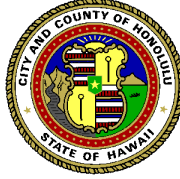


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 527-5573 \$ Fax: (808) 527-6936 \$ EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics



MUFI HANNEMANN
MAYOR

CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

December 5, 2005

TO: CHAIR ROBIN D. LIU AND MEMBERS OF THE ETHICS
COMMISSION

FROM: CHARLES W. TOTTO, EXECUTIVE DIRECTOR
AND LEGAL COUNSEL

SUBJECT: AGENDA ITEMS FOR DECEMBER 13, 2005 MEETING,
EXECUTIVE SESSION

V. EXECUTIVE SESSION

- A. Approval of the minutes of the executive session of the November 17, 2005 meeting
- B. Report and recommendation regarding possible violation of RCH Section 11-102(c) (conflict of interest arising from financial interest), RCH Section 11-103 (failure to disclose conflict of interest) and/or RCH Section 11-104 (use of city position to obtain unwarranted advantage) by [REDACTED], an employee of the [REDACTED]; EC No. 02-037(w)

1. Facts

This is the Commission's oldest unresolved case. On October 21, 2001, we received a complaint alleging that, in the course of his city employment, [REDACTED] had purchased chemical supplies for the [REDACTED]

██████████. The purchases were made through his girlfriend with whom he lived at the time and fathered a child. His girlfriend, ██████████, was the salesperson for a vendor to the facility, ██████████.

The ██████████ investigated whether ██████████ purchases through his girlfriend were reasonable and necessary. In a report dated March 22, 2002, ██████████ concluded that the purchases were appropriate in quantity and price. It took several months to confirm that ██████████ did not examine whether there was any impropriety resulting from the fact that the purchases were made through ██████████ paramour. In addition, there was a ██████████ pending regarding other matters at the ██████████ related to the conduct of ██████████ and other employees that also delayed responses from ██████████. ██████████ also faced a criminal investigation, later closed, that delayed his responses to staff's inquiries.

After several letters to ██████████ to obtain information went unanswered, staff issued a Notice of Possible Violation of the standards of conduct on November 26, 2003 and a Second Notice on November 24, 2004. By memo dated December 24, 2005, ██████████ asked for a meeting with staff, which occurred on January 5, 2005. Based on the conversation with ██████████, I contacted the man who supervised him during the time he made the purchases.

The supervisor corroborated ██████████ statement that ██████████ had been temporarily assigned as a section head. In that capacity, on occasion ██████████ was required to submit purchase requests for materials and chemicals to help run the facility. When first assigned to this new role, ██████████ raised the issue to his supervisor that it may be inappropriate for him to originate purchase requests that ultimately would be transmitted to and filled by his girlfriend and her employer. He asked his supervisor whether there was a problem with his making such requisitions and was told that, as long as he followed the established procurement procedures, there should not be a problem.

The ██████████ investigative report noted that ██████████ “appeared to have followed standard operating procedures” for purchases. Out of nine supply requests processed during his temporary assignment as ██████████, only three requests originated with him. The ██████████ report concluded that there were “no unusual increase in purchases” during the relevant time and the materials were used in the normal course of operations. The total purchases initiated by ██████████ were valued at about \$2,600.

2. Questions and analysis

Three questions arise from these facts. First, did ██████ have a financial interest in his girlfriend's employment that may have tended to impair his independent judgment in carrying out his duties to order supplies, in violation of RCH Section 11-102(c).¹ Second, if ██████ had a conflict of interest, did he properly notify his appointing authority and the EC as required by RCH Section 11-103.² Third, did ██████ use his city position to obtain an unwarranted benefit or special treatment for his girlfriend or her employer when he requisitioned materials and supplies, in violation of RCH Section 11-104.³

a. Financial conflict of interest

According to ██████ and his supervisor, ██████ was concerned that his need to order supplies through his girlfriend and her employer might create a conflict of interest. He would be conducting business with someone with whom he had a close personal relationship as well as financial interest because they lived together, had a child and shared family expenses. He requested the advice of his

¹ Section 11-102. Conflicts of Interest --

No elected or appointed officer or employee shall:

(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

² Section 11-103. Disclosure of Interest --

Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent.³⁷ Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he or she has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

³ Section 11-104. Fair and Equal Treatment --

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

supervisor who cautioned him to carefully follow the applicable procurement procedures, which he apparently did. His department found no basis to believe that ██████ sought to order more supplies than were needed. There are no facts supporting a conclusion that ██████ independent judgment may have been impaired in requisitioning the supplies.

On the other hand, an apparent conflict of interest may be the basis of a violation of the standards of conduct. The Commission has consistently interpreted RCH Section 11-101⁴ as prohibiting appearances of conflicts of interest. *See*, Advisory Opinion No. 2001-2 (June 22, 2001). "The appearance of a conflict arises when one may reasonably perceive that the officer's public duty may be interfered with or compromised by a personal or financial interest." *Id.* In this case, ██████ had an interest in carrying out his duties for the city to order only the necessary reasonable supplies at fair value. This public duty appeared to conflict with his personal⁵ and financial relationship with ██████, the salesperson for the supplier.

██████ and his supervisor could have avoided even this appearance of a conflict of interest by removing ██████ from all steps in the requisition of supplies through his girlfriend. This is the course we would have recommended to them had they contacted the Commission staff.

I think that the actions taken by ██████ and his supervisor created an appearance of a conflict of interest by letting ██████ requisition supplies through his girlfriend. However, because ██████ raised the issue to his supervisor and requisitioned only reasonable and necessary supplies, it is hard to conclude that his conduct warrants any discipline.

⁴ Section 11-101. Declaration of Policy --

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

⁵ The Commission has found that a conflict of interest may arise from a close personal relationship independent of a financial conflict of interest. *See, e.g.*, Advisory Opinion No. 184 (April 8, 1988) (a commission member had a conflict of interest because of her personal friendship with a member of the public who had business before the commission).

b. Failure to report conflict of interest

Any time a city officer or employee has a real or apparent conflict of interest, RCH Section 11-103 requires him or her to disclose the conflict in writing to the appointing authority and the Ethics Commission. *See*, Advisory Opinion No. 184 (April 8, 1988). The Commission has adopted a form for this purpose, which is available in every department and the Council and from the Commission.

██████████ failed to follow the written disclosure requirements established in RCH Section 11-103, but did notify his supervisor of the potential conflict of interest. Being in at least partial compliance with the law by orally reporting the conflict of interest to his supervisor reduces the need for discipline in my opinion.

c. Fair and equal treatment policy

Similar to an appearance of conflict of interest, the Commission has concluded that an appearance of favoritism may result in a violation of RCH Section 11-104. *See*, Advisory Opinion No. 2004-1 (March 5, 2004) (a city officer who has authority over a donor's interests should not accept a valuable gift from the donor because it may create an appearance of favoritism toward the donor). Although, ██████████ did not favor his girlfriend or her employer, it is reasonable to conclude that it looked as if they may be afforded special treatment to supply materials to the facility. City officers and employees are held to the highest standards of conduct in order to justify public confidence in the integrity of government. *See*, RCH Section 11-101.

Once again, an employee in such circumstances must avoid even the appearance of impropriety by removing him or herself.

3. Recommendation

Based on the facts and analysis, I recommend that the Commission conclude that ██████████ violated RCH Sections 11-102(c), 11-103 and 11-104. He should have sought advice from the Commission as to how to avoid the predicament. He would have avoided the ethics problems and the lengthy investigation. However, I do not recommend any discipline. I believe that his review of the advisory opinion should be sufficient for him and others in similar situations to understand the potential downside of failing to follow the letter of the law and to seek advice.

I readily admit that it may be impractical to expect more from an employee than what [REDACTED] did. One could make a good argument that he raised the issue to his supervisor and followed the supervisor's advice and nothing more should be expected of him. The problem is that, although they made a good faith attempt to avoid ethics breaches, they did not follow the requirements of the law. RCH Section 11-101 holds city personnel to the "highest standards of ethical conduct," not just a good try.

Should you have any questions regarding these matters, please contact me.