

HAWAI'I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION

Wednesday, August 9, 2006 – 10:00 a.m.

County Council Room
25 Aupuni Street, Room 201
Hilo, Hawai'i 96720

Present: Reeve Williams, Chair
Wayne Joseph, Vice Chair
Kerry Inouye, Member
Ann Lum, Member
Kendall Sharpless, Member

Also present: Lincoln S. T. Ashida, Corporation Counsel
Bobby Jean Leithead-Todd, Deputy Corporation Counsel
Mary E. Crosson, Secretary

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1. CALL TO ORDER

The Chair called the meeting to order at 10:05 a.m.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

No members of the public were present.

3. APPROVAL OF MINUTES

Motion and Vote: Mr. Joseph moved to defer approval of the minutes, as only pages 1 and 2 were received by the members. Ms. Lum seconded the motion, and all members voted aye.

4. COMMUNICATIONS

Communication No. 2006-73: The Chair checked that all members had read the communication and asked whether Mr. Ashida had any comment. He did not.

Motion and Vote: Mr. Joseph moved to accept and file the communication, Ms. Sharpless seconded the motion, and all members voted aye.

Communication No. 2006-76: The Chair checked that all members had read the communication. The Chair asked why the Board was only seeing this communication now.

Ms. Leithead-Todd explained that the request for copies of the executive minutes came to her office. Under law, when executive session minutes are no longer necessary to preserve the privacy of individuals, they have to be released upon request. She reviewed the requested minutes and since they disclosed no personal or financial information on individuals, they were required to be released. This communication was put on the agenda to show the Board that the request for minutes came in and they were released.

Ms. Lum asked whether, when a request like this comes in, the minutes are reviewed and not automatically handed over, and Ms. Leithead-Todd said yes. Ms. Lum said she did not want there to be an invasion of privacy. Ms. Leithead-Todd said that if it would be an invasion to release them, she would write to the requesting party to explain why the minutes would not be released. In lieu of that, the personal information would be redacted and the rest released.

Motion and Vote: Ms. Lum moved to accept and file the communication, Ms. Sharpless seconded the motion, and all members voted aye.

Communication No. 2006-79: The Chair asked Mr. Ashida to come forward and provide a chronology of events.

Mr. Ashida said that Mayor Kim received letters complaining about Councilman Gary Safarik from Kaniu Kinimaka-Stocksdale and Norman Olesen. Mr. Ashida said he would respond to the letters on the Mayor's behalf. Mr. Ashida informed both Ms. Kinimaka-Stocksdale and Mr. Olesen that the Board of Ethics would be the proper forum in which to bring up their complaints, and they were provided with the petition form. They subsequently both filed petitions.

Ms. Kinimaka-Stocksdale and Mr. Olesen wanted their petitions resolved as soon as possible due to the upcoming September election. Therefore, Mr. Ashida contacted Mr. Safarik and informed him about the petitions, making it clear that the Office of the Corporation Counsel would not be providing him legal representation in this matter. He also put this in writing. He informed Mr. Safarik that he could seek a resolution by the Council, authorizing reimbursement of his legal fees and costs if he were successful in the outcome of the petitions. This was done on a recent impeachment case against Council members, wherein the legal fees were paid by the County. Mr. Ashida said he did not want Mr. Safarik to have the mistaken impression that what he told the Corporation Counsel's Office would be confidential. He also provided Mr. Safarik with a copy of the rules of the Board of Ethics. The rules were also provided to Ms. Kinimaka-Stocksdale.

Mr. Ashida said that Mr. Safarik told him that he would not waive the 20-day notice requirement, which is in the rules. Mr. Ashida said he read this rule, which was strangely worded. It was not clear whether the 20 days' notice is an absolute right, but he felt that to be fair, Mr. Safarik should be given the 20 days' notice. In addition, Mr. Safarik had indicated he would only accept personal service of the petitions. The Board of Ethics never had this situation before. The whole process is supposed to be informal, and taxpayer money should not be spent hiring agents to serve County employees or officers. But in this case, and since the Board's attorney, Ms. Leithead-Todd was on vacation, he authorized hiring an agent to serve the petitions. The primary is coming up shortly, and he wanted to do things by the book. He did not want a challenge about how Mr. Safarik was served. The petitions promptly were given to a

civil agent to serve, but it did not appear that service was effected yet. Therefore, if Mr. Safarik wanted personal service, the 20 days' notice had not yet commenced.

Ms. Leithead-Todd said that under her interpretation of the rules, the process is informal. As long as the Board knows that a petition was sent to the County officer or employee, and can be sure that it was received, they can make the assumption that the officer or employee received notice. She clocked the 20 days' notice at around August 17, 2006. However, a response was needed from Mr. Safarik, so she was looking at September 13, 2006, as the date for the hearing. However, the rules also indicate that the Board can proceed, even if a response was not received, if it has given the respondent the opportunity to respond.

The Chair asked what specifically was being served on Mr. Safarik, and Ms. Leithead-Todd said both petitions, as in the interest of fairness he would need to see them to respond intelligently. She said the petitions were also sent to Mr. Safarik via e-mail on July 26, 2006. The rules are ambiguous in that there is nothing in the informal process which states how service is to be accomplished. In the formal advisory opinion process, service is via certified mail. Personal service is not required, although the respondent could refuse to accept the certified mail. As long as the Board is confident that the officer or employee was given notice of the petition, it can clock the 20 days from when it is sure the petition was received.

The Board's secretary said the petitions were also sent to Mr. Safarik via regular U.S. mail.

Mr. Ashida said that Mr. Safarik is under the impression that the clock is not running, because when he told Mr. Ashida that he wanted personal service, Mr. Ashida said all right. So if the Board decides service occurred sooner, it needs to so inform Mr. Safarik.

Mr. Joseph said he believed the clock started running and that the 20 days commenced.

Ms. Leithead-Todd said if the Board is comfortable that the petitions were mailed and e-mailed to Mr. Safarik, the hearing could be scheduled for September 13, which would be more than 20 days from when he was given notice and would be adequate time to respond.

The Chair asked Mr. Ashida if he concurred. Mr. Ashida said that his office does not have a vested interest in how this issue turns out. However, he was concerned for the Board, as he did not want any accusation that it was dragging its feet.

Ms. Sharpless asked Mr. Ashida whether he had promised Mr. Safarik personal delivery of the petitions. Mr. Ashida said no, but that Mr. Safarik indicated he would like personal service. Mr. Ashida told him okay and that he would arrange for the service. The Board's secretary then had a civil agent pick up the petitions for service.

Ms. Sharpless said that based on Mr. Ashida's indication to Mr. Safarik that personal service would be done, the Board should stand by that.

Mr. Joseph said that he is a constituent of District 5, Mr. Safarik's district, and has serious concerns about this issue. He would like to see it resolved before the election. If the

Board waited until September 13 for the hearing, it would be too late. He said he would be in favor of holding a special meeting prior to then.

The Chair agreed with Mr. Joseph, as the outcome of the petitions could cast a cloud on the election. The Chair suggested that a member of the Board serve Mr. Safarik, as a back-up service. Upon that service, the 20 days would start ticking. The Chair volunteered to serve Mr. Safarik personally, and if not him, his aide.

Ms. Lum said she, too, wanted the special meeting heard before September.

The Chair said he wanted the minutes to reflect that the Board does intend to pursue a special meeting, with the date to be worked out, and that he was personally willing as Chair to put a notice in Mr. Safarik's aide's hands at the least.

Mr. Ashida said that if they were planning a special meeting, they would need to announce the date, time, and place at today's meeting in order to avoid having to publish the notice in the newspaper.

After further discussion, the Board agreed that the special meeting would be held on August 30, 2006, and the Chair questioned whether there would be a quorum. All members raised their hands that they could attend.

Motion and Vote: Mr. Joseph moved to have a special meeting on August 30, 2006, to hear the petition against Councilman Safarik. Mr. Inouye seconded the motion, and all members voted aye. The location of the special meeting was still to be determined.

The Chair asked Ms. Leithead-Todd to prepare a letter for Mr. Safarik, which he would pick up later today and personally serve.

Ms. Leithead-Todd said there were a couple of matters under Rule 4.8 that the Board should address. Letters acknowledging receipt of the petitions were already sent out, and steps were taken under Rule 4.7 to provide the County officer an opportunity to respond. As August 30, 2006, is 21 days from today's date, and as long as Mr. Safarik receives notice today, under Rule 4.8 the Board could render that Mr. Safarik received his 20 days' notice. They could also take into consideration the fact that Mr. Safarik was previously sent the first petition via e-mail and regular mail, and that the second petition is essentially identical to the first petition.

The Chair at this point told the members to look at the Mr. Safarik's letter and the County stationery, but Ms. Leithead-Todd instructed them not to discuss the subject matter or substance of the petitions at this time, as the appropriate parties are not present. Only procedural matters should be dealt with at this time.

Ms. Leithead-Todd asked if the Board desired her to get additional information related to the petitions and to do legal research on whether there have been similar petitions or issues with ethics boards, and to write a report for the Board. The Chair said yes. But he still wanted the Board to look at Mr. Safarik's cover letter on the County letterhead. He said his point is that if the cover letter itself is the offending document, and the other documents were just attached to the letter, he wanted counsel to research whether this was done by others before, or whether it

was indeed unusual. He felt he'd seen this sort of thing before from elected representatives and wanted to make sure that Mr. Safarik's letter was indeed unique, rare, or extraordinary.

Ms. Sharpless said she wanted to know if Mr. Safarik had made similar mailings regarding the first quarter of 2006 or the four quarters of 2005, as the communication that is the subject of the petitions is labeled the 2nd quarter of 2006. She also would like to know what rights elected officials have to use the County seal, and where that seal may appear. The Chair said he did not want to spend counsel's time on that issue.

Ms. Sharpless said she would like to know the legalities of using the County seal on personal letters. She also wanted it clarified whether the enclosure to Mr. Safarik's letter was also sent out in June, since it was dated June 2006. The Chair said he believed the enclosure was sent out with the official July cover letter. The Chair said that the question, however, is the basic charge: whether reporting to constituents on County stationery is legitimate or not.

Ms. Sharpless said that the petitions were also not clear on what specific government services were used, and the Chair said that Mr. Olesen could be asked that at the special meeting, in an open format. However, he does want counsel to research the legality of using County stationery to communicate with constituents.

Ms. Leithead-Todd clarified what information the Board wanted her to research. She said she will gather State ethics opinions on the issue of similar letters being done before by elected or legislative bodies in the State of Hawai'i. Also, she will check into how Mr. Safarik's letter was prepared and mailed, and the cost of the mailing. She said she will check with the Machine Room about who is in charge of County mailings. As well, she is to find out what right elected officials have to send materials out on official letterhead.

The Chair said the letterhead is the salient issue, and she may not need to go to the other issues.

Ms. Leithead-Todd said she will also provide a print-out of the website referred to in Mr. Safarik's letter.

The Chair questioned whether it would be appropriate to ask Mr. Safarik to prepare a written response for the Board to review several days prior to the special meeting. Ms. Leithead-Todd said he has an opportunity to provide a written response, but he can also choose to provide an oral response. However, she will mention in the letter to him that the Board would like a written response. Mr. Joseph said the Board members should receive the response seven days prior to the meeting so they will have time to review Mr. Safarik's position. Ms. Leithead-Todd said she will also ask Mr. Olesen and Ms. Kinimaka-Stocksdale if they could be more specific on their petitions, rather than just referring to the rule.

Ms. Sharpless said she went over the rules regarding form and content of petitions, and the petitioners met Nos. 1, 2, and 3. However, Nos. 4, 5, and 6 are not clear and she does not know if they are standard. She asked Ms. Leithead-Todd to check on that.

Mr. Joseph disclosed, for the record, that he was one of the recipients of Mr. Safarik's letter, which was the subject of the petitions. Ms. Leithead-Todd told Mr. Joseph that he should

also disclose this at the special meeting and that if any of the members had gone to the website, they should disclose that at the meeting as well.

The Chair said he will disclose that he knows all three principals, and Ms. Leithead-Todd said he should also disclose that at the special meeting.

Upon checking with the Council staff, Ms. Leithead-Todd informed the Board that the special meeting of August 30, 2006, would be held in the County Council Room, which had just been reserved for them.

Ms. Leithead-Todd said the announcement of the meeting has to be posted six days prior to the meeting, but she will try to have it done sooner. The six days' notice is the normal Sunshine Law requirement.

The Chair said to let the record reflect that a special meeting has been scheduled for Wednesday, August 30, 2006, to address the petitions by Ms. Kinimaka-Stocksdale and Mr. Olesen.

Motion and Vote: Mr. Joseph moved to accept and file Communication No. 2006-79, Mr. Inouye seconded the motion, and all members voted aye.

5. NEW BUSINESS

Review of Disclosure of Financial Interest statements: The secretary informed the members that item 5a should not have been on the agenda, as there were no regular session financial disclosures to review.

Review of Gift Disclosure Statements: The members reviewed the gift disclosure statements of council members Peter Hoffmann and Virginia Isbell.

Motion and Vote: Ms. Sharpless moved to accept and file the gift disclosures, Mr. Inouye seconded the motion, and all members voted aye.

6. UNFINISHED BUSINESS

Financial Disclosure Subcommittee Report: Ms. Lum distributed a typed report she had compiled on what she and Ms. Sharpless had been studying. The first issue they researched was which boards and commissions require members to file financial disclosures. It seemed to be that if a board had adjudicatory power, the members would need to file disclosures. If a board is advisory only, the filing of financial disclosures is not required.

The Chair asked about whether new boards or commissions needed disclosures filed. Ms. Lum said if they have adjudicatory powers, it would be required, but if they were only advisory, then disclosures would not be required. She said when boards and commissions are set up, it should be decided whether they have powers. Since the Cost of Government Commission

is advisory only, disclosures would not be required. She was unsure of what the duties are for the Kona Steering Committee.

Ms. Leithead-Todd said the Kona Steering Committee's job is to come up with a recommended community development plan. This plan is to be forwarded to the Planning Commission for public hearing and comment, and then forwarded to the Council for adoption under the umbrella of the General Plan. The Chair said the Committee appeared to be advisory.

Ms. Lum said the information she has is clear on where boards come from. They are from the County Code, the Charter, or the Hawai'i Revised Statutes.

Mr. Joseph asked what the difference was between the Cost of Government Commission, the Police Commission, and the Salary Commission, which are advisory. Ms. Leithead-Todd said the Salary Commission has the power to adopt and change salaries. Under the Charter, they also set the salaries for council members, the mayor, and department heads. They do not make recommendations. They adopt. They have the legal authority to impact the County budget.

Mr. Joseph stated, then, that any board which can only make recommendations does not need to have disclosures filed.

Ms. Leithead-Todd said the Police Commission has investigatory power and so is different. Also, it is specifically established by both the Charter and the Hawai'i Revised Statutes.

Ms. Lum said the next issue they studied was what financial information should be included in financial disclosures, which was prompted by David Frankel's petition in 2005 regarding including spouse and dependent children information. She and Ms. Sharpless looked at state and county disclosure forms. They also noted Lincoln Ashida's concern at increasing the stringency of the forms because there is already difficulty in finding people to sit on boards and commissions. She said that the State Constitution does not specify who has to do financial disclosures. The Hawai'i Revised Statutes defines financial interest to include spouse and dependent children. The State Ethics Commission requires all members of State boards and commissions which are not advisory to file disclosures. The Hawai'i County Code describes financial interest in Chapter 2-82(a) (7) as interest held by an individual, spouse, or dependent children. If you look at the definition of officer, however, it would include those who are on advisory boards. Another confusing section is 2-91.1(c), where it states that the disclosure of financial interest shall state the interests of the person disclosing, whether held in the person's name or by any other person for the person disclosing's use and benefit and it includes numerous other assets. As far as the Code goes, it seems to be saying that any person, not specifically a spouse or dependent child, but even a brother-in-law or uncle, etc., who holds something that benefits a person disclosing, has to disclose it. She does not know if she is interpreting this correctly. Also, in the Frankel petition, the Board ruled that the disclosure of spousal and dependent children income was not required.

Ms. Leithead-Todd said that Mr. Frankel's petition wanted the spouse and dependent children financial information disclosed regardless of whether the person disclosing had access to or use of the money. The way the Code reads, the money needs to be held for the benefit of the person disclosing, or be accessible by that person. So if a person receives money from a

trust, but the trust is not specifically held in that person's name, the income would need to be disclosed. If a person has access to and can use the money in a bank account that is in the name of that person's child, it would need to be disclosed.

Ms. Lum said she could not say what could or should be done with the current form. Her opinion, however, is that the form currently being used is not in compliance with the County's own Code of Ethics. However, whether the Code should be changed to be more specific, or the disclosure form changed to take everything into account, she does not know.

Ms. Lum said she had obtained a state form which has a section that specifically says that the person disclosing, and the spouse and dependent children, are joined. This could be a way to clear up the County's form.

Ms. Sharpless said she believed the State Ethics Commission was the originator of the disclosure form, which was nine pages long, including instructions. Then the State and the counties made their own forms. In the process, bits and pieces were left out. They should look at the State Ethics Commission form as the root document. She believes the current County form was a cut-and-paste job. Her personal belief, from all that she has read, is that the expectation of conduct is the highest for all State and County officers, employees, and others. It is clear that the purpose of the law is to provide the highest level of confidence and trust to the public while still protecting the constitutional rights of those who serve. Therefore, the weight is more on the strict and rigorous side. She feels just putting a reminder on the form is not enough and that people should receive formal training or sign an acknowledgment regarding their accountability.

The Chair asked Ms. Sharpless if she was recommending some hours of training for County officers, and she said it could be part of the Sunshine Law training. It could be done in a way that is not threatening or an invasion of privacy, yet efficient.

Ms. Leithead-Todd said it would be good for the Board to come up with a set of instructions to attach to the financial disclosure form, explaining the terminology. She does not believe the Code as written requires the disclosure of spousal and children's interest, unless a person has access to it or beneficial use of it. She said the Council years ago had wrestled with whether spousal income disclosure should be required, and they agreed not to require it. It came up when Keola Childs was serving. He was married to a Greenwell and was concerned because he did not know the extent of his wife's family's holdings. He was not involved in the day-to-day management and running of the Greenwell business. He did not know if he could even access the financial information.

Ms. Leithead-Todd further explained that there already is a requirement on the Council that if anyone has a conflict of interest on an issue, it has to be disclosed prior to any vote. A common disclosure is that one's spouse is a member of the HGEA, when the Council is dealing with union issues. If a person serving on a board or commission has a conflict of interest, that person cannot vote on that issue. It does get questionable on the issue of having access to, or benefit from, a spouse or dependent's income. The Board may want to look at proposing an amendment. If they want the disclosure of spousal and dependent children's financial interest, it would require an amendment to the Code. This means coming up with a proposal which would be sent to the Council. It would be up to the Council on whether it gets adopted.

Ms. Lum said that to meet the current requirements, however, there needs to be an instruction about listing spousal or dependent income when a person has access to or benefits from it. Ms. Leithead-Todd said that language might fit into item 3. Each section of the form says to list each ownership, so they could expand the wording to track the language of the Code. They could reword it to say “list each ownership or beneficial interest, whether held by you or somebody else for your benefit and use,” or something like that.

Ms. Lum said that if they were allowed to clean up the wording on the disclosure form, and have an instruction/information sheet, the issue might be resolved.

The Chair asked Ms. Lum and Ms. Sharpless if they could take the next step of revising the financial disclosure form to reflect what was just discussed. Ms. Lum asked whether everyone agreed that was the direction they should take—to stick with the Code as written and review the form to make it easier to comply with the law they already have. The disclosure should include not only the financial interests of the spouse and children, but any interest that benefits the person disclosing. The Chair agreed but told them to be mindful of Mr. Ashida’s concern about not discouraging public service.

Ms. Lum noted that there needs to be a place on the form for a person to disclose if they have any potential conflict, as well.

Mr. Joseph said the cover sheet should be revised to say that the disclosure is not required for the following groups, and list the advisory boards. He said the Board has often reviewed disclosures from members of advisory boards, so this should be cleared up.

The Chair asked whether the Workforce Investment Board needed to file disclosures. Ms. Lum said yes, as they have to put money out. Ms. Leithead-Todd explained that they actually control money and who gets contracts.

Ms. Lum said it becomes clear when you know what a board does, whether it controls money, or handles a legal, disciplinary, or regulatory issue. Mr. Joseph said he would like an opportunity at a future meeting for the Board to go over all the boards and commissions and make specific recommendations on whether they need to file disclosures or not. He has sat on this Board for a year and a half and has seen members of boards submit financial disclosures when did not need to, so obviously there are many who are not aware of who should file and who should not. The Chair said the educational target should be the staff for each board.

Ms. Leithead-Todd said the disclosure form’s cover sheet could list who has to file and who is not required to. This would make it easier. There is confusion on the part of the staff who service the committees. Out of an abundance of caution they may have board members file the disclosures, to be on the safe side in case there is a rule of which they are not aware.

Mr. Joseph asked what to do with someone who is required to file but has not. Ms. Leithead-Todd said the Board’s secretary is working on a database of this information. She explained that at one time the Board of Ethics was staffed by a clerical pool and came under the Mayor’s Office. Some other boards and commissions are in limbo in terms of staffing, and the Corporation Counsel is covering them for now. In addition, the Mayor’s Office used to solicit

applications, but now the Corporation Counsel is handling this. In the transition, the whole issue of keeping track of commissioners and applicants was not addressed. A database is currently being worked on; and in the future there will be a database maintained of who is to file financial disclosures, and the filing will be followed up on.

Ms. Sharpless said she does not want to get into the issue of what to do with people who do not file the disclosures. She said she would like copies of the various state and county disclosure forms to work from. She would also like to have some consideration, perhaps by another subcommittee, about the Sunshine Law class and what can be done so that all employees are aware of certain things.

Ms. Leithead-Todd apologized, as she had meant to send the members the State Ethics checklist and how it was converted to be applicable to the County Code of Ethics, as well as a handout on the Ethics Code and some specific examples of what might be violations based upon cases she was familiar with. She will make sure copies get mailed to the members. She said the Board could adopt it as an official handout and make a request that when board members are taught about the Sunshine Law, it be part of that training. The Chair said this should go on the October agenda.

Ms. Lum said they did not hear from Mr. Inouye on whether he wanted the current form brought into line with the State form, and he said he does.

Motion and Vote: Mr. Joseph moved to accept and defer the subcommittee's report and action until the October agenda. Mr. Inouye seconded the motion, and all members voted aye.

7. EXECUTIVE SESSION

Motion and Vote: Mr. Joseph moved to enter executive session, Mr. Inouye seconded the motion, and all members voted aye.

The Board moved into Executive Session at 11:30 a.m. and re-entered Regular Session at 11:40 a.m., at which time the Chair announced that the Board had reviewed the financial disclosures of Mark Fujimoto, Michael Sumja, and Fred Takeo Yamashiro.

Motion and Vote: Mr. Joseph moved to accept and file the financial disclosures of Mr. Fujimoto, Mr. Sumja, and Mr. Yamashiro. Mr. Inouye seconded the motion, and all members voted aye.

8. ANNOUNCEMENT

The Chair announced that Ms. Sharpless will not be able to attend any meeting in September, so suggestions and discussion regarding the Sunshine Law and financial disclosures were deferred to October.

The Chair again announced that a special meeting is scheduled for August 30, 2006. Ms. Leithead-Todd said that in an abundance of caution, it may be best for the Board to amend the

agenda to take up the issue of holding a special meeting. They would need a two-thirds vote to amend the agenda, and then they would need to retake the vote.

Motion and Vote: Mr. Joseph moved to amend the agenda to add the issue of holding a special meeting on the petitions regarding Mr. Safarik. Mr. Inouye seconded the motion, and all members voted aye.

Motion and Vote: Ms. Lum moved to schedule a special meeting on August 30, 2006, to address the petitions regarding Mr. Safarik. Mr. Joseph seconded the motion, and all members voted aye.

The Chair also announced the Board's regular meeting scheduled for September 13, 2006, and said that if the meeting on the petitions regarding Mr. Safarik was not concluded on August 30, 2006, the issue could be continued on September 13, 2006.

The Chair asked if there was flexibility to move the special meeting of August 30, 2006, if Mr. Safarik could not attend on that date. Mr. Joseph asked whether everyone was available on August 29 or August 31, 2006, and no one indicated unavailability.

9. ADJOURNMENT

Motion and Vote: Mr. Joseph moved to adjourn, Mr. Inouye seconded the motion, and all members voted aye.

The meeting adjourned at 11:45 a.m.

Respectfully submitted:

Mary E. Crosson, Secretary