

THE BOARD OF ETHICS

COUNTY OF KAUAI

ADVISORY OPINION RAO 2024-01

The Kauai County Board of Ethics (“Board”), having reviewed a request for an advisory opinion, dated May 7, 2024 (“RAO”) from Ludvina K. Takahashi, County Executive on Aging for the County of Kauai, and having obtained all the information deemed necessary by the Board to make a proper determination regarding the subject request, renders this Advisory Opinion (“RAO 2024-01”) pursuant to the Charter of the County of Kauai and Rule 5 of the Kauai County Board of Ethics Rules and Regulations (“Rules”).

The issue before the Board is whether a conflict of interest exists because the County Assistant Executive on Aging, Donna Lynn Loo, is married to the owner of Regenerative Services Kauai (“Business”), which has a current contract with the County’s Agency on Elderly Affairs (“AEA”), and may participate in AEA’s upcoming procurement for a new contract later this year.

The Board concludes that a conflict of interest exists but can be mitigated if the Executive Assistant is disqualified from all official action affecting the Business.

BACKGROUND

On May 17, 2024, the Board convened at its monthly meeting and considered rendering an advisory opinion on the above referenced RAO. Ms. Takahashi and Ms. Loo were in attendance and responded to questions from members. After the members asked their questions, the Board entered into Executive Session to consult with the Board’s attorney. The Board requested supplementary information from Ms. Takahashi that it deemed necessary to make a proper determination pursuant to Rule 5(c) and deferred the RAO to the Board’s next open meeting.

On June 21, 2024, the Board convened at its monthly meeting and continued discussing the above referenced RAO. At this meeting the Board received and reviewed the requested supplementary information. Ms. Takahashi attended and answered members’ questions. The Board then entered into Executive Session to consult with the Board’s attorney. The Board returned to open session. With a quorum present and voting, the Board concluded that a conflict of interest exists.

FACTS

In reaching its conclusion, the Board relied on the facts in the RAO, the supplementary information submitted, and the testimony and representations of Ms. Takahashi and Ms. Loo. Based on the facts in the record, the Board finds that the Grants Manager of AEA is primarily responsible

for the agency's procurement activities and contract management. The Grants Manager is part of AEA's Grants Management division. The Grants Management division is one of four divisions within AEA. The other three divisions include Fiscal, ADRC/Information Referral, and Volunteer Development. Each of the four divisions are supervised by the Assistant Executive on Aging. The Assistant Executive reports to the County Executive on Aging.

As it relates to the above referenced RAO, the Grants Manager, with the approval of Ms. Takahashi and the County's Division of Purchasing ("Purchasing"), prepared a request for proposal for fiscal year October 1, 2021-September 30, 2024 ("RFP No. 1"). RFP No. 1 was published for public bidding on August 27, 2021. RFP No. 1 sought to award a contract to a contractor who could provide personal care, homemaker, chore, and assisted transportation services to adults sixty (60) years old and older as part of the State of Hawai'i Kupuna Care ("KC") Program administered by the AEA. The KC Program is a state-sponsored program designed to meet the long-term care needs of older adults unable to live at home without adequate help to perform their activities of daily living and instrumental activities of daily living. There is significant need for these services on Kaua'i as evidenced by a growing waitlist for the KC Program administered by AEA. However, on-island providers are limited.

Only two service providers submitted proposals in response to RFP No. 1. One of the proposals was submitted by the Business. After the deadline, Purchasing then opened the submitted proposals and forwarded the proposals to the Grants Manager. Upon receipt, the Grants Manager convened an evaluation committee to review and score the submitted proposals. The evaluation committee used a set of criteria that was publicly posted with RFP No. 1 to grade each proposal. Following the scoring by the evaluation committee, the Grants Manager with approval by the Executive, completed a recommendation of award to Business, and forwarded it to Purchasing for review and approval. Purchasing then sent the Business a notice of award. The Grants Manager, with approval of the Executive, then completed pre-contract paperwork, including the formal contract. The Grants Manager then worked with Purchasing and other County entities to execute and then manage the contract. Ms. Takahashi signed the contract and the notice to proceed for AEA.

Ms. Loo was not a member of the evaluation committee for RFP No. 1. Importantly, Ms. Loo was not the Assistant Executive when RFP No. 1 was published, and the contract awarded to the Business. Rather, Ms. Loo was an employee in AEA's Volunteer Development division. In this position, Ms. Loo was not involved in any procurement activities related to RFP No. 1. Despite this, the Grants Manager consulted with Purchasing on whether a conflict of interest existed because Ms. Loo was an employee of AEA and her spouse's Business was about to be awarded a contract. Purchasing determined no conflict of interest existed because there was a competitive bid process and Ms. Loo was not involved in it. The contract was awarded and executed with the Business for a term of three years. The term of the contract expires in the Fall of 2024.

At some point during the term of this contract, Ms. Loo was promoted to Assistant Executive. Ms. Loo now supervises the four AEA divisions, including the Grants Manager position. The Grants Manager and Purchasing are now in the process of issuing a new request for proposals for the same services discussed above for a new term to begin later this year (“RFP No. 2”).

APPLICABLE LAWS

With regard to this request, the Board considered the following provisions of the Kauaʻi County Charter in rendering this Advisory Opinion:

Section 20.02. No officer or employee of the county shall:

- A. Solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the officer or employee in the performance of the officer or employee’s official duties or is intended as a reward for any official action on the officer or employee’s part.
- B. Disclose information which, by law or practice, is not available to the public and which the officer or employee acquires in the course of the officer or employee’s official duties or use such information for the officer or employee’s personal gain or for the benefit of anyone.
- C. Acquire financial interest in business enterprises which the officer or employee may be directly involved in official action to be taken by the officer or employee.
- D. Appear on behalf of private interests before any county board, commission, or agency.
- E. Use the officer or employee’s official position to secure a special benefit, privilege, or exemption for the officer or employee or others.
- F. Use county property for other than public activity or purpose.

The Board also considered the following provisions of the Kauaʻi County Code in rendering this Advisory Opinion:

Sec. 3-1.6. Fair Treatment.

(a) No councilmember or employee of the County shall use or attempt to use his or her official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for him or herself or others, including but not limited to the following:

- (1) Seeking other employment or contract for services for him or herself by the use or attempted use of his or her office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his or her official duties or responsibilities except as provided by law.
- (3) Using County time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or person or business whom he or she inspects or supervises in his or her official capacity.

Sec. 3-1.7. Conflicts of Interest

- (a) No employee shall take any official action directly affecting:
 - (1) A business or other undertaking in which he or she has a substantial financial interest; or
 - (2) A private undertaking in which he or she is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.
 - (A) Except that a department head who is unable to disqualify him or herself on any matter described in Paragraphs (1) and (2) of this Subsection, will not be in violation of this Subsection if he or she has complied with the disclosure requirements of Section 3-1.9; and
 - (B) Except that a member of a board, commission or committee, whose participation is necessary in order to constitute a quorum to conduct official business on any matter described in Paragraphs (1) and (2) of this Subsection, will not be in violation of this Subsection if he or she has complied with the disclosure requirements of Sec. 3-1.9.
- (b) No Councilmember or employee shall acquire financial interests in any business or other undertaking which he or she has reason to believe may be directly involved in official action to be taken by him or her.
- (c) No Councilmember or employee shall assist any person or business or act in a representative capacity before any County agency for a contingent compensation in any transaction involving the County.
- (d) No Councilmember or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he or she has participated or will participate as a Councilmember or employee, nor shall he or she assist any person or business or act in a representative capacity for a fee or other compensation on a bill, contract, claim or other transaction or proposal before the Council or agency of which he or she is an employee or Councilmember.

(e) No employee shall assist any person or business or act in a representative capacity before a County agency for a fee or other consideration on any bill, contract, claim, or other transaction or proposal involving official action by the agency if he or she has official authority over that County agency unless he or she has complied with the disclosure requirements of Section 3-1.9.

Sec. 3-1.8. Contracts.

(a) A County agency shall not enter into a contract with an officer or an employee or with a business in which an officer or an employee has a substantial interest, involving service or property of a value in excess of \$1,000, unless the contract is made after competitive bidding.

Sec. 3-1.3. Definitions.

[. .]

“Financial interest” means an interest held by an individual, his or her spouse, or his or her minor children. A divorce or separation between spouses shall not terminate any relationship which is

- (1) An ownership in a business.
- (2) A creditor in an insolvent business.
- (3) An employment, or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property.
- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

[. .]

“Official act” or “official action” means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

OPINION

Based on the foregoing Code of Ethics provisions contained in the Kaua‘i County Charter and County Code, and considering the evidence in the record, the Board finds that a conflict of interests exists because Ms. Loo has a substantial financial interest in the Business by being married to its owner, and in her capacity as Assistant Executive of Aging, is in a position to take official action affecting the Business. Importantly, the conflict of interest gave rise when Ms. Loo was promoted to Assistant Executive. The following subparts discuss the Board’s Advisory Opinion and its recommendations on mitigating the conflict of interest.

(A) A conflict of interest exists whenever Ms. Loo can take official action that directly affects the Business

A conflict of interest exists because Ms. Loo has a substantial financial interest in the Business, and as Assistant Executive, is in a position to make decisions, recommendations, approvals, disapprovals, or other action (including inaction), which involves the use of discretionary authority, directly affecting the Business. When Ms. Loo was promoted to Assistant Executive, she assumed

supervisory duties and responsibilities over the Grants Manager and all other AEA employees who handle various procurement activities and contract management involving the Business. The Board finds that Ms. Loo's supervisory duties and responsibilities over AEA employees whose job functions include procurement activities and contract management involving the Business constitute official action under Kaua'i County Code ("KCC") § 3-1.3 and thus creates a conflict of interest pursuant to KCC § 3-1.7.

However, to make clear, no conflict of interest existed when RFP No. 1 was published to the public, nor did a conflict exist at the time the initial contract was awarded to the Business, because Ms. Loo was not in a position to take official action on anything relating to this procurement or contract award. But even if a conflict of interest existed, the County could still award this contract to the Business because it was made after competitive proposals pursuant to the Procurement Code in Hawai'i Revised Statutes ("HRS") § 103D, and in conformance with KCC § 3-1.8, Contracts.

(B) The conflict of interest is mitigated by disqualifying Ms. Loo from all official action that affects the Business

The conflict of interest is mitigated by disqualifying Ms. Loo from all official action that directly affects the Business. The Board is persuaded by State Ethics Commission Advisory Opinion 2000-1, dated March 15, 2000, and relies on it to identify activities that constitute official action. Official action includes but is not limited to developing policy; developing requests for bids; developing contracts or criteria for evaluating contracts; evaluating bids; awarding or approving contracts; personally executing contracts and other official documents or having the documents stamped in one's name; monitoring contracts; making decisions; making recommendations; providing input in substantive matters; handling complaints and grievances; conducting investigations; making referrals; issuing advice; interpreting laws, polices, and rules; rendering administrative decisions; and ***oversight of any of these activities***.¹ The State Ethics Commission also provided guidance to define the degree to which conduct is considered *directly affecting* the Business, writing, "for example, . . . a decision to reduce the size of a contract award to a competitor of the Business that enabled the Business to receive a larger award might constitute official action impacting the Business."²

Disqualification is reasonable because it appropriately mitigates the conflict of interest under these specific circumstances. First, the Board does not believe the Code of Ethics was intended to be so restrictive as to preclude Ms. Loo from continuing to serve in her current position as Assistant Executive or to require her spouse to divest his ownership interest from the Business.³ Second,

¹ See *Hawai'i State Ethics Comm'n Advisory Opinion* 2000-01, 2000 WL 3672764, *6 (March 15, 2000).

² *Hawai'i State Ethics Comm'n Advisory Opinion* 2000-01, 2000 WL 3672764, *6 (March 15, 2000).

³ See *Hawai'i State Ethics Comm'n Advisory Opinion* 2000-01, 2000 WL 3672764, *6 (March 15, 2000) ("[T]he Commission did not believe that [HRS section 84-14(a)] was intended to be so restrictive as to preclude the employee from continuing to serve as the head of the Office or require his spouse to terminate her employment with the Business. The Commission however, advised the employee that he must disqualify himself from taking any official action that directly affected the Business, to the extent possible or practicable.").

disqualification takes into account the growing need for and the importance of the KC Program on Kāua'i and the significant impact on the community in the event AEA is prohibited from continuing with the current contract with the Business or from considering a proposal from the Business in a subsequent procurement. Accordingly, Ms. Loo is to be disqualified from all official action directly affecting the Business.

(C) Ms. Loo's conflict of interest does not prohibit AEA from contracting with the Business provided certain conditions are met

AEA may continue with the current contract and may contract with the Business in the future provided the following conditions are met:

1. The AEA administration works with Ms. Loo and all applicable AEA staff to develop and implement policies and procedures that accommodates Ms. Loo's disqualification from all official action directly affecting the Business consistent with the Code of Ethics and this Advisory Opinion. The Board requests AEA present these policies and procedures to the Board for comment. The request for a presentation should not prohibit AEA from immediately implementing policies and procedures that screen off Ms. Loo from all official action affecting the Business. The presentation should be made to the Board prior to the end of this calendar year.
2. For any new contract that may be awarded to Business or any of its competitors, the contract may only be awarded after it has gone through the competitive procurement process.

Moving forward, AEA is to keep the Board apprised of any changes in circumstances applicable to Ms. Loo or the Business as it may affect the recommendations made in this Advisory Opinion. If AEA has any further questions or concerns, please contact the Board for additional guidance. In closing, as a reminder to AEA, all employees must conduct themselves in strict accordance with the Code of Ethics and this Advisory Opinion. AEA supervisors must also ensure their direct reports understand the importance of and conduct themselves in strict compliance with the Code of Ethics. The Board thanks Ms. Takahashi and Ms. Loo for seeking its advice and for their cooperation on this matter.

Members present and voting: Chair Ryan de la Pena, Secretary Chantal Zarbaugh, Members Kevin McGinnis and Amber Mokuahi.

Absent: Vice Chair Rose Ramos-Benzel and Member John Latkiewicz.

Concurring, Dissenting: None

Abstaining: None

Board of Ethics:

Ryan de la Pena, Chairperson