

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

State of Hawaii

Date: Thursday, October 29, 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

Susan N. DeGuzman, Chair
David O'Neal, Vice Chair
Ruth D. Tschumy, Commissioner
Melinda Wood, Commissioner
Reynaldo D. Graulty, 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. Chang, Staff Attorney

CALL TO ORDER

The meeting was called to order at approximately 10:00 a.m. by Chair DeGuzman.

Agenda Item No. I: Service Recognition: Associate Director Susan Yoza

The Commission recognized Associate Director Susan Yoza for over 30 years of service with the State of Hawaii.

Agenda Item No. II: Minutes: Consideration and Approval of the Minutes of the September 16, 2015, Meeting

Commissioner Tschumy made and Commissioner Wood seconded a motion to approve the minutes of the September 16, 2015, Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Graulty voting).

Agenda Item No. III: Executive Director's Report

1. Education/Training Report

Executive Director Kondo said that he conducted ethics training for the Corporate Board of the Hawaii Health Systems Corporation on September 24, 2015, and for approximately 60 state employees of the Hawaii State Hospital on October 8, 2015. Executive Director Kondo said that, to date, staff has provided ethics training for approximately 1,000 state employees and board and commission members.

Commissioner Wood asked if the ethics training for employees of the Department of Transportation ("DOT") Highways Division would be scheduled for 2016. Executive Director Kondo said that staff was waiting for DOT Highways Division Deputy Director Ed Sniffen to set a date for the training.

2. September 2015: Guidance and Assignment Statistics

Executive Director Kondo updated the Commission on the office's statistics for the month of September. Staff received a total of 62 attorney-of-the-day calls, opened 76 new assignments, and closed 77 assignments.

Executive Director Kondo said staff provided general guidance to legislators and state officials regarding an invitation to a party sponsored by Alaska Airlines and an invitation from the Marine Corps for VIP parking, a buffet lunch, and seating in a VIP tent to view the Blue Angels. Staff advised legislators and state officials that, unless there was a legitimate state purpose for attending the events, they should not accept the invitations.

3. Teacher-Chaperone Travel

Executive Director Kondo said that the Commissioners were provided with the Board of Education's ("BOE") Investigative Committee's report and staff's testimony that was submitted to the BOE at its October 20, 2015, meeting. Executive Director Kondo said that the BOE adopted the recommendations of the Investigative Committee's report and designated school travel as being either school-sponsored trips or private trips. Executive Director Kondo said that it was his impression that the Department of Education ("DOE") would implement the BOE's policies with respect to future trips, including pending trips.

4. Nai Aupuni, Election of Delegates to the Native Hawaiian Constitutional Convention

Executive Director Kondo said that staff has been receiving a number of inquiries as to whether or not there are any ethics issues regarding the election of delegates to the Native Hawaiian Constitutional Convention, primarily, because a number of candidates are state legislators and Office of Hawaiian Affairs Trustees. Executive Director Kondo said that staff has provided guidance that there are no ethics issues because the election is being held by a private entity.

5. Honolulu Ethics Commission Decision Dismissing Charge Against Current and Former City Council Members

Executive Director Kondo discussed a Honolulu Ethics Commission case where charges against two Honolulu City Council members and one former City Council member were dismissed. Executive Director Kondo compared the City Ordinance with the State Ethics Code with respect to charge proceedings and the conducting of discovery.

6. Cool Schools 4 Ewa Program

Executive Director Kondo said that staff had an opportunity to speak with Representative Matthew LoPresti regarding his Cool Schools 4 Ewa Program, and that staff did not have any ethics concerns regarding the program.

7. Hawaii State Ethics Commission Financial Report for FY 2015-2016 (Quarter Ending September 30, 2015)

Executive Director Kondo said the Commission's financial report for the first quarter of the fiscal year was included for the Commission's information.

Executive Director Kondo mentioned that staff issued the October issue of "The High Road" newsletter.

Agenda Item No. IV: 2016 Legislative Proposals

Preliminary Discussion of Possible Policy Initiatives and Other Amendments Relating to the State Ethics Code, Hawaii Revised Statutes Chapter 84, and/or the State Lobbyists Law, Hawaii Revised Statutes Chapter 97, for the 2016 Legislative Session

Staff Attorney Neuffer said that 2016 will be the second half of the legislature's biennium session, so all of the bills that were introduced to the legislature in 2015 will be considered in 2016.

Staff Attorney Neuffer said staff would request that the bills that the Commission introduced in the 2015 legislative session be heard by the committees. Staff Attorney Neuffer said staff would support House Bill No. 813, HD 3, Relating to the Code of Ethics, introduced by Representative Matthew LoPresti. HB 813, HD 3 would amend the fair treatment law, Hawaii Revised Statutes ("HRS") section 84-13, to restore the legislative exemption in that statute to its original language. The original language provided an exemption for legislators acting in the exercise of a "legislative function." This phrase is a term of art taken from the State Constitution's grant of legislative immunity. Staff Attorney Neuffer explained that the statute was changed in 2012 as part of a broader amendment that exempted task force members from provisions of the State Ethics Code. The exemption now refers to "official action" rather than "legislative function." Executive Director Kondo said that this matter is the subject of a request by the Commission for an opinion from the Attorney General.

Staff Attorney Neuffer said that staff will be tracking Senate Bill No. 1144, SD 2, HD 1, Relating to Technology Transfer at the University of Hawaii (“UH”). This bill would exempt UH faculty and technical staff who are engaged in technology transfer activities from the State Ethics Code, provided there exists a regulatory structure within the UH. Staff Attorney Neuffer explained that technology transfer is when UH employees develop technology as part of their state positions and that technology evolves into the private sector. These situations may generate conflicts of interests issues.

Staff Attorney Neuffer said that staff would like the Commission to introduce a bill in the 2016 legislative session that relates to a recurring issue where state employees are asked to serve on the boards of non-profit organizations in their state capacities. For example, a Hawaii State Library employee may be asked to serve on the board of Friends of the Library, or a nurse employed by the State may be asked to serve on the State Board of Nursing. Staff Attorney Neuffer said that these situations would create a financial interest in a business for the employee and involve conflicts of interests issues. In the past, the Commission had held that the state employee did not have a personal financial interest in a business because the state employee was serving in the interest of the State. However, there is no support in the statute for this. This bill would allow an exemption from the conflicts law for these situations.

Executive Director Kondo said that Common Cause Hawaii, the League of Women Voters, and other similar groups requested an opportunity to meet with staff on November 3, 2015, to discuss the ethics-related bills that would be proposed by the Commission in the 2016 legislative session.

By consensus, the Commission asked staff to prepare drafts of new bills for the Commission’s review and consideration at the December meeting.

Agenda Item No. V: Stipends Paid to Department of Education Teachers from Non-Department of Education Entities

Consideration of Whether Stipends Paid to Teachers from Non-Department of Education Entities are Consistent with the State Ethics Code; Consideration of Staff Recommendation to Issue Guidance to the Department of Education Regarding the Application of the State Ethics Code to Such Stipends

Staff Attorney Chock said that the Department of Education (“DOE”) has a long-standing practice where non-DOE entities, such as private companies or other state agencies, pay stipends and cash incentives to DOE teachers and employees for performing a wide range of activities, including: attending training workshops to learn a new curriculum, implementing the new curriculum, participating in various programs and projects sponsored by the non-DOE entities, completing surveys, evaluating data, and mentoring student teachers. Staff believes that in many situations, the payment of the stipends and cash incentives to the teachers may be inconsistent with the State Ethics Code.

Staff Attorney Chock explained that a majority of the DOE teachers receiving stipends and cash incentives are “10-month” state employees who are paid for working during the 10-month school year, which runs from approximately the end of July through the end of May. Staff believes that section 84-13(2) likely prohibits teachers from being compensated by an entity other than the DOE for work that the teachers perform in their DOE capacities. Staff does not believe that 84-13(2) would prohibit the teachers from working for non-DOE entities during the summer.

Staff Attorney Chock said that staff believes that stipends paid by non-DOE entities to teachers also raise ethics issues under HRS section 84-14, the conflicts of interests law. Staff Attorney Chock discussed an example of where DOE teachers receive stipends to learn a new curriculum with the expectation that the teachers will implement the curriculum in the classroom and promote the curriculum to the rest of the DOE. This situation raises issues under HRS sections 84-14(b) and 84-14(d).

Staff Attorney Chock said that cash incentives paid to DOE teachers by non-DOE entities for performing certain tasks raise issues under the gifts law, HRS section 84-11. For example, if DOE teachers are paid cash incentives to enroll students in their advance placement courses, there is an appearance that the incentives are given to influence, motivate, or reward the teachers for performing their official duties. Staff Attorney Chock said there also are concerns that cash incentives to teachers are unwarranted benefits under the fair treatment law, HRS section 84-13.

Staff Attorney Chock said that staff does not question the value of the teachers’ participation in such activities, but said that ethics issues arise when the teachers are paid by non-DOE entities. Staff Attorney Chock explained that if the DOE, as the teachers’ employer, determines that the additional compensation is justified, staff does not believe there are ethics concerns where the DOE pays its teachers additional compensation. Staff Attorney Chock also said that staff does not believe there are ethics concerns where a non-DOE entity provides funds to a school to conduct a project or study that the school uses to compensate teachers who participate in the project or study, because the DOE is controlling the funds.

Vice Chair O’Neal disclosed that his wife is a DOE teacher and said she has never received a stipend from a non-DOE entity. Vice Chair O’Neal asked if it would be considered a benefit to the State, rather than a private benefit to the teacher, if a teacher attended training in a certain curriculum and ended up using that curriculum in the classroom. Vice Chair O’Neal noted that the DOE would be saving money by not having to pay the teacher for attending the training. He noted that his wife was required to attend training by a non-DOE entity on a Saturday during the school year and received a per diem from the DOE. Executive Director said that saving the State money is not a factor when applying the State Ethics Code in this situation. He said there are many opportunities where the State may be able to save money, but the overriding purpose of the State Ethics Code, to promote public confidence in state government, may prohibit state employees from taking advantage of some of those opportunities.

Staff Attorney Chock said that the DOE also has its own stipend policy where it pays the teachers \$159 per day for additional work performed by the teachers. Staff Attorney Chock said that the ethics issues arise due to the way the payment of stipends is structured, where the teachers are additionally compensated by non-DOE entities for performing work that is part of their DOE duties or responsibilities.

Commissioner Tschumy asked if the payment of stipends by non-DOE entities was a fairly common and standard practice at schools in other states, and also if there was a difference if the non-DOE entity was a state entity as opposed to a private entity. Staff Attorney Chock recalled one jurisdiction where it was determined that public school teachers should not be paid by outside entities to mentor student teachers. Staff Attorney Chock said that the State Ethics Code would apply with respect to a non-DOE state agency in the same way it would apply with respect to a private entity.

Commissioner Wood noted that with federally-funded projects and studies, such as Pono Choices, state employees are reimbursed for the time that they expend in the projects. Staff Attorney Chock said that in one case staff reviewed, a federal grant was received by the DOE. The DOE used the grant monies to carry out the program and compensated the teachers involved in the program through the State payroll system. In staff's view, this was not inconsistent with the State Ethics Code. Chair DeGuzman summarized that there are no ethics problems so long as stipends and cash incentives are paid to the teachers through the DOE. Commissioner Grauly agreed with Chair DeGuzman and commended staff for the comprehensive work in gathering information for the Commission.

Vice Chair O'Neal asked whether HRS section 84-13(2) would prohibit a 10-month teacher from receiving a stipend for work done on a weekend. He noted that on the weekend, as well as in the summer, a teacher is not required to work.

Commissioner Grauly suggested that the Commission defer this agenda item to allow staff time to research the questions raised by Vice Chair O'Neal. The Commission concurred to defer this agenda item to the next Commission meeting.

Agenda Item No. VI: Legislators' Annual Allowance

Review of Legislators' Use of Their 2015 Annual Allowance Accounts; Consideration of Commission Action With Respect to Expenditures and Disbursements that Appear to be Contrary to the Guidelines on the Use of Legislators' Annual Allowance

Associate Director Yoza said that she and Staff Attorney Chang conducted a review regarding legislators' use of their 2015 annual allowance to determine if the expenditures are consistent with the guidelines issued to the legislators by the Commission in 2014. Staff reviewed the Senate and House of Representatives' lists of expenditures for the period January 2015 to early June 2015, and met with the Chief Clerks of the Senate and the House of Representatives regarding certain types of expenditures. Associate Director Yoza stated that the Chief Clerks were very helpful in providing staff with the information regarding the use of legislative allowance accounts.

Associate Director Yoza said that based on staff's review, the majority of the legislators' expenditures appear to be consistent with the Commission's guidelines. However, certain types of expenditures may require further review. Associate Director Yoza informed the Commission that staff will be following up with the Chief Clerks to request additional information for specific expenditures, and that the Commission's guidelines may need to be clarified with respect to certain types of expenditures.

Staff Attorney Chang provided a brief overview of the legislative allowance guidelines and procedures, and a summary of the legislative allowance expenditures for January 2015 through early June 2015. Certain types of expenses such as fundraising event tickets and working meals may require further review. Staff Attorney Chang said that staff will update the Commission at the next Commission meeting.

Agenda Item No. VII: "Official Duties" of a Legislator for Purposes of HRS Section 84-13

Consideration of Recommendation to Request an Opinion from the Department of the Attorney General as to What Constitutes a Legislator's "Official Duties" for Purposes of Applying HRS Section 84-13

Staff Attorney Neuffer said staff would like to request an opinion from the Attorney General with respect to the application of the fair treatment law, HRS section 84-13, to legislators. Prior to 2012, the fair treatment law contained an exemption for legislators where the law could not be applied when the legislator was acting in the exercise of their "legislative functions." The term "legislative functions" is from the State Constitution and refers to legislative immunity, which appears to refer to certain core lawmaking functions, such as voting on a bill, standing on the floor giving a speech, or debating in committee. Legislators cannot be held liable for exercising these "legislative functions." Staff Attorney Neuffer said that the Commission has always construed the legislative exemption in the fair treatment law covering the same activities as the legislative immunity provision of the State Constitution. In 2012, a bill to exempt task force members from large portions of the State Ethics Code amended the language of the legislative exemption in the fair treatment law where the law no longer refers to "legislative function," but instead refers to "official action" as a legislator. Staff is concerned that the language may expand the legislative exemption. A request to the Attorney General would clarify whether that amendment changed the legislative exemption.

Staff Attorney Neuffer said that if the Attorney General opines that the 2012 amendment expanded or otherwise changed the legislative exemption, then the Commission would also request that the Attorney General clarify the activities encompassed by the phrase "official action as a legislator." Staff Attorney Neuffer said that there are no statutes that describe a legislator's duties. Therefore, legislators may say that a wide variety of things they do are considered part of their duties, such as intervening on behalf of a constituent with a private employer, community cleanup, and assisting nonprofits.

Staff Attorney Neuffer said that HRS section 84-13(2), part of the fair treatment statute, provides that a legislator cannot accept outside compensation for performing the legislator's official duties. The Attorney General's clarification of the official duties of a legislator would also help staff in interpreting HRS section 84-13(2).

Commissioner Grauly made and Vice Chair O'Neal seconded a motion to authorize staff to request an opinion from the Attorney General as described by staff. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Grauly voting).

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 11:49 a.m., Commissioner Grauly made and Commissioner Wood seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys, specifically Deputy Attorney General Robyn Chun, on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Grauly voting).

EXECUTIVE SESSION

Agenda Item No. VIII: Peer News LLC, dba Civil Beat, vs. State Ethics Commission; Civil No. 14-1-2022-09 RAN

Discussion of Status of Lawsuit with Commission's Deputy Attorney General

The Commission met in Executive Session.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 11:56 a.m., Commissioner Grauly moved and Vice Chair O'Neal seconded a motion to adjourn the executive session and return to the Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Grauly voting).

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 11:56 a.m., Commissioner Grauly moved and Commissioner Wood seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(2) to consider personnel matters affecting the Executive Director's privacy interest and/or pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys,

specifically Deputy Attorney General Robyn Chun, on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

Staff left the meeting at approximately 11:56 a.m.

EXECUTIVE SESSION

Agenda Item No. IX: Minutes: Consideration and Approval of the Minutes of the September 16, 2015, Executive Session regarding Agenda Item III: Follow-up Discussion Regarding Executive Director's Performance Evaluation and Review of Executive Director's Performance Objectives

The Commission met in Executive Session with Deputy Attorney General Robyn Chun.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 12:02 p.m., Vice Chair O'Neal moved and Commissioner Gaulty seconded a motion to adjourn the executive session and return to the Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

Agenda Item No. IX: Minutes: Consideration and Approval of the Minutes of the September 16, 2015, Executive Session regarding Agenda Item III: Follow-up Discussion Regarding Executive Director's Performance Evaluation and Review of Executive Director's Performance Objectives

Commissioner Tschumy made and Vice Chair O'Neal seconded a motion to approve the executive session minutes of the September 16, 2015, meeting regarding Agenda Item III, as amended. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 12:04 p.m., Commissioner Gaulty moved and Commissioner Wood seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(2) to consider personnel matters affecting the Executive Director's privacy interest and/or pursuant to Hawaii Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

EXECUTIVE SESSION

Agenda Item No. X: Follow-Up Evaluation of Executive Director's Job Performance

The Commission met in Executive Session.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 12:56 p.m., Vice Chair O'Neal moved and Commissioner Gaulty seconded a motion to adjourn the executive session and return to the Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF ADJUDICATORY MEETING

At approximately 12:56 p.m., Vice Chair O'Neal moved and Commissioner Gaulty seconded a motion to recess the Sunshine Law meeting and to convene the adjudicatory meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

ADJUDICATORY MEETING

The Commission met in the Adjudicatory Meeting.

RETURN TO THE SUNSHINE LAW MEETING

At approximately 3:29 p.m., the Commission returned to the Sunshine Law meeting.

RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE SESSION

At approximately 3:29 p.m., Commissioner Tschumy moved and Vice Chair O'Neal seconded a motion to recess the Sunshine Law meeting and to convene an executive session pursuant to Hawaii Revised Statutes section 92-5(a)(2) to consider personnel matters affecting the Executive Director's privacy interest. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Gaulty voting).

EXECUTIVE SESSION

Agenda Item No. X: Follow-Up Evaluation of Executive Director's Job Performance

The Commission met in Executive Session with Executive Director Kondo.

ADJOURNMENT OF EXECUTIVE SESSION AND RETURN TO THE SUNSHINE LAW MEETING

At approximately 3:51 p.m., Commissioner Grauly moved and Vice Chair O'Neal seconded a motion to adjourn the executive session and return to the Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Grauly voting).

Chair DeGuzman stated that with respect to Agenda Item X, the Commission finds that the Executive Director's performance is above satisfactory and the Commission will be conducting annual evaluations of the Executive Director beginning in June 2016.

ADJOURNMENT

At approximately 3:55 p.m., Commissioner Tschumy moved and Commissioner Grauly seconded a motion to adjourn the Sunshine Law meeting. The motion carried unanimously (DeGuzman, O'Neal, Tschumy, Wood, and Grauly voting).

The meeting was adjourned at approximately 3:55 p.m.

Minutes approved on December 2, 2015.