

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

State of Hawaii

Date: Wednesday, February 18, 2015

Time: 10:00 a.m.

Place: Hawaii State Ethics Commission Conference Room
American Savings Bank Tower
1001 Bishop Street, Suite 960
Honolulu, Hawaii 96813

Present: State Ethics Commission Members
Edward L. Broglio, Chair
David O'Neal, Vice Chair
Susan N. DeGuzman, Commissioner
Ruth D. Tschumy, Commissioner
Melinda Wood, Commissioner

State Ethics Commission Staff
Leslie H. Kondo, Executive Director
Susan D. Yoza, Associate Director
Nancy C. Neuffer, Staff Attorney
Virginia M. Chock, Staff Attorney
Megan Y. S. Johnson, Staff Attorney
Bonita Y. M. Chang, Staff Attorney

CALL TO ORDER

The meeting was called to order at approximately 10:02 a.m. by Chair Broglio.

SUNSHINE LAW SESSION

Agenda Item No. I: Minutes: Consideration and Approval of the Minutes of the January 22, 2015, Meeting

Vice Chair O'Neal moved and Commissioner Tschumy seconded a motion to approve the minutes of the January 22, 2015, Sunshine Law meeting. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. II: Executive Session Minutes: Consideration and Approval of the Minutes of the January 22, 2015, Executive Session Regarding Agenda Item V: Staff Guidance to State Board Member Regarding Application of Hawaii Revised Statutes Section 84-14(a) (Conflicts of Interests)

Vice Chair O'Neal moved and Commissioner DeGuzman seconded a motion to approve the Executive Session minutes of the January 22, 2015, meeting regarding Agenda Item V. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. III: Executive Session Minutes: Consideration and Approval of the Minutes of the January 22, 2015, Executive Session Regarding Agenda Item VII: Executive Director's Job Performance

Commissioner DeGuzman moved and Vice Chair O'Neal seconded a motion to approve the Executive Session minutes of the January 22, 2015, meeting regarding Agenda Item VII. The motion carried unanimously (Broglia, O'Neal, DeGuzman, Tschumy, and Wood voting).

Agenda Item No. IV: Election of Officers for Calendar Year 2015

Commissioner DeGuzman moved and Commissioner Wood seconded a motion to vote for Chair Broglia and Vice Chair O'Neal to continue in their positions until June 30, 2015, to allow Chair Broglia to complete ongoing projects until his current term expires on June 30, 2015. The motion carried (Broglia, O'Neal, DeGuzman, and Wood voting aye; Tschumy voting nay).

Agenda Item No. V: Executive Director's Report

1. Education/Training Report (Mandatory Ethics Training Session 2, Department of Education Employees in Hilo, Hawaii Health Systems Corporation Corporate Board of Directors, General Ethics Training for Governor's Staff, Department of Transportation Highways Division Contract Managers)

Executive Director Kondo reported that he conducted two mandatory ethics training sessions that new legislators and the cabinet members appointed by the Governor are required to attend. Executive Director Kondo said that staff would be conducting ethics training in March for Department of Education, Hilo Waiakea Complex ("DOE") administrators and for the Hawaii Health Systems Corporation's Corporate Board ("HHSC"). Executive Director Kondo said that staff will separately train the Governor's staff and Department of Transportation ("DOT") Highways Division contract managers in the future. Both sessions are yet to be scheduled. Executive Director Kondo said that the DOT is interested in having ethics training for the employees in other divisions and

for its neighbor island employees, and he felt that this may be an opportunity for the Commission to invite neighbor island employees from other agencies to attend ethics training.

Vice Chair O'Neal inquired about who initiated the training requests and the reasons that prompted the DOE and HHSC's requests. Executive Director Kondo said that the Complex Area Superintendent's staff and John Middleton, HHSC's compliance officer, had requested the training. Executive Director Kondo said that Mr. Middleton participated in the session that he conducted for the HHSC Kauai Regional Board.

Commissioner Wood asked if the ethics training for lobbyists had been rescheduled. Executive Director Kondo said that he had postponed the training for lobbyists because of his uncertainty about certain interpretations of the Lobbyists Law. He said that he hoped to reschedule the training but doesn't have a tentative timeframe.

2. Projects Under Consideration

Executive Director Kondo explained his reasons for asking the Commission to reconsider certain of its prior opinions and interpretations. Executive Director Kondo stated that, in his view, staff's primary job is to protect the credibility of the Commission, meaning that the Commission must be viewed as fair, impartial, and operating within its statutory mandate. Executive Director Kondo explained that the Commission's decisions must be solidly grounded in the language of the statute and staff must be able to defend the Commission's decisions if challenged.

Executive Director Kondo said that a court will review the Commission's interpretation of the statutes de novo, meaning without deference to the Commission. Executive Director Kondo said that he thought some of the Commission's past opinions were difficult to legally support and, if challenged, would likely be deemed by a court to be incorrect.

Executive Director Kondo discussed basic principles of statutory construction and suggested that the Commission's interpretation of the State Ethics Code and Lobbyists Law must be consistent with these principles.

Executive Director Kondo said that, as the Commission had requested, he included four projects that he believed the Commission should undertake.

- a. Reconsidering whether "lobbying," as defined in HRS section 97-1(7) includes "goodwill" or relationship-building lobbying

Executive Director Kondo said that, in 2007, the Commission staff issued guidance that goodwill lobbying, i.e., communicating for the purpose of relationship building, was considered lobbying under the Lobbyists Law. Executive Director Kondo said that examples of goodwill lobbying were "meet and greets," where organizations, that may or may not have business before the legislature, invite and pay for the legislators to attend receptions for the purpose of building and maintaining relationships. Executive Director

Kondo said that when looking at the definition of lobbying, goodwill lobbying or relationship-building lobbying does not appear to be lobbying and, therefore, reporting of expenditures relating to such activities may not be required.

In response to a question by Commissioner Tschumy, Associate Director Yoza said that she recalled the memorandum on goodwill lobbying that was issued by the previous Executive Director in 2007. Associate Director Yoza recalled that the focus at that time was on events that were occurring very close to the legislative session and were held by organizations that employed lobbyists. Associate Director Yoza stated that the previous Executive Director believed that the events were being held for the purpose of influencing legislative action by legislators who were invited to attend.

Chair Broglio said that the Commission should not reinterpret the statute that was the basis for the Commission's 2007 memorandum and that he felt the reporting of goodwill lobbying expenditures lends itself to more openness in government. Chair Broglio also said that there are ongoing matters, such as the marriage equality issue, where individuals meet with legislators when there are no bills before the legislature at that time, but may have pending legislation in the future.

Vice Chair O'Neal said that it seemed to be the Commission's consensus that goodwill lobbying was lobbying. Vice Chair O'Neal said that the lobbyists are building relationships for the purpose of influencing future matters before the legislature. Executive Director Kondo explained that interpreting the statute to include all future matters that would be pending before the legislature was likely too vague. Vice Chair O'Neal said it was his opinion that the Commission not reinterpret the Commission's 2007 opinion on goodwill lobbying. Vice Chair O'Neal said that, if the Commission's opinion were to go to the courts and the Commission's opinion was found to not be right, then the Commission would know for certain about their interpretation of the statute.

Commissioner Tschumy asked the other Commissioners on where they stood on revisiting the 2007 memorandum which defined goodwill lobbying as lobbying. Chair Broglio, Vice Chair O'Neal, and Commissioner Tschumy said that the Commission should not pursue the reconsideration of the definition of lobbying to include goodwill lobbying. Commissioner DeGuzman and Commissioner Wood said that the Commission should reconsider the matter of goodwill lobbying as lobbying.

Executive Director Kondo explained that he did not intend for the Commission to consider the merits of the issue and that, if he had understood that the Commission intended to do so, he would have provided a more thorough written analysis for the Commission to consider prior to the meeting. Executive Director Kondo said that he had understood the Commission simply wanted to know what projects staff intended to undertake before staff incurred the time working up the issues. Executive Director Kondo offered that the additional work necessary to fully develop the issue was relatively minimal and suggested that the Commission allow staff to provide a more thorough analysis of the concern and the reasons for the recommended interpretation for the Commission's consideration at a future meeting; however, he said that staff would not be following up with this project unless the Commission requested staff to do so.

- b. Reconsidering whether HRS sections 84-14(a) and/or 84-14(d) does not apply to state employees serving on private organizations' boards in their "state capacities"

Executive Director Kondo said another project is the reconsideration of whether state employees can serve in their state capacities on the boards of private organizations. Executive Director Kondo said that the Commission currently interprets the conflicts of interests provision not to prohibit an employee from serving in his/her "official" capacity on a for-profit or not-for-profit organization's board of directors. Executive Director Kondo discussed an example of a University of Hawaii dean serving on a private not-for-profit organization's board. In that situation, the organization intended to develop launch vehicles for micro-satellites and the University would likely be a potential vendor for all or parts of the launch vehicles. Executive Director Kondo questioned how the employee can serve on the private board, where by law the employee owes duties of loyalty to the private organization, and protects the interests of the state.

Vice Chair O'Neal asked if there were any opinions that generated staff's request for the reconsideration of HRS sections 84-14(a) and 84-14(d). Associate Director Yoza said that there were two advisory opinions issued by the Commission in 1986 where it was determined that it was not a conflict of interests for state employees to serve on boards in their state capacities. The factors they considered in determining whether there were any conflicts of interests were stated in the two advisory opinions. Some of the factors were whether the employee was authorized by their state agency to serve in this capacity, and the nature of the organization.

Chair Broglio asked the other Commissioners if they would prefer that staff provide further information on the issue at a later commission meeting. All of the Commissioners said that they were open to see further work done by staff.

- c. Examining whether state employees may accept discounts and other special deals offered to them because of their status as state employees from private organizations; whether employees may accept discounts and other special deals offered only to employees of a specific state agency from private organizations

Executive Director Kondo said that staff was aware of state employees being offered special deals due to the fact that they were state employees. Executive Director Kondo said that staff would be providing guidance to the general state population as it related to the fair treatment provision, which states that no employee can use their position to give themselves an unwarranted benefit. Commissioner DeGuzman asked if the guidance would include special deals given to Hawaii Government Employees Association members as these employees pay membership dues. Vice Chair O'Neal said that both public and private school teachers also receive special deals designated for teachers and not necessarily only for public school teachers. Executive Director Kondo said that staff would further develop and analyze the issues at the time that the

matter is an agenda item. The Commissioners concurred that staff bring this issue back as an agenda item.

d. Examining legislators' use of their 2015 discretionary allowances.

Executive Director Kondo said that the Commission issued guidelines to the legislators on the use of their legislative allowance, and that staff would like to examine the legislators' 2015 expenditures reports to confirm that their use of their discretionary allowance was consistent with the Commission's guidelines. Executive Director Kondo said that the Senate issued revisions to their legislative allowance rules in accordance with the Commission's guidelines. Commissioner Tschumy felt that, as a courtesy, staff should first give the legislature an opportunity to respond to the Commission's request on whether they are following the Commission's guidelines. Vice Chair O'Neal said that he was opposed to the legislative allowance guidelines in the first place, but said that since the guidelines were issued, then the Commission should follow up with the legislators. The Commission concurred with Vice Chair O'Neal that a follow-up of the legislators' use of their legislative allowance in 2015 should be requested of the legislature.

3. Update on Electronic Filing Issues and Proposals to Develop Alternative E-File System

Executive Director Kondo updated the Commission on the electronic filing issues. The quotes were \$100,000 for Hawaii Information Consortium ("HIC"), the company that manages the State's portal, to develop and implement an e-filing system; plus \$20,000 for Premier Solutions to integrate the new e-filing system with the Commission's current SharePoint system; and an annual \$10,000 hosting fee for a server outside of the Commission's firewall. Executive Director Kondo said that these amounts were not included in the Commission's budget, but there were two other bills that were introduced in this legislative session to fund the e-filing system. Executive Director Kondo said that the funding from the two bills would not come into play until the 2016 filing year. For the 2015 filing year, a fix of the current e-filing system is being considered to be completed by HIC with funds paid out of the Commission's current fiscal year budget.

4. League of Women Voters of Hawaii's Lobbyist Information Flyer

Executive Director Kondo said that, with the help of Senator Les Ihara, the Senate President had allowed the posting of the League of Women Voters' lobbyist informational flyers in the elevators and around the Senate conference rooms at the State Capitol. Executive Director Kondo said the flyers provided notification to people testifying at the State Capitol that they may need to register as lobbyists.

The Commission took a break from approximately 11:58 a.m. to approximately 12:05 p.m.

5. Recent Media Reports (Resolution of Golf Investigation; Resolution of Investigations of Land Use Research Foundation and David Z. Arakawa)

Executive Director Kondo said that the media reports on the Resolution of Charges against the state employees who received free golf and the Resolution of Investigations of David Arakawa and the Land Use Research Foundation helped to educate the public of the Commission and its requirements.

6. Delinquent Filers: 2014 Disclosure of Financial Interests

Executive Director Kondo said that there are individuals who are delinquent in filing their 2014 Disclosure of Financial Interests forms. The statute requires legislators, certain state employees, and board and commission members to file disclosure forms annually. Individuals who fail to file disclosure of financial interests statements can be assessed administrative fines. Executive Director Kondo said that staff is starting the enforcement process by sending out fine letters, in accordance with the statute, to the delinquent filers. Executive Director Kondo said that this matter would be covered in more detail in the adjudicatory meeting.

7. Delinquent Filers: Lobbyists and Lobbying Organizations

Executive Director Kondo said that as a consequence of the attention given to the Resolution of Investigations of David Arakawa and the Land Use Research Foundation, lobbyists and organizations with lobbyists have recognized that they have not registered to lobby and have failed to file expenditures reports. Executive Director Kondo said that this matter would be covered in more detail in the adjudicatory meeting.

8. Free Trips to Teachers Who Chaperone Student Educational Tours

Executive Director Kondo said that staff had received an inquiry from the Department of Education's ("DOE") Castle-Kahuku Complex Area Superintendent's office. Executive Director Kondo explained that, from the information provided to staff, the teachers were involved in all aspects of student educational tours: the teachers decided who will chaperone the students on the trips; the teachers selected the educational tour company that will organize the trips; the teachers signed letters on the tour company letterhead informing parents of the tour; the teachers organized after-school meetings for interested students and parents at which they used PowerPoint presentations to promote the trips. The teachers received numerous benefits from the tour company: (1) the head chaperone or group leader received an all expense-paid weekend trip to New York or Boston for orientation; and (2) the chaperones received free round-trip airfare, hotel accommodations, meals, insurance coverage, admission fees, gratuities, stipends, and points that could be used for personal items and personal travel. Executive Director Kondo said Education First, the selected tour company, advertised having the best student-to-free-chaperone ratio. The cost for this year's tour was \$2,600 per student with an estimated total of 50 students, and \$2,900 per adult with approximately 10 adults traveling. The entire trip generated revenues for the tour company of \$160,000.

Executive Director Kondo said staff examined this matter under the gifts law, HRS section 84-11, which states that no employee can accept a gift if it can reasonably be inferred that the gift is intended to influence or reward any official action. The teachers were offered free trips that reasonably appear to be offered to influence them in soliciting students and promoting the trip. Executive Director Kondo said that, based on quick research, other jurisdictions appeared to prohibit similar gifts for the same reasons. Staff issued advice to DOE Complex Area Superintendent Lea Albert and King Intermediate Principal Wendy Matsuzaka that the State Ethics Code likely prohibited the teachers from accepting the free travel and other benefits. Staff, however, told Ms. Albert and Ms. Matsuzaka that staff would not recommend to the Commission that the DOE teachers be told that they cannot accept the free travel and other benefits associated with this year's trip because the trip had already been planned and was occurring in a few weeks.

Executive Director Kondo said that, because it was staff's impression that similar types of trips were coordinated at other schools, staff intended to provide a letter to the Superintendent about the advice and to issue a public Ethics Advisory about the advice. Vice Chair O'Neal asked if the Parent Teacher Organization ("PTO") would be a better entity to handle student educational trips. Executive Director Kondo said that a structure handled by the PTO or the DOE itself may be better than having the teachers handle these trips. Chair Broglio brought up how such trips are handled by the Boys Scouts, but Executive Director Kondo said that what may be good for private organizations, may not work for the DOE schools because of what would not be allowed under the State Ethics Code. Commissioner Wood said that the teachers may not think of the free travel as gifts because they may be involved with school work related to the trip.

Commissioner DeGuzman had reservations about issuing an opinion that would be interpreted as the Commission robbing the students of these educational travel opportunities. Commissioner DeGuzman suggested that the opinion contain a caveat that staff would work with the teachers should an opportunity for educational travel arise. Commissioner Tschumy suggested that, in lieu of issuing a public Ethics Advisory, staff only send a letter to the DOE superintendent stating the Commission's concerns and asking the DOE to develop policy on student educational tours. Vice Chair O'Neal agreed that the Commission should go to the DOE superintendent without issuing a public Ethics Advisory. Chair Broglio asked that this item be placed on the agenda of a future commission meeting.

9. Hawaii State Ethics Commission Financial Report for FY 2014-2015
(Quarter Ending December 31, 2014)

The Commission acknowledged the second quarter report for FY 2014-15.

Agenda Item No. VI: 2015 Legislative Session: Discussion of Legislative Proposals

Executive Director Kondo provided the Commission with a spreadsheet listing bills that staff was tracking through the legislature. Executive Director Kondo also summarized the legislature's upcoming deadlines.

Executive Director Kondo reviewed the bills that were currently active and proceeding through the legislature.

Agenda Item No. VII: Peer News LLC, dba Civil Beat vs. State Ethics Commission; Civil No. 14-1-2022-09 RAN; Motion for Preliminary Injunction

Executive Director Kondo said that Civil Beat filed a response to the writ that was filed in the Supreme Court.

Agenda Item No. VIII: Development of Executive Director's Performance Evaluation Criteria

Chair Broglio said that he and Commissioner DeGuzman, as members of the Permitted Interaction Group ("PIG"), met with Executive Director Kondo and staff and summarized their recommendations in a report to the Commission on the criteria that would be used in the evaluation of the Executive Director's performance and goals. Chair Broglio said that the 360 degree feedback from the staff would be a process that would be incorporated into the Executive Director's evaluation system. Chair Broglio said that staff preferred to give feedback orally to the members of the PIG and the feedback would then be summarized in a report to the rest of the Commission. Vice Chair O'Neal asked that the five commissioners be able to sit in on the 360 degree feedback from staff. A brief discussion by the Commission followed. Executive Director Kondo said that the Sunshine Law required the Commission to refrain from deliberating on the PIG's recommendations until the next commission meeting. Commissioner DeGuzman said that the PIG would have a supplemental report reflecting the oral summary for the Commission to vote on at the next commission meeting.

ADJOURNMENT

At approximately 1:57 p.m., Vice Chair O'Neal moved and Commissioner Tschumy seconded a motion to adjourn the Sunshine Law meeting. The motion carried unanimously (Broglio, O'Neal, DeGuzman, Tschumy, and Wood voting).

The meeting was adjourned at approximately 1:57 p.m.

Minutes approved on March 18, 2015.