

The Honorable E. John McConnell (Ret.)
33 N. Market Street, Suite 200
Wailuku, Maui, Hawai'i 96793
Maui Phone: (808) 244-6531
Fax: (808) 242-4610
Hearing Officer

BEFORE ARBITRATOR THE HONORABLE E. JOHN McCONNELL

BOARD OF ETHICS OF THE COUNTY OF KAUAI

In re: MICHAEL CHING)
)
) BOE No. 94-001(a)
)
) HEARING OFFICER'S REPORT
)
_____)

HEARING OFFICER'S REPORT

The undersigned Hearing Officer was duly appointed to conduct a contested case hearing of the above-captioned matter on behalf of the Kauai County Board of Ethics. A hearing was duly noticed and conducted on November 18, 2005. Corlis J. Chang, Esq., appeared for the Complainant Board of Ethics. Yuriko J. Sugimura, Esq., appeared for the Respondent Michael G. Ching.

Each of the parties was afforded a full and complete opportunity to call and examine witnesses and to offer evidence. Testimony was taken from Respondent Ching, Kauai County Police Officers Bryson Ponce and Eric Caspillo, and from Kauai Police Commissioner Leon Gonsalves. Numerous exhibits, including transcripts of earlier proceedings before the Board, were stipulated into evidence.

Having carefully considered the totality of the evidence in light of the claims and contentions of each of the parties, the

Hearing Officer recommends that the proposed Findings of Fact and Conclusions of Law and Recommended Order attached hereto as Exhibit "A" be adopted by the Commission.

The purpose of this brief report is to set forth in summary form the Hearing Officer's reasons for this recommendation.

I. THE CHARGES.

Complainant Board found probable cause that Respondent Ching committed three violations of the Charter and Code by:

(1) Soliciting support for candidate for Chief of Police K.C. Lum from the State of Hawaii Organization of Police Officers ("SHOPO") in violation of Article XX, Section 20.02E of the Kauai County Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code; (2) placing candidate K.C. in the office of interim police chief in violation of the same provisions; and (3) by failing to conduct the selection process in a fair and impartial manner.

II. SOLICITATION OF SHOPO.

The Hearing Officer agrees with Complainant that a preponderance of the evidence more than establishes the fact that Respondent Ching actively solicited support for Lum from SHOPO, specifically Officer Bryson Ponce, SHOPO'S Kauai chair. The Hearing Officer finds the testimony of Officer Ponce and not that of Respondent Ching to be credible. The attached findings of fact more than support this conclusion. The more difficult question is whether

such conduct violated Article XX, Section 20.02E of the Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code. The two provisions have essentially the same purpose. The Charter provides no officer shall:

"Use his official position to secure a special benefit privilege or exemption for himself or others."

Chapter 3, Article 1, Section 3-1.6 of the Code states:

"No councilman or employee [it is undisputed that for purpose of this Section police commissioners are "employees"] shall use or attempt to use his official position to secure or grant unwarranted privileges, exceptions, advantages, contracts or treatment for himself or others."

Respondent Ching at a minimum attempted to use his official position to gain support for candidate Lum from SHOPO through its representative on Kauai, Officer Ponce. In fact, of course, his efforts proved unsuccessful. The question remains whether a SHOPO endorsement constitutes an "unwarranted" benefit or advantage within the meaning of the foregoing provisions.

The Hearing Officer concludes that it does. Endorsements by SHOPO are obviously an internal matter for SHOPO. Any attempt by a police commissioner to influence the union can be viewed as unwarranted pressure from an official in a position to influence unrelated issues of importance to SHOPO.

It should not be overlooked the job of a police commissioner at least in part may properly include the encouragement of qualified applicants to apply for the position of Chief. Here, however, Respondent Ching's own testimony establishes that his efforts on behalf of candidate Lum were concealed from one or more of his co-commissioners. Thus, the openness and transparency of the selection process was compromised. The clear purpose of the Commission is to ensure the selection process is open and fair and to minimize political influence. That purpose was not served by Respondent Ching's conduct.

III. SELECTION OF LUM AS INTERIM CHIEF.

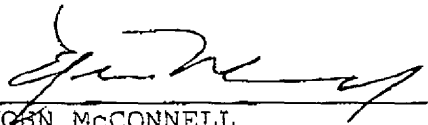
There is little doubt that Respondent Ching conducted a concerted campaign to place candidate Lum in the position of interim chief of police. His actions in this regard took place in the middle of the selection process, and plainly gave Lum the advantages of administrative experience and exposure over the other candidates. Further, the decision not to extend the contract of interim chief Ihu without reason, the failure to follow the chain of command in selecting an interim chief, and the warning to Lum to be prepared to discuss the issue of his candidacy for the permanent position before the meeting at which the interim chief was chosen, establish Respondent Ching's efforts to manipulate the process.

IV. UNFAIR PROCESS.

The Complainant further contends that the process was unfair in the following respects: (1) the opinion of Commissioner Gonsalves who had 34 years experience in law enforcement was ignored; (2) Lieutenant Lum's failure to act during the infamous "lap dancing" incident was ignored; (3) candidate Lum's negative background check was ignored; (4) a proposed strategic plan from another candidate was not considered; and (5) a favorable petition on behalf of candidate Lum was accepted.

The evidence supporting these facts certainly tends to cast some doubt on the fairness of the selection process. Although this evidence tends to establish a bias on the part of at least some Commission members, it does not establish any specific violation of the Charter or Code by Commissioner Ching individually. For this reason, the Hearing Officer declines to conclude that the findings of fact set forth in Section D of Complainant's proposed findings establish a particular violation of the Charter or Code by Commissioner Ching.

Respectfully submitted this 23rd day of February, 2006.



E. JOHN McCONNELL
Hearing Officer