 10, 2000**
- Appellee's Exhibit 36- Memorandum dated June 10, 2002 from Lincoln S. T. Ashida, to Myrleen Kaloi regarding Evaluation June 1, 2001 through May 31, 2002**
- Appellee's Exhibit 37- Job Performance Report dated June 12, 2002**
- Appellee's Exhibit 38- Memorandum dated June 24, 2003, from Myrleen K. Kaloi, to Lincoln S. T. Ashida, regarding Job Performance Report period of June 1, 2001 through May 31, 2002**
- Appellee's Exhibit 39- Memorandum dated February 7, 2003, from Lincoln S. T. Ashida to Myrleen Kaloi, regarding Written Reprimand**
- Appellee's Exhibit 40- Memorandum dated February 7, 2003, from Myrleen K. Kaloi, to**

**Lincoln S. T. Ashida, regarding
Written Reprimand**

- Appellee's Exhibit 41-** Memorandum dated February 20, 2003, from Lincoln S. T. Ashida, to Myrleen K. Kaloi, regarding Written Reprimand
- Appellee's Exhibit 42-** Memorandum dated April 30, 2003, from Lincoln S. T. Ashida, to Myrleen Kaloi, regarding Written Notice of Termination (with attachments)
- Appellee's Exhibit 43-** Memorandum dated May 12, 2003, Myrleen K. Kaloi, to Lincoln S. T. Ashida, regarding Written Notice of Termination dated April 30, 2003
- Appellee's Exhibit 44-** Letter dated May 13, 2003, from Lincoln S. T. Ashida, to Ms. Myrleen K. Kaloi, regarding Memorandum dated May 12, 2003 (with attachments)
- Appellee's Exhibit 45-** Activity Sheet dated February 10, 2003 (with attachments)
- Appellee's Exhibit 46-** Activity Sheet dated February 11, 2003
- Appellee's Exhibit 47-** Activity Sheet dated February 14, 2003
- Appellee's Exhibit 48-** Work Request dated February 3, 2003, from KAG (with attachment)
- Appellee's Exhibit 49-** Work Request dated February 7, 2003, from KAG (with attachment)

Appellee's Exhibit 50- Work Request dated February 7, 2003, from KAG (with attachment)

Appellee's Exhibit 51- Work Request dated February 10, 2003, from KAG

Appellee's Exhibit 52- Work Request dated February 11, 2003, from KAG

Appellee's Exhibit 53- Work Request dated February 11, 2003, from KAG

The following witnesses were sworn in and testified:

Ms. Myrleen K. Kaloi, Appellant

Ms. Myra Ochi, Supervising Legal Clerk, Corporation Counsel

Vice Chairperson Kahler called the hearing to order at 10:38 a.m.

The Appellant requested a closed hearing.

Vice Chairperson Kahler stated that the issue in this case is whether or not there were any violations of any civil service laws, rules, or regulations in the Appellant's termination from the department of the Corporation Counsel.

Mr. Crudele stated the following in his opening statement:

The Appellant was a civil service employee for the County for over ten years, and for the last 2-½ years had been an employee of the Office of the Corporation Counsel as a Legal Clerk III. Her termination occurred in May 2003. The law that applies at that time was a revised version of what is referred to as Hawai`i Revised Statutes §76-41. Mr. Crudele distributed copies of the statute.

The Appellant is basically asserting that the law that applies to the termination is the law that was in effect at the time, which is significantly different from the law that was in effect prior to the termination. The basic position is that the law, as revised, indicates that the County has to have an established performance appraisal system in place and that it has to comply with the criteria of the new law. In other words, the performance appraisal system that was in place for the purposes of this termination has to comply with the new HRS §76-41, most particularly 76-41(b), which is entirely new and provides essentially that while the hiring authority, in this case the Corporation Counsel's Office, may terminate a civil service employee and can only do so if the termination is based on upon the failure of performance if that failure of performance occurred during a period of time that all seven of the employment conditions that is in that law were actually in place at the time.

The evidence will show that the termination in this particular case was not done applying the criteria of the new law, more specifically the conditions that the law requires be applied in determining whether or not an employee is meeting the performance requirements of the position. The law is clear. It specifically provides that the termination can only occur if those seven conditions were in place at the time.

In this particular case the new law came into effect in July of 2002. The evidence will show that Ms. Kaloi's last job performance evaluation (JPR) occurred in May of 2002, prior to the effective date of the new law, so there has not been any performance evaluation done during or under the new law.

The evidence will show that the Appellant received four JPRs prior to the new law and that the last one is the only one in which she received an unsatisfactory performance rating. The evidence will also establish that prior to the last JPR, under the old law, the Appellant did not receive any negative feedback that would have indicated to her that she was going to be receiving a negative JPR if she did not comply or correct herself. What

happened after the issuance of this sole negative JPR was that she met with the department head and her supervisor. The Appellant was surprised about getting a negative JPR and did not know why she was getting a negative JPR, because she hadn't gotten that kind of negative feedback.

The law specifically indicates that the employer must provide the employee with feedback so that the employee is put on notice regarding what the employer believes the employee is not doing or needs to do. This will give the employee reasonable opportunity to correct performance.

When the Appellant met with the department head and supervisor, they reconfirmed what was written in the last JPR in May 2002. The Appellant told them that she didn't agree with their assessment. She went back to work with the idea that she would work harder and try to correct the perception that she wasn't not performing up to expectations.

In December of 2002, the Appellant had a meeting with Corporation Counsel Lincoln Ashida. Mr. Ashida told the Appellant that he had talked to her two supervisors, both her former supervisor and current supervisor, and both had told him that her job performance was good and there were no problems with her job performance. So as a consequence of that meeting the Appellant believed that if there was a problem back in May it must have been corrected, and everything was fine.

During the course of same meeting the Appellant expressed to Mr. Ashida her desire to be transferred to a different department. The Appellant will testify that Mr. Ashida appeared visibly upset and did not understand why she wanted a transfer, because her performance was good and they were not having problems with her performance.

Soon thereafter on February 7, 2003, the Appellant received what is Exhibit 4, a written reprimand citing four events, which the Corporation Counsel's Office indicated evidence of a departure from the performance standard they were expecting.

Again the evidence will indicate that the Appellant was somewhat surprised because at the last meeting in December, she was told that she was performing fine.

Perhaps they perceived something wrong in the interim period, but nonetheless, under the new law, they are obligated to bring it to her attention and also to notify her of the possible consequences.

Once again the Appellant communicated with the Corporation Counsel's Office trying to find out why they believed her performance was not up to their expectations. She provided an explanation to some of the events that they were using as the basis for the written reprimand. The Appellant will testify as to what happened and why she feels at least three of the four events really do not reflect negative performance on her part. Shortly after the February reprimand, she received her notice of termination on or thereabout April 30, 2003.

The evidence will show that the Appellant was an initial probationary employee and that during the period of her probation she was issued two JPRs. Those two JPRs occurred with a prior department head, Mr. Ted Hong. In each of the JPRs, Mr. Hong made his own comments. In the first one, he said she was doing good, and in the second one he used words to the effect that "we really need your skills, you're doing a good job." Shortly thereafter, Mr. Hong wrote her a letter indicating that he was ending her probation, because he felt that she was performing as a Legal Clerk III.

The Corporation Counsel's position relative to the Appellant's termination is essentially that she doesn't have the basic skills to do her job. She doesn't have the education to do her job. The prior department head had her passing probation, basically under the comments that she was doing a great job, they need her skills, they rely on her, and now there's a new department head saying that not only is she not doing her job, but she doesn't have the basic skills to do the job or the education to do the job. Perhaps they made a mistake in the

beginning in passing her probation, but more importantly, under the new law it says that they're supposed to afford her in-service remedial training to address the shortcoming. The evidence will show that she has not offered that in-service remedial training that was specifically to address the complaints that they had.

The evidence will establish that the termination does not comply with the seven conditions under the statute.

Mr. Freitas stated the following in his opening statement:

He is in agreement with Mr. Crudele that 76-41 applies, however 76-41 applies in a different fashion. 76-41(a) basically says that you need to have a performance appraisal system. The County has had that all along. It is called a JPR, a job performance rating.

In order to terminate someone because they are not complying with the job performance rating, then paragraph b applies. That paragraph sets out the seven qualifications or the seven elements that must be fulfilled before terminating anyone.

The Appellant came in, not as a Legal Clerk III, but as a Steno Clerk when the Corporation Counsel's Office was actually looking for a Legal Clerk III. The position was allocated downwards because the Appellant did not qualify for that position. She was brought in as a Steno Clerk III in June of 2000, then September of 2000 was reallocated back up to a Legal Clerk III.

The probationary period was for six months. What Mr. Hong basically did was to say that they would not extend her probationary period from the September date forward; she had been doing the job, basically saying that come December 1, her probationary period is done. Coincidentally, January 1 is the same time the new administration took over.

Ms. Kaloi stayed for several years, and it wasn't till May of this year that she was released. She said she had gone through numerous trainings and that's why she can do some of the jobs, but because the office is training her so much, she doesn't have time to finish her work. So, now to come out to say that she didn't get the training is amusing, but all of that will be provided to the Commission in the evidence.

The bottom line is that Ms. Kaloi is not qualified and not capable to do the work of a legal clerk. The County gave her opportunities to do it, they gave her training, they critiqued her as she was going on, and finally they came to a point where they couldn't keep her anymore, not as a Legal Clerk III.

In presenting the Appellant's case, Mr. Crudele called upon Ms. Kaloi, who testified on her employment with the Corporation Counsel's Office and the circumstances leading to her termination. Ms. Kaloi was cross-examined by Mr. Freitas and questioned by the Commission. Refer to tape recording for testimony.

The Commission recessed at 12:45 for lunch and reconvened at 1:25 p.m.

Ms. Kaloi was redirected by Mr. Crudele, recrossed by Mr. Freitas, and questioned by the Commission.

In presenting the Employer's case, Mr. Freitas called upon Ms. Myra Ochi, who testified on the classification process of the Legal Clerk III position and the performance and qualifications of the Appellant in the position. Ms. Ochi was cross-examined by Mr. Crudele.

The hearing was continued to November 18, 2003, at 10:30 a.m. at which time Ms. Ochi will complete her testimony.

ADJOURNMENT

The hearing recessed at 4:10 p.m.

Submitted by,

Secretary, Civil Service Commission

APPROVED:

**Jeanne E. Yagi
Chair**

vym
