

**Hilo, Hawaii  
Tuesday, December 18, 2007**

**The regular meeting of the Merit Appeals Board, County of Hawai`i, was held in the conference room of the Department of Human Resources, 101 Pauahi Street, Suite 2, Hilo, Hawai`i, on Tuesday, December 18, 2007.**

**Present:**

**Mr. G. Rick Robinson, Chair  
Mr. Clifford Kaminaka, Vice Chair  
Mr. Joel Cohen, Member  
Ms. JoAnne Balberde- Kamalii, Member  
Mr. Michael R. Ben, Director of Personnel  
Ms. Diane Noda, Deputy Corporation Counsel  
Ms. Velma Y. Menezes, Secretary- Reporter  
Ms. Yumi Nakamura, Clerk III**

**Excused:**

**Ms. Kaliko Chun, Member**

**Chair Robinson called the meeting to order at 9:41 a.m.**

**MINUTES OF OCTOBER 16, 2007**

**MOTION: Mr. Cohen moved that the minutes of October 16, 2007 be approved as circulated. The motion was seconded by Vice Chair Kaminaka and unanimously carried.**

**COMMUNICATIONS**

**A) Communication No. 07- 14, dated October 17, 2007, copy of a memorandum to Lawrence K. Mahuna, Police Chief, from**

**Michael R. Ben, Director of Human Resources, regarding the County assuming animal control duties from the Hawai`i Island Humane Society.**

**Mr. Ben reported that the decision is pending with the Mayor on whether the County will assume the animal control duties. By ordinance, the function is actually a police function, for which Police has been contracting out all this time.**

**B) Communication No. 07- 15, dated October 18, 2007, from Michael R. Ben, SPHR, Director of Human Resources, enclosing a memorandum to a department who failed to respond to a request.**

**Mr. Ben explained that given what had transpired on evaluating his performance, he thought it would be pertinent information to provide the Board with information concerning what goes on. These are examples of the department doing its job but not getting the cooperation of other people. The communication speaks for itself.**

**C) Communication No. 07- 16, dated October 19, 2007, copy of a memorandum to Darryl J. Oliveira, Fire Chief, from Michael R. Ben, Director of Human Resources, regarding additional agreements with HFFA.**

**Mr. Ben stated that this is another example of his staff working closely with another department to get all the documentation then finding they weren't given everything and having to repeat the process.**

**The same is for the ensuing communication.**

**D) Communication No. 07- 17, dated October 26, 2007, copy of a memorandum to Darryl Oliveira, Fire Chief, from Michael R. Ben, Director of Human Resources, regarding suitability guidelines.**

**E) Communication No. 07- 21, dated December 3, 2007, from Lincoln S. T. Ashida, Corporation Counsel, regarding revised affidavit for County policy on the destruction of personal records.**

**Vice Chair Kaminaka noted that this communication is a good reminder for Board members as well to properly dispose of information they receive.**

**NEW BUSINESS**

**B) Communication No. 07- 19, received November 7, 2007, petition of appeal, from Brian F. Jordan, appealing the rejection of his application by the Department of Human Resources, Recruitment and Examination Division, for the Civil Defense Staff Officer recruitment because of his failure to meet the minimum qualification requirements.**

**Mr. Jordan was present. The Board scheduled his appeal hearing for February 19, 2008, at 10:00 a.m.**

**A) Communication No. 07- 18, received November 1, 2007, petition of appeal, from Russell C.H. Lee, appealing the fire Department's denial of his application for the Fire Captain internal recruitment because of his failure to meet the minimum requirement of two years as a Fire Equipment Operator.**

**C) Communication No. 07- 20, received November 19, 2007, petition of appeal, from Henry G. Silva, appealing the questions on the Fire Captain written exam administered on October 31, 2007.**

**Mr. Lee was present. The Board scheduled his appeal hearing for January 15, 2008, at 10:00 a.m., and scheduled Mr. Silva's at 1:00 p.m.**

**Chair Robinson asked Mr. Lee whether he was represented by the union, to which Mr. Lee responded in the negative.**

## **UNFINISHED BUSINESS**

### **Action Plan by the Director of Human Resources For Evaluation Period July 2007 to June 2008**

**Mr. Ben distributed a draft of a circular, which he intends to issue to all departments on the protocol for working with him and the Department of Human Resources. He noted that the circular has been cleared with the Managing Director.**

**The points of the circular are to:**

- 1) encourage staff to work with staff; and he's philosophized a bit on what he thinks department heads should be doing.**
- 2) give departments an avenue to voice their complaints. Mr. Ben has instructed Mr. Takahashi to field those complaints and report them to the Board so that the complaints are timely, there's documentation that they exist, and the Board can deal with them at that time.**

**Mr. Ben recognizes that at this stage of the game, people may still choose not to talk to him; however, with the above in place, there shouldn't be any concerns about not working with HR. Once the circular is issued, how to work with HR should be clear to everyone.**

**Vice Chair Kaminaka suggested that the Board respond, on Mr. Ben's behalf, on the non-responsive letters. He can appreciate Mr. Ben's frustration.**

**Mr. Ben stated that while he appreciates the concern, it's not a subject for this forum, but perhaps another forum.**

**Mr. Cohen noted that they are a neutral body looking at the same issues that come from the Board, not the director; and being a neutral board, they can say something.**

**Ms. Balberde- Kamalii stated that the circular provides clarification, accountability, and avenues for the departments to follow, which might also help them to streamline within their own department. She thanked Mr. Ben for doing this, as it will give the Board an opportunity to see the impact this will have.**

**Mr. Ben added that by issuing the circular, it also sends a message out that the Board has acted on his evaluation and that he has heard the concern.**

**MOTION: Mr. Cohen moved that the Board change the evaluation period from July 1 through June 30 to January 1, 2009.**

**Mr. Cohen noted that they will be doing this again in six months. He added that there has to be continued communication on the issues, and as he stated at the previous meeting, this is just part of the process. His motion is basically to establish January 1 through December 31, 2008 as the next evaluation period rather than June 30.**

**Mr. Ben stated that the Board's rules specifically provide the period as being from July to June. The Board would have to go through a rule change to provide for Mr. Cohen's motion.**

**Mr. Cohen withdrew his motion. He added that the process ideally should be as follows:**

**Open the evaluation process to receive information/input, summarize and review it, then discuss it with the person being evaluated. After that process, then the Board comes to a conclusion after getting the whole picture.**

### **DIRECTOR'S REPORT**

**Mr. Ben reported the following:**

**1) The HR department is looking at the whole personnel program and at the duties and responsibilities. They are always getting requests from departments for reallocations and have been turning them down because the employees are not doing the work of the higher class.**

**The HR department is changing the class specs to recognize professional duties and will be pricing them higher, so now there will be a carrot out there—"if you want the higher pay, then here's what you need to do." Only one person right now qualifies for that higher pay, and they have slowly been upgrading the HR clerical type personnel within the County who are working independently.**

**2) The contracting-out/janitorial issue with UPW has finally been settled. They recently recruited for janitorial type positions, because the County will be assuming those duties from January 1, 2008. Twenty full-time and approximately nine part-time civil service positions have been established to assume those duties. The union subsequently filed grievances concerning all the other contracts for bargaining unit 1 type work, but Mr. Ben has been working closely with the union on that and is hopeful it will be resolved.**

#### **NEXT MEETING DATE**

**The next meeting was scheduled for January 15, 2008 at 9:30 a.m., followed by Russell C.H. Lee's appeal hearing at 10:00 a.m. and Henry G. Silva's appeal hearing at 1:00 p.m.**

**The meeting recessed at 10:15 a.m.**

**Hilo, Hawaii  
Tuesday, December 18, 2007**

**APPEAL HEARING – WILLIAM SHAPIRO – DID THE PLANNING  
DIRECTOR VIOLATE ANY CIVIL SERVICE LAWS, RULES, OR  
REGULATIONS IN TERMINATING APPELLANT FROM A PLANNER  
POSITION WITH THE PLANNING DEPARTMENT?**

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**Present:**

**Mr. G. Rick Robinson, Chair  
Mr. Clifford Kaminaka, Vice Chair  
Mr. Joel Cohen, Member  
Ms. JoAnne Balberde- Kamalii, Member  
Mr. Julian White, Deputy Attorney General  
Ms. Yumi Nakamura, Clerk III  
Ms. Velma Y. Menezes, Secretary- Reporter**

**Excused:**

**Ms. Kaliko Chun, Member**

**Absent:**

**Mr. William Shapiro, Appellant**

**Others Present:**

**Ms. Diane A. Noda, Deputy Corporation Counsel  
Mr. Chris Yuen, Planning Director  
Mr. Bennett Mark, Supervisor, Planning Department (Kona)**

**Chair Robinson called the hearing to order at 10:30 a.m.**

**Chair Robinson noted the absence of the Appellant.**

**Ms. Menezes distributed a statement that the Appellant had faxed.**

**Ms. Noda stated that she did previously file two motions to dismiss, one for untimely filing of this appeal and the second on the Merit Appeals Board lacking jurisdiction.**

**On her memorandum for untimely filing, Ms. Noda noted two corrections that need to be made. The last paragraph of page 4 of the motion to dismiss for untimely filing contains an error in the date. The date should be February 20 and not 22. The date also needs to be corrected on page 5—it should read February 20, 2007.**

**Ms. Noda asked that the Board dismiss Mr. Shapiro's case at the onset before even considering her two motions. Regarding appeals in contested cases, the Hawai`i Administrative Procedure Act in the statutes governs. Section 91- 10, subsection 5, says that the party initiating the proceeding has the burden of proof, including the burden of producing evidence, as well as the burden of persuasion and the degree or quantum of proof shall be a preponderance of the evidence. Because Mr. Shapiro is not here, he's not presenting anything, and he's not meeting his burden at all.**

**If the Board moves on to consider one or both of her motions, then she can address it.**

**Mr. White noted that Mr. Shapiro has given the Board a statement. He makes it clear in a portion of his statement that the Board consider it as a presentation of his case and a theory of his case.**

**On the County's motion on Mr. Shapiro's untimely filing of the appeal, Ms. Noda requested that his appeal be dismissed. Mr. Shapiro's initial internal complaint was about his evaluation. It later evolved into addressing his not continuing employment. Under both timelines, he's still untimely; and he does not make any filing deadlines. If he is talking about his evaluation, his evaluation went through an internal complaint procedure, which is the timeline at the top of page 4 in Ms. Noda's memorandum.**

**Mr. Shapiro received the Mayor's Office's decision on the step 2 evaluation on January 22, according to his own written statement. The 20-day filing deadline for that lapsed on February 11, which was a Sunday, so he has the benefit of the next working day, which would be Monday, February 12, 2007. He filed on February 20, which was too late.**

**Even if they look at the tighter deadline of Mr. Shapiro's termination, he got a termination letter from Mr. Yuen on November 20, 2006, and his last day of work was on December 13, 2006. Ms. Noda noted that they are actually looking at his not continuing on with employment and not a termination. Twenty days for filing from his last day of work would have run out on January 2, 2007. Under either scenario, he missed the deadline.**

**On his written submission, Mr. Shapiro says that Billy Kenoi tells him something different; however, Ms. Noda submits that the appeal form, which Mr. Shapiro submitted, clearly states the rules of the Civil Service Commission that an appeal shall be filed within 20 days from any action. Therefore, whether they are looking at Mr. Kenoi's step 2 decision evaluating the Planning Department's evaluation, or Mr. Shapiro's last day of work, he's beyond the deadline in either scenario.**

**As Ms. Noda has set forth in her motion, the state statute, HRS 76-14(b), says that appeals shall be filed within the time limit and according to the Merit Appeals Board rules. "Shall" is a requirement; it's not discretionary. Also, the Merit Appeals Board rule 104-2(a), which is cited in her motion, says that appeals shall be filed within 20 days from the action giving rise to this appeal.**

**Again, Mr. Shapiro's last day of work was December 13, 2006. Twenty days expired on January 2, 2007.**

**Mr. White asked what the authority is for Ms. Noda's position that 20 days is calendar days and not working days.**

**Ms. Noda responded that it is the plain reading of the state statute and the Merit Appeals Board rule. Her further argument for**

**the Board even considering Mr. Shapiro's position that he thought it was business days is that if this Board makes that exception and excuses him for what he possibly thought was different, then the Board is granting an exception and an excuse; and that would set precedent for any other appellant who comes in and says he/she misunderstood that rule. The County submits that this Board cannot interpret the state statute, nor the Merit Appeals Board rule, as such.**

**Chair Robinson asked what capacity Mr. Kenoi was operating in when he issued the internal complaint decision.**

**Ms. Noda responded that Mr. Kenoi did the Step 2 evaluation on behalf of the Mayor. He was the Mayor's executive assistant at that time and was designated to do the evaluation on behalf of the Mayor.**

**MOTION: Vice Chair Kaminaka moved to convene into an executive session to consult with counsel. The motion was seconded by Ms. Balberde- Kamalii and unanimously carried.**

**The Board convened into an executive session at 10:45 a.m. and reconvened into the hearing at 11:00 a.m.**

**Ms. Noda reiterated that the County requests Mr. Shapiro's appeal be dismissed for untimely filing. Ms. Noda noted that she failed to point out when she was addressing the motion that there is a Merit Appeals Board rule regarding computation of time, rule 101- 8(c), and it says for time periods more than ten days, Saturdays, Sundays, and holidays are included.**

**MOTION: Mr. Cohen moved that the appeal be dismissed for lack of timeliness in filing. The motion was seconded by Vice Chair Kaminaka and unanimously carried.**

**ADJOURNMENT**

**MOTION: Mr. Kaminaka moved that the meeting be adjourned.  
The motion was seconded by Ms. Balberde- Kamalii  
and unanimously carried.**

**The meeting adjourned at 11:03 a.m.**

**Respectfully submitted,**

**Secretary, Civil Service Commission**

**APPROVED:**

**G. Rick Robinson  
Chair**

**vym**