

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION¹

Wednesday, March 11, 2009

10:00 a.m. to 10:22 a.m.

11:06 a.m. to 11:22 a.m.

11:42 a.m. to 11:44 a.m.

101 Aupuni Street, Suite 230

Hilo, Hawai'i 96720

Present: Ann Lum, Acting Chair
Marilyn Nicholson, Member
Diane Gentry, Member
Arthur Martin, Member
Renee N. C. Schoen, Deputy Corporation Counsel
Mary E. Crosson, Secretary for the Board

Also present: Roy Takemoto, Petitioner

1. CALL TO ORDER

10:00 a.m. Ms. Lum called the meeting to order and announced that John Dill, the Board's Chair, was unable to attend today's meeting, so she would therefore preside as Chair.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

No one from the public was present.

3. APPROVAL OF MINUTES

Minutes of the February 11, 2009, Regular Session.

Motion and vote: Ms. Nicholson moved to accept and file the Regular Session minutes, and Mr. Martin seconded the motion. Ms. Nicholson, Mr. Martin, and Ms. Gentry voted aye. Ms. Lum abstained, explaining that she was absent for that meeting.

Minutes of the February 11, 2009, Executive Session.

Motion and vote: Ms. Gentry moved to accept and file the Executive Session minutes, and Mr. Martin seconded the motion. Ms. Gentry, Mr. Martin, and Ms. Nicholson voted aye. Ms. Lum abstained, explaining that she was absent for that meeting.

¹ Minutes in italics are verbatim.

4. COMMUNICATIONS

Communication No. 2009-13: Letter from Dan A. Cole in response to the Board's January 9, 2009, letter.

LUM: Are there any comments? It's this one.

MARTIN: I read it.

GENTRY: Do we have to respond to it?

LUM: I think we are—we can act, or we can decline to act on it. If we were to decline to act on it, it could be—he's asking us to prosecute, which is not something that we do. We are a volunteer citizens board who offers opinions, and I think that we could decline it—decline to take action in that he's asking us to do something that we are not empowered to do.

SCHOEN: Madame Chair, just so the record is clear, I believe this is Mr. Cole's third response—or actually, he filed an initial petition, and this is his second attempt to respond to the Board's request for additional information pursuant to Rule 4.13. And so at this point, I believe the Board can decide whether or not it has sufficient information to proceed with acting upon Mr. Cole's request for an informal advisory opinion, or you can decide that you will take no action on this matter, or you can decide that he has not provided sufficient information. Those are your options.

LUM: Did he ask for an advisory opinion? I don't recall—

SCHOEN: He made—

LUM: --This, yeah.

NICHOLSON: Well, we clearly don't have enough information to move any further on this, so our choices are to either just accept and file it -

SCHOEN: Correct -

NICHOLSON: --or to respond again, saying that we feel that we do not have sufficient information to take any action.

LUM: Or we can decide—we can decline to take action on the matter.

SCHOEN: Correct.

LUM: Do we really want to try to monitor everything a council member says? Is that what we're here to do?

GENTRY: Well, it looks like it was something direct.

MARTIN: That's my problem with this, because it seems like it all hinges on the use of one word—

LUM: --And is this something that—

MARTIN: --and it's a word that—those are the kind of words that—it's one of those kind of words that we all—people that we're sort of against would use anyway. Probably we've all used them. But what's so wrong about it? I don't understand.

LUM: Yeah, I've read—we're not acting on it now, but I think that I'm in agreement there, that —

GENTRY: Well, if we look at the copy that he sent us, September 30th, the first paragraph could be seen as a slur against Mr. Cole. Everything else, I tell you—

LUM: --Wait, where are you looking?

GENTRY: This one here. Now, I consider myself to be educated enough to read this stuff. I started reading it, and my eyes went crossed. And it's nothing against him, I understand where he's coming from. But I feel everything after the first paragraph is like totally irrelevant. So if he wants to focus on the incident and what led up to the incident, then that should be formally put into a petition, point by point.

LUM: That's what we asked him to do before.

GENTRY: Yeah, and he has—so in my eyes—he has failed to do that. So one paragraph out of what—two pages probably meets the criteria out of this particular document. So I don't think he's the kind of person, and I don't know him personally, but I don't think he's the kind of person that's going to let this one go. He might come after us and say that we failed to do our duty, and quote us another three and a half pages.

LUM: Well, I think that we can just put it very succinctly, what we do. If we do not take action, that we—if we were to decide not to take action on it, that it could be just clear-cut, that we decline to take action in the matter, and —

GENTRY: Well, I'll make a—I would make a motion, then. I move that we reply to Mr. Cole, saying that the Board has reviewed his documents and will not take action on this matter because he hasn't supplied us with enough information.

LUM: Well, is that true—enough information? Oh, we have to have—wait, before we can discuss—do we have a second, before we can discuss?

MARTIN: I'll second.

LUM: Okay. Do we want more information, or do we really think—

GENTRY: --He has to provide specific information about—we don't know why she said what she said.

LUM: Or, do we want to know?

GENTRY: Or do we want—well—

NICHOLSON: Yeah, I kind of hate to open the door to soliciting additional information which will be as irrelevant as what we've gotten now. So if we're going to make a motion, I think we would have to be really explicit about exactly what we need to see, because the last time we asked for information, this—

GENTRY: --This is what we got—

NICHOLSON: --and I think we could just continue to get this kind of stuff for quite some time.

GENTRY: Well, we could ask him in the letter to be very specific about—not her role as an elected official, but about the specific incident. I think in that letter, there's a little bit in here. He just found it offensive and he stated why, a little bit. But there must be some underlying circumstances.

LUM: But is this something that we really want—is it really ours? Is this an action that he really wants to take against her? Is it really an ethical thing or is it some sort of a slur, that he really wants a legal action against her?

GENTRY: He has to decide that, and he needs to put it in the form of a petition.

LUM: We could just decline it, also.

NICHOLSON: Yes, but it could be an ethical violation. Because we weren't there, we don't know, we don't have any information. We didn't see a videotape, we didn't hear an audiotape. We don't have anyone else saying anything about it, so—I don't think it is, but it could be. But because we weren't there and we didn't witness it, so we don't know. We simply don't know, and I—

GENTRY: Maybe in the outline or in the letter, we should say we reviewed it—now I just lost my train of thought—

LUM: --We reviewed the document and decline to act without specific information—

GENTRY: --Yeah, to determine if it's really ethical or unethical. It's along the lines that Marilyn was just talking about.

LUM: What the last one that we sent to him, though—I don't have that January 9th letter that John Dill signed. Do you have it? I probably have it somewhere here.

NICHOLSON: I have it.

LUM: *Is it in this packet?*

GENTRY: *Here, this is the one he sent, here.*

SECRETARY: *It was mailed out earlier. I have it if you need it.*

NICHOLSON: *Yeah, it's in the packet. There.*

LUM: *Oh, okay.*

NICHOLSON: *I think we were very specific in this request for information.*

LUM: *I don't think we need to repeat this request.*

NICHOLSON: *Yes. But could we say that because—I hate to say that because he failed to respond to our specific request, but in fact he did, and I don't know this gentleman, so I don't know how he's likely—what kind of voluminous material he's likely to react with. But can we say that we are declining to take action at this time because he failed to respond to the specific request for information--*

LUM: *--Yes--*

NICHOLSON: *from our January 9th—*

LUM: *--Yes—*

NICHOLSON: *--letter?*

LUM: *So we're going to withdraw the motion and re-motion it?*

GENTRY: *We can do that.*

MARTIN: *Yeah.*

GENTRY: *I withdraw my motion.*

MARTIN: *I withdraw the second.*

LUM: *Okay. So the new motion reads, failed to respond—*

NICHOLSON: *That we are declining to take any action because he failed to respond to the specific information that we requested in our letter to him on January 9th, 2009. What do you think, Renee, will that work?*

LUM: *Failed to, failed to—*

NICHOLSON: *--provide specific information—*

LUM: --provide specific—

NICHOLSON: --specific information—well, we asked for specific information, but he failed to provide specific information as requested in our January 9, 2009 –

LUM: Okay, so what does it say now?

SCHOEN: Well, I believe, Madame Chair, your motion is really whether or not this Board wants to take any action based upon the submittal that Mr. Cole submitted to this Board, correct?

LUM: Um hmm.

NICHOLSON: And so we're declining to take any action.

SCHOEN: You're declining, and so I guess your next course of action would be to then issue a letter articulating the reasons why.

LUM: So the motion could be that we fail—that we will decline to take action.

SCHOEN: Correct.

GENTRY: At this time.

LUM: At this time, period. Okay.

GENTRY: Yeah.

LUM: And then in the letter we can explain to him. All right. So, if I may have that motion.

GENTRY: I motion to—

LUM: Okay, that one wasn't seconded, so go ahead.

GENTRY: Oh, well—did you finish it?

NICHOLSON: I think I had.

LUM: We didn't have a second on it, so—

GENTRY: --Okay, second, because it backs up what we said, right?

SECRETARY: Well, she was giving the wording of the letter, so I didn't know if that was a motion or—

LUM: --It was sort of combined, the motion and the letter. So what we need is a motion—a clear motion that the Board declines to act on this matter.

GENTRY: So moved. There.

LUM: Now I need a second.

NICHOLSON: Second.

LUM: Okay, and in favor?

GENTRY, NICHOLSON, and MARTIN (simultaneously): Aye.

LUM: Aye—the Chair votes aye. Now we can decide what should go in the letter, in the response, which would be that we are not acting. So that, Mary, is probably what was contained in the motions.

SCHOEN: So Madame Chair, might I suggest that—just incorporating what you all have discussed—you might want to say that the Board has reviewed the document Mr. Cole has submitted in response to our January 9th letter. Unless and until he provides pertinent facts that support the allegation that Councilmember Emily Naeole violated Hawai'i County Code Section 2-83(a)(3), the Board will take no further action.

LUM: Very nicely put.

NICHOLSON: Is it beyond pertinent facts, is it also supporting facts, too? I mean, he can just say over and over and over again the same thing. But –

LUM: Pertinent and supporting?

NICHOLSON: Or collaborating?

SCHOEN: Basically, he didn't respond to your—this Board's January 9th letter, and so that's basically what we want to say. You didn't respond, and therefore the Board's not going to take any action.

NICHOLSON: Right, without really inviting him to make another response, or he may do that.

GENTRY: There's also something in here that I think I read—I wish I had underlined it. But he also said that, referring to—he represents something-something for other people-something, because her capacity is something—see how I read. But what I was getting was that he was trying to say that he was acting on behalf of everyone else in the district. That's my interpretation of what he said, and that is like, not cool.

NICHOLSON: Well, I don't think we can –

GENTRY: --No, but you know, he's trying to claim not only was the slur against him, but from my reading of it, he's trying to make it—well, if she slurs me, she'll slur everyone else, you know. So it's—

LUM: --Well, that's way beyond us.

GENTRY: Correct, correct. But that leads me to believe that he's a little bit off-base, and he's not specific about—because we can only look at what happened to him.

LUM: Specifically him.

GENTRY: Right.

LUM: Right, and until we have that—

MARTIN: --Is that the part right here?

GENTRY: Yeah, it might be that part right there.

LUM: But I think that's way beyond what we do.

GENTRY: Yeah. But that just lead me to believe that he's coming from a different place, that it's more than just a personal affront. He's trying to make it—it appeared to me that he was trying to make it bigger than it actually was.

LUM: Okay. So we're finished with this?

GENTRY: Yea.

5. NEW BUSINESS

- a. **Petition No. 2009-1: from Roy Takemoto, requesting an informal advisory opinion relating to post-employment as authorized under Hawai'i County Code Section 2-91.2(f)(1).**

LUM: Okay. All right, New Business. Mr. Takemoto. Yes. Petition 2009-1, Mr. Takemoto requesting an informal advisory opinion relating to post-employment as authorized under Hawai'i County Code Section 2-91.2(f)(1). First, I need to offer you the option of having a closed hearing. According to our rules—I know that there isn't anyone here, but we will be discussing probably business, personal business, and you have the option of having a closed hearing. And even though there's no one here, I would remind you that our minutes are published. So you get to make that decision, and let us know what you want.

TAKEMOTO: By closed, that means it's not—

LUM: --Closed, that means the pertinent information that would refer to you would be—I think, what do you call it—taken out of it?

SECRETARY: Executive Session.

LUM: It would be in Executive Session minutes.

SCHOEN: Actually, what happens is the petitioner may request a closed hearing, and then the Board must determine by majority vote that closing the hearing is appropriate and necessary.

TAKEMOTO: I would prefer closed, but it doesn't really matter.

LUM: So then our rule is—

SCHOEN: --4.13.

LUM: 4.1 –

SCHOEN: 3.

LUM: 4.13, which reads –

SCHOEN: c. Subsection c. 4.13, subsection c.

LUM: What page are you on?

SCHOEN: 13. I don't know if you have the same pages as I do.

LUM: I have 4.1, request—wait. Oh, c, okay. In a closed meeting or hearing to the public, there shall be required an affirmative vote taken at an open meeting of two-thirds of the members present, a majority of—providing it's a majority of the Board. Okay. The reason for a closed hearing shall be publicly announced. So the reason for the closed hearing would be because we are discussing perhaps personal and business matters relating to Mr. Takemoto's—and at his request. So may I have a—let's see, do we have a motion to vote on whether to close the hearing or not?

GENTRY: I'll move to close the hearing.

MARTIN: Second.

LUM: Okay, all in favor?

GENTRY and MARTIN (simultaneously): Aye.

LUM: And the Chair votes aye. Opposed?

NICHOLSON: I don't see any reason to have a closed hearing.

LUM: So that's three out of five, the motion passes.

NICHOLSON: Three out of four.

GENTRY: Three out of four today.

LUM: Three out of four. I think it's two-thirds of the Board, though, yeah. So we will close the hearing, and I think then we have to move into Executive Session, right?

SCHOEN: I think we're just closed.

LUM: You think we're in? Okay. We think we're there.

10:22 a.m.: Executive Session was entered.

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11:06 a.m.: Regular Session was reentered.

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6. UNFINISHED BUSINESS

a. Update n the status of amending the Board's Rules of Practice and Procedure regarding the imposition of administrative fines pursuant to Ordinance 08-57.

b. Counsel's report on the status of Senate Bills 1128 and 531 and House Bill 626, pending before the legislature regarding administrative fines.

Ms. Schoen reported that the legislative bills she was tracking died yesterday. She spoke to Chuck Totto, the attorney for the Honolulu Ethics Commission, and he believed the bills died because they were improperly worded. He is trying to find a way to resurrect the bills but believes it will be difficult and will keep her informed. If he cannot resurrect them, he will try again next year.

Because these bills died, it will be necessary to have a County agency created to hear appeals of fines the Board may issue. Mr. Totto mentioned that his commission recently created such an agency, so they will share ideas on how it should be done. One of the difficulties is getting people appointed to an agency which may never get to actually hear an appeal.

Ms. Lum asked whether the appeals agency could be tacked onto another County agency, and Ms. Schoen said she will look into that. It would make sense to place it with another agency that already conducts Chapter 91, Hawai'i Revised Statutes, hearings. She will discuss the appropriate procedure with her office.

Ms. Lum said she was confused as to why they needed to wait for the State on the appeal matter. Ms. Schoen explained that the bills which died in the State legislature would have

removed requirements articulated in HRS Section 46-1.5(24(A) and (F) which are currently needed before the Board may issue fines: (1) the requirement that when the Board makes a finding of ethical violation, the violator must be instructed to cease or correct the violation; (2) if the violator does not cease or correct the violation, the Board must provide notice to the violator that it may impose the fine; and (3) the requirement that an appeals agency be in place so the violator can appeal the fine.

Ms. Schoen said that at this point there is nothing more for the Board to do. She will need to work with her office on creating the appeals agency.

Ms. Gentry said to let them know what she comes up with.

c. Ongoing discussion on the Sunshine Law.

Ms. Lum said that the Sunshine Law is what caused her to bumble through in giving Mr. Takemoto the option to have his petition heard in Executive Session. There has to be a good reason to hear a petition in closed session. It would need to involve personal or business matters that could potentially adversely affect the petitioner if heard in Regular Session. She felt that Mr. Takemoto might have had a need to discuss business contracts he was considering.

Ms. Nicholson said she voted no on having the petition in Executive Session, as she did not see the relevance. She also noted that on the petition, Mr. Takemoto had left blank the section where he could have requested an open or closed hearing.

Ms. Gentry said that because of the nature of Mr. Takemoto's petition, he had the right to request a closed hearing, but that the Board's process flows well enough that they could have opted to close the hearing had they felt it necessary.

Ms. Schoen pointed out that a petitioner can request a closed hearing only if the petition is about his own conduct. If the petition is about another person, there is no option to close the hearing.

11:15 a.m.: The Board recessed.

11:22 a.m.: The meeting was called back to order.

Motion and vote: Ms. Nicholson moved to go into Executive Session to review the confidential financial disclosures. Mr. Martin seconded the motion, and all members present voted aye.

11:22 a.m. Executive Session was reentered.

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11:42 a.m.: The Board returned to Regular Session for voting on the confidential financial disclosures.

7. **EXECUTIVE SESSION (VOTING)**

- a. **Review of *Confidential Financial Disclosure Forms* filed pursuant to Section 2-91.1(d), Hawai'i County Code, by County board and commission members and designated County employees, where personal matters will be reviewed.**

Motion and vote: The Chair asked for a motion to accept all the financial disclosures except for 9, 10, 12, and 15, which needed clarification. Ms. Gentry so moved, Mr. Martin seconded the motion, and all members present voted aye.

Motion and vote: Ms. Gentry moved to accept disclosure 11 from Ann Lum. Mr. Martin seconded the motion, and Ms. Gentry, Mr. Martin, and Ms. Nicholson voted aye. Ms. Lum abstained.

8. **ANNOUNCEMENTS**

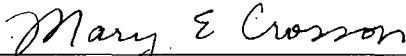
Ms. Lum announced the next meeting as being on April 8, 2009, at 10:00 a.m. at a location to be announced.

9. **ADJOURNMENT**

Motion and vote: Ms. Gentry moved to adjourn, Mr. Martin seconded the motion, and all members present voted aye.

11:44 a.m.: The meeting adjourned.

Respectfully submitted:



Mary E. Crosson, Secretary