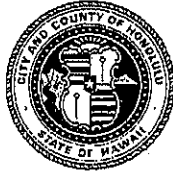


**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR
AND LEGAL COUNSEL

February 29, 2016

HAND DELIVERED

Charles W. Totto, Esq.
Executive Director and
Legal Counsel
Honolulu Ethics Commission
715 S. King Street, Suite 211
Honolulu, HI 96813

RE: Employment Discipline

Dear Mr. Totto,

As you are aware, the Honolulu Ethics Commission ("Commission") received an internal complaint regarding the management, supervision, and workplace conditions under your leadership as the Executive Director and Legal Counsel of the Honolulu Ethics Commission. Given the nature of the complaint, the seriousness of the allegations as they impacted pending cases before the Commission, and the persons and positions involved, the Commission believed that it was in its best interest for all parties to retain an outside investigator to investigate the allegations and to provide the Commissioners with his/her findings.

As you also know, the Commission retained Anna Elento-Sneed, Esq. to conduct the investigation regarding the internal complaint. The internal complaint was raised by [REDACTED] for the Honolulu Ethics Commission. Ms. Elento-Sneed interviewed several persons, including you and [REDACTED]. Ms. Elento-Sneed prepared written statements and provided each interviewee, including you, with an opportunity to review and revise his/her statements.

Based on Ms. Elento-Sneed's investigation and findings, and after deliberating and discussing the past and current management, supervision, and workplace conditions under your leadership, the Commission, upon the unanimous vote of the Commissioners, has come to the following conclusions regarding your employment as the Commission's Executive Director and Legal Counsel:

Exposure of the Commission to a Whistleblower Protection Act Claim

- Based on the actions taken by you as Executive Director of the Commission, you may have exposed the Commission to liability for a violation of the Hawaii Whistleblower Protection Act.
- Ms. Elento-Sneed's investigation and findings suggest that your conduct related to the "Executive Session Transcript" and "Dismissal of the Councilmembers Cases" as summarized below may have exposed the Commission to a viable Hawaii Whistleblower Protection Act claim.

Litigation and Organizational Skills

- You have no specific procedures for processing investigations, prioritization of cases or preparation of cases.
- Decision-making practices and procedures are not written.
- This lack of written procedures and practices causes uncertainty and unnecessary and undue workplace stress in the office.
- [REDACTED] took sick leave and vacation leave because [REDACTED].
- You have not provided the Commissioners with any instruction on how to run a meeting in accordance with Roberts Rules of Order.

Professional Judgment

- In a demonstration of lack of professional and managerial judgment, you shared your personal views and opinions about individual Commissioners, the Corporation Counsel for the City and County of Honolulu, and the City administration with your staff. This has caused unnecessary anxiety in the office.

Preparation of Transcript of Discussion of Your Performance Evaluation That Took Place During Executive Session

- Initially you asked [REDACTED] to listen to the Executive Session recording; then you asked that either [REDACTED] or [REDACTED] to transcribe the Executive Session. This occurred on or about September 24, 2015. This was unauthorized and invaded the confidentiality of the Commissioners' executive session deliberation.

Complaints Against Councilmembers

- ██████████ discussed ██████ concerns about the factual and legal basis for the Councilmember cases, and believed that you were ordering ██████ to go forward with litigating these cases in violation of the Hawaii Rules of Professional Conduct.
- ██████████ thought that you were going to terminate ██████ because ██████ dismissed these cases.
- You asked ██████████ if ██████ was looking for employment elsewhere and asked ██████ to give you two (2) weeks notice as soon as possible.
- Based on your actions, ██████████ reported that ██████ was very upset, ██████████, felt that ██████ was being retaliated against, and was afraid of being terminated.

* * * * *

Notwithstanding your long tenure with the Commission and past record, we all believe that you as the Executive Director and Legal Counsel should have set an example and provided sound leadership and guidance for all of your subordinates, not foment stress, anxiety and discontent at the workplace.

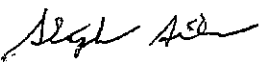
Based on the foregoing, the Commissioners unanimously have decided on the following course of action:

1. You will be placed on suspension without pay from March 1, 2016, to April 1, 2016. You will report to work on Monday, April 4, 2016.
2. Effective March 1, 2016, the Commissioners ██████████ will return to the Commission's offices. Upon your return to work, you will continue to serve as Executive Director and Legal Counsel. ██████ will remain in the Commission's offices after your return to the workplace.
3. Effective March 1, 2016, all attorneys and investigators of the Commission shall complete daily timesheets that detail by tenth of an hour increments legal and administrative tasks performed during the day. Timesheets shall be turned in monthly to the Chair of the Commission by close of business on the last day of each month via electronic mail.

4. By April 15, 2016, you will provide the Commissioners with an office flow chart that details the process for intake of cases "for information" or "for action" and for assignment of cases (1) RFA "for advice only," indicating who is responsible for providing the response/advice; and (2) "CRI needs more investigation," indicating who is assigned the case for more investigation for probable cause. This office flow chart should detail the process for reviewing "probable cause" cases.
5. Commissioner and Vice Chair Lilly and Commissioner Silva will meet with you and [REDACTED] separately prior to your suspension to discuss the Commission's expectations that it has for you and [REDACTED] to organize and manage all Commission case files. The Commissioners expect that all open cases and files shall be organized and updated on a timely and consistent basis.
6. Upon your return to work, you will provide the Commissioners with a status report on all open cases on a monthly basis as part of your Executive Director report to the Commissioners.
7. You are advised that any retaliation against any individual who complained of or participated in the workplace investigation shall not be tolerated. If we learn that you retaliated in any way against any person who complained or participated in the workplace investigation, you will be disciplined further, including immediate termination.

We trust that on a going forward basis, you and your team will establish, develop and maintain a workplace that is productive, proactive, and positive. The Commissioners will continue to look to you to set a sound, professional, and positive example for the Honolulu Ethics Commission.

Very truly yours,


for Judge Victoria S. Marks (Ret.)
Chairperson

cc: Commissioners

CITY & COUNTY OF HONOLULU
CONFIDENTIAL PERSONNEL INVESTIGATION
INVESTIGATION REPORT

Department: ETHICS COMMISSION – HONOLULU
Complainant: ████████████████████
Respondent: Charles W. Tutto
Date of Report: January 18, 2016
Investigator: Anna Elento-Sneed, Esq.
ES&A, Inc., A Law Corporation

On December 8, 2015, ES&A, Inc. was retained as a neutral, third party investigator by the City & County of Honolulu, to conduct a confidential investigation into the issues and concerns raised by ████████████████████ for the Ethics Commission – Honolulu (the “Commission”), against Charles W. Tutto (“Totto”), Executive Director/Legal Counsel for the Commission. The following is my report.

I. SCOPE OF INVESTIGATION

This investigation is the result of an October 20, 2015 email sent by ██████████ to Tutto. (See Attachment 1.) Although ██████████ initially addressed ██████████ email to Tutto, ██████████ subsequently sent a series of emails to Deputy Corporation Counsel ██████████ and indicated ██████████ wanted ██████████ email to be considered a complaint. (See Attachment 2.)

I interviewed ██████████ on December 9, 2015. In discussing the issues and concerns raised in ██████████ October 20, 2015 email, ██████████ did not identify any statutes or regulations (ethics related or otherwise) which ██████████ contends were violated by Tutto. Rather, ██████████ described ██████████ concerns as problems with “management” and “personality.”

After interviewing ██████████, I sought clarification from the Commission on the scope of this investigation. I pointed out that ██████████ was concerned about the overall “management” of the Ethics Commission Office (the “Office”), as well as ██████████ particular employment situation. The Commissioners confirmed that they did not want me to conduct a management audit of the Office’s operations. Rather the scope of this investigation was to be confined to ██████████ complaints about ██████████ employment situation, which ██████████ characterized as an “ethics complaint” in ██████████ November 7, 2015 email to ██████████, Chair Chen, Vice Chair Lilly, and Commissioners Amano, Marks and Suemori. (See Attachment 3.)

With the foregoing clarification in mind, I proceeded to complete the investigation.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Given these allegations, the issues in this investigation are whether: (a) [REDACTED] reported or threatened to report to the Commission (as an employer) or another public body, verbally or in writing, a violation or a suspected violation of a law, rule, ordinance or regulation, unless [REDACTED] knew the report was false; and (b) Tutto has threatened to discharge or has discriminated against [REDACTED] in the terms and conditions of [REDACTED] employment. See HRS §378-62(1)(the Hawai'i Whistleblower Protection Act or "HWPA").

III. INVESTIGATION PROCEDURE

At the outset of this investigation, I checked the Commission's website and the Honolulu Department of Human Resources' website for procedures that would govern an HR investigation involving the Commission Staff. I could find no regulations or procedures that specifically pertain to HR investigations involving the Ethics Commission. Indeed, when I asked [REDACTED] (in [REDACTED] capacity as Counsel for the Ethics Commission) if there were any investigation standards, [REDACTED] indicated that [REDACTED] was not aware of any rules or procedures that would be applicable. I reconfirmed this fact during [REDACTED] interview. (See Statement of Interviewee [REDACTED] ¶¶18-20.³)

Given the absence of specific HR investigation procedures for the Commission, I followed the generally accepted procedures for "full and fair investigations" followed by investigators in employment situations. These procedures involve: (1) an interview of the complainant; (2) an interview of the respondent; (3) interviews of key witnesses⁴ identified by

² [REDACTED] from the Commission on the scope of the investigation, and a copy of the November 7, 2015 email from [REDACTED], I contacted [REDACTED] by [REDACTED]

³ [REDACTED] to by the witness's last name and the pertinent paragraph numbers in the statement (e.g. [REDACTED]).

⁴ Parties often identify numerous witnesses who they believe may provide information favorable to their position. In most cases it is not practical, or necessary, to interview every witness identified. In this case, I

the parties; and (4) a review of any documents identified by the parties or the witnesses that may be relevant to the issues in question.

A. Interview Process

Face-to-face, one-on-one interviews were conducted with the following individuals⁵:

- Complainant [REDACTED] on December 9, 2015;
- [REDACTED] on December 11, 2015;
- [REDACTED] on December 11, 2015;
- Respondent Totto on December 12, 2015;
- [REDACTED] on December 15, 2015; and
- [REDACTED] on December 29, 2015.⁶

Each of the interviewees was informed that I was a neutral, third party investigator retained by the City & County of Honolulu to investigate the issues and concerns raised by [REDACTED] in [REDACTED] October 20, 2015 email.⁷ I told each of them that the interviews were confidential and that retaliation was prohibited by federal and state laws. I then explained the interview process, including the fact that they would be able to review and make corrections to their statements. I specifically told each of them that, after he/she reviewed his/her statement, I wanted them to sign and return a PDF to me so that I could include their statement with my report to the Commission.

After listening to the instructions, each of them agreed to proceed.⁸ Because [REDACTED] allegations (particularly of management practices, workloads and work-related stress) were so general and broad, I asked each of the interviewees to describe their understanding of the Office's operations, tell me what they knew of the issues and concerns in [REDACTED] October 20,

interviewed the witnesses who were employed by the Commission during the relevant time period, and who [REDACTED] and/or Totto indicated were present when certain events occurred or participated in certain activities.

⁵ During his interview and in his Statement, Totto stated or implied that I should interview [REDACTED] because [REDACTED]

[REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

Totto did not refuse to answer any questions during the interview.

2015 email, and provide personal observations of the work environment. I interjected to request copies of any documents they had, the names of people or documents they were referring to, the dates or approximate dates of any events or conversations, and the circumstances surrounding a particular event or conversation (to ensure that I understood the context of the event or conversation).

B. Written Statements

During the interviews, I took detailed type-written notes of what each witness said. After the interview, I "cleaned up" the notes by: formatting their statements into numbered paragraphs; correcting spelling, punctuation and grammatical errors (provided they did not detract from the meaning of the interviewee's statement); adding headings for ease of reference; and moved paragraphs on the same topic under the same headings, again for ease of reading. I then transmitted Word versions to the interviewees and reminded each of them that he/she was free to amend the statement as he/she deemed appropriate.

The interviewees who reviewed and corrected their statements sent back redlined versions. I accepted all the changes, checked the spelling and paragraph numbering, and then sent the FINAL version back to the interviewee for review and signature, along with any documents provided as part of his/her statement. As of the date of this Report, final written statements were signed and returned by [REDACTED] and [REDACTED].

As of the date of this Report, Totto has not returned a signed copy of his written statement. Accordingly, I have attached the latest "unsigned" draft of his written statements to this Report.⁹ The testimony and citations referenced in this Report are from his latest draft statement.

C. Relevance, Credibility of Witnesses, Weight and Sufficiency of the Evidence

As you can see, the witnesses provided a good deal of information. However, in evaluating the evidence, I only considered statements and documents relevant to a HWP claim. If there was a direct conflict in the statements provided by two or more witnesses, I evaluated the credibility of each witness by taking into account: the demeanor of the witness during the interview; whether he/she was biased or had a motive to falsify; the inherent plausibility of their statement; and whether their account of the facts was corroborated by documentation or testimony from other witnesses.

After evaluating the relevance of the evidence and the credibility of the witnesses, I made the following findings based on the weight and sufficiency of the evidence.

IV. DISCUSSION

⁹ [REDACTED] was sent to him on January 6, 2016 for review. I reminded him to attach [REDACTED]

A. Pertinent Background Facts

1. The Office Staff

[REDACTED]

[REDACTED]

[REDACTED]

Finding: In summary, Totto has spent the majority of his years with the Commission working by himself.

2. The Office Procedures and Decision-Making

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finding: Based on the few documents that were provided, and the descriptions provided by the Staff, it appears that Totto manages the office primarily through verbal instructions.

3. **The Workload**

[REDACTED]

11
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finding: Regardless of the cause, the Staff perceive the workload as “out of control” and they are all stressed.

4. **Totto’s Concerns Regarding the Commissioners, the Corporation Counsel’s Office (“COR”) and the Administration**

[REDACTED]

[REDACTED]

[REDACTED]

13 [REDACTED]

14 [REDACTED]
15 [REDACTED]

[REDACTED]

Findings: Clearly, Totto makes his views and concerns about the Commissioners, COR and the Administration known to the Office Staff. This fact is, more likely than not, the cause of Staff anxiety about the future of the Office and the outcome of this investigation. (See [REDACTED] 35; [REDACTED] 22; [REDACTED] 10, 14; [REDACTED] 44.a-f)

B. The Events In Question

[REDACTED] allegations are centered on three events: (1) Totto's 2015 performance evaluation; (2) [REDACTED] handling of the Councilmember cases; and (3) [REDACTED] October 20, 2015 email to Totto. The facts pertinent to each of these events are as follows.

1. Totto's 2015 Performance Evaluation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Findings. There are conflicting statements on whether Tutto asked [REDACTED] and [REDACTED] to provide him the transcript of the Commissioner's executive session discussion on his

¹⁸ I asked [REDACTED] in [REDACTED] capacity as Deputy Corporation Counsel assigned to the Commission, for assistance in determining whether I could review the emails between the interviewees on this issue. [REDACTED] did not know whether the City has the right to review employee emails, or the procedure for requesting access. However, as noted *infra*, resolution of this point is not required for [REDACTED] whistleblower complaint.

¹⁹ Apparently, [REDACTED] normally prepares the minutes for open and executive sessions, and then sends them to [REDACTED] for review. ([REDACTED] 2.a) Tutto commented that [REDACTED] has difficulty on minutes. (Totto 96)

performance evaluation. However, there is no dispute on the following: (a) [REDACTED] told [REDACTED] that Totto asked [REDACTED] for the transcript of the Commissioner's executive session discussion; (b) Totto told [REDACTED] that [REDACTED] was confused about his request; (c) [REDACTED] believes that Totto asked for the executive session transcript and that [REDACTED] said did not feel right about it; and (d) [REDACTED] believes [REDACTED] is now changing [REDACTED] story out of "fear of retaliation." ([REDACTED] 30.f) In short, [REDACTED] believes Totto made an inappropriate request for the executive session transcript which [REDACTED] also believes violates 11-104 of the Ethics Code. ([REDACTED] 34)

2. The Councilmember Cases

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20 [REDACTED]

21 [REDACTED]

[REDACTED]

[REDACTED]

Findings. Tutto's explanation that his question ("What do you expect us to do – fold?") was only a request for [REDACTED] to assess the Councilmember cases is not credible given Tutto's previous statement that [REDACTED] could not make critical decisions on [REDACTED] own and had to get his approval for a dismissal. (Totto 65) Moreover, Tutto's characterization of this situation as a "communication breakdown" is not plausible since he acknowledged that [REDACTED] spoke to him on several occasions about [REDACTED] concerns, and he conceded that [REDACTED] interpreted his remarks as a statement not to dismiss the cases. (Totto 53, 56)

However, whether or not Tutto actually ordered [REDACTED] to litigate the Councilmember cases without sufficient legal or evidentiary basis is irrelevant in a HWPA case. The key issue is whether [REDACTED] believed [REDACTED] was being ordered to so. The overwhelming evidence shows that [REDACTED] *believed* [REDACTED] was being forced to litigate the case in violation of the HRPC. (See Attachment 1, [REDACTED] October 20, 2015 email to Tutto at p. 2-3; [REDACTED]; [REDACTED]; [REDACTED])

3. [REDACTED] October 20, 2015 Email

[REDACTED]

[REDACTED]

22 [REDACTED]

23 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24 [REDACTED]
25 [REDACTED]

[REDACTED]

Findings: Totto directed [REDACTED] to write her October 20, 2015 email listing all of [REDACTED] concerns, including [REDACTED] belief that Totto may have violated 11-104 of the Ethics Code and the HRPC. [REDACTED] sent copies to [REDACTED] and certain Commissioners. Although [REDACTED] has not been terminated, [REDACTED] is concerned that [REDACTED] may be retaliated against. Totto's comments, particularly those in his Interview Statement, suggest [REDACTED] fears are not unreasonable. (Totto 85)

V. OVERALL IMPRESSIONS AND FINDINGS

As noted above, the issues in this investigation are whether: (a) [REDACTED] reported or threatened to report to the Commission (as an employer) or another public body, verbally or in writing, a violation or a suspected violation of a law, rule, ordinance or regulation, unless [REDACTED] knew the report was false; and (b) Totto has threatened to discharge or has discriminated against [REDACTED] in the terms and conditions of [REDACTED] employment. See HRS Section 378-62(1).

[REDACTED] has alleged four areas of violations or suspected violations:

- Totto is focused on investigations, filing complaints and prosecutions, but he lacks litigation and organization skills which is causing stress for everyone;
- Totto's ego and emotions cloud his professional judgment, puts everyone under stress;
- Totto instructed [REDACTED] and [REDACTED] to provide him the Executive Session Transcript; and
- Totto may be trying to terminate [REDACTED] employment because [REDACTED] dismissed the Councilmember cases despite Totto's wishes to the contrary.

My overall impressions and findings for each of these areas is as follows.

A. Totto's Lack Of Litigation And Organizational Skills

[REDACTED] alleges Totto's lack of litigation and organizational skills is causing stress for the Staff. The investigation revealed that Totto does, in fact, manage the office primarily through verbal instructions. This approach has become increasingly problematic as the Office's workload increased.

However, I could not find, and [REDACTED] did not identify, any particular management procedures required for the Commission. Furthermore, [REDACTED] has not alleged that Totto's approach to management violated any law, rule, ordinance or regulation. Therefore, I find no HWP violation in this area.

B. Totto's Ego And Emotions Cloud His Professional Judgment

[REDACTED] also alleges Totto allows his ego and emotions to cloud his professional judgment in cases. There is substantial evidence that Totto has had difficult working relationships with a number of individuals, and that his temper sometimes clouds his judgment. The evidence also

shows that Totto shares his views and concerns about the Commissioners, COR and the Administration with the Office Staff which, more likely than not, caused anxiety.

However, once again, ██████ has not alleged that Totto's poor judgment violates any law, rule, ordinance or regulation. Therefore, I find no HWPAs violation in this area.

C. The Executive Session Transcript

On October 21, 2015, ██████ sent ██████ and the Commission a copy of ██████ October 20, 2015 email that stated Totto directed ██████ and ██████ to provide him with the Executive Session Transcript. The evidence shows that at the time of this "report," ██████ believed Totto's request was inappropriate and violated 11-104 of the Ethics Code.²⁷ The real question is whether Totto, after learning that ██████ made ██████ report, attempted to discriminate against or discharge ██████

The evidence shows that Totto was aware ██████ included ██████ concerns about the Executive Session Transcript in ██████ October 20, 2015 email to him, and he was upset by it. The evidence also shows that Totto soon learned that ██████ shared ██████ email with others.

Although ██████ is still currently employed by the Commission, Totto has made several comments to ██████ which have caused ██████ to be concerned about retaliation. Totto's comments include: remarks about whether they [Totto and ██████] can still work together; questions about whether ██████ is looking for another job; and statements that ██████ exercised poor judgment in discussing ██████ concerns with ██████ coworkers.

This sequence of events, combined with Totto's comments, suggest ██████ fears about retaliation are not unreasonable. If steps are not taken to intervene, ██████ may have a viable claim under the HWPAs based on his request for the Executive Session Transcript.

D. Dismissal Of The Councilmember Cases

As noted above, whether or not Totto actually ordered ██████ to litigate the Councilmember cases without sufficient legal or evidentiary basis is irrelevant in a HWPAs case. The issues are: whether ██████ believed ██████ was being ordered to so; whether ██████ reported the violation; and whether ██████ was discharged and/or discriminated against for making the report.

There is overwhelming evidence that ██████ believed ██████ was being forced to litigate the case in violation of the HRPC. After Totto directed ██████ to write ██████ concerns down, ██████ sent him the October 20, 2015 email (the same email containing the report about the Executive Session Transcript), and then shared the email with others.

²⁶ The evidence shows ██████ may have reported Totto's directive to ██████ on an earlier date, when ██████ and ██████ had lunch together soon after the hearing on the Councilmember cases. (█████ 25)

²⁷ As previously stated, whether this request actually violated 11-104 of the Ethics Code is for the Commission to decide. For purposes of a HWPAs investigation, all that is required is that the employee believe, in good faith, that a violation has occurred.

Needless to say, Tutto's post-email remarks to [REDACTED] about working together, [REDACTED] job search efforts and [REDACTED] "poor judgment" could also be used to support a viable claim under the HWPAs based on the Councilmember cases.

VI. CONCLUSION

Although there are two potentially viable HWPAs claims, the problems have been caught early. Intervention is called for.

If you have any questions or need further elaboration, please let me know.

Anne Blato-Breed