

TO: JUDtestimony@capitol.hawaii.gov

FR: Rolf H. Bieber II, 5015 Malie Rd., Kapaa, HI 96746 808 821-2194

RE: Testimony on HB 468, 2/1/11, 2 p.m., JUD Committee hearing

Dear Committee Members,

LATE TESTIMONY

I support HB 468.

My name is Rolf H. Bieber II, a former Kauai County Board of Ethics Member 2009. HB 468 is a long-overdue, vital piece of legislation for this county. Kauai's ethics board is in desperate need of a process that ensures the board's impartiality and independence. This has been true for many decades now. Ethical controversies have been a bone of contention on our island for far too long.

Author of the controversial book, *KPD Blue* (2008), Anthony Sommer, has attested to it.

Much else too has been published in regard to our local brand of ethics and its effects among governmental bodies and individuals that perpetuate it. I have provided below three contemporary articles in chronological order of publication in *The Garden Island Newspaper*, the last of which is authored by me in what I hope you will find an honest and candid expression of my personal witness to a multitude of corrupt practices and less-than ethical actions during my one year term on the Kauai Board of Ethics.

An independent and impartial process for the board of ethics would go a long way to alleviate future calamities such that I described in my story, "Year of Conflicting Ethics: Together We Can't" (2009).

Heart-felt Mahalo for your diligence in recognizing our need in crafting this law.

Much luck, Rolf Bieber.

Theater of the absurd

By The Garden Island

Published: Sunday, September 13, 2009 2:11 AM HST

http://thegardenisland.com/news/opinion/editorial/article_bb63ccba-0ebf-58f1-acb5-d30ada13f7e0.html

The Garden Island | Posted: Sunday, September 13, 2009 12:00 am |

It is not the first time our local government has made us scratch our heads, and it certainly won't be the last, but the most recent dubious decision by a group of county officials may very well make us go bald.

We looked at the facts available to us. Then we looked again. And again. We still don't get it.

The Ethics Board recently advised a Charter Review Commission member in a fashion that seems to totally contradict the advice it gave two of its own members a couple months ago on a similar issue.

Matilda "Mattie" Yoshioka confirmed this week that she proffered a resignation letter to the Charter Review Commission on Aug. 14, a day after the Ethics Board advised her to no longer appear before the Kaua'i County Council in her role as Kaua'i Economic Development Board president and CEO.

Charter Section 20.02D says "No officer or employee of the county shall ... appear in behalf of private interests before any county board, commission or agency."

Yoshioka agreed that she had done just that for KEDB. But as far as we can tell, so have Ethics Board

members Judy Lenthall (who appeared before the County Council on behalf of Kaua'i Foodbank) and Mark Hubbard (who appeared before the council on behalf of Kaua'i Planning and Action Alliance), not to mention Cost Control Commissioner Lorna Nishimitsu (who appeared before the council on behalf of Kikiaola Land Co.) and Charter Review Commissioner Jonathan Chun (who appeared before the council and Planning Commission on behalf of his legal clients).

The first three were cleared June 4 of allegations they violated the County Charter. Similarly, the board unanimously decided last year that Chun, a private attorney, should be allowed to continue representing his clients before county government bodies.

No matter how you choose to define "appear" or "private interest," there is no logical way of interpreting 20.02D to have it apply to Yoshioka's behavior but not to Chun's or the other three examples we mentioned. So why was Yoshioka — who, like Chun, voluntarily went to the Ethics Board for an advisory opinion — held to a different standard? We're not saying we don't like the new direction, but we are concerned about its selective application.

In a discussion on the merits of applying 20.02D earlier this year, County Attorney Al Castillo told the Ethics Board that forbidding board and commission members to appear on behalf of private interests before other boards and commissions could have a chilling effect, causing a mass exodus of such county volunteers and "absurd results."

In a new legal opinion provided this week to the Ethics Board, which it appropriately released to the public, the County Attorney's Office argues that the absurdity of a "strict constructionist reading" is what essentially nullifies the charter provision and allows the County Code to reign supreme.

So why did the board apparently heed that advice for Lenthall, Hubbard, Nishimitsu and Chun in the past, but not now for Yoshioka? Is it personal, a new path or what?

The law is clear to us, and even the latest legal opinion calls it "unambiguous." Can it be interpreted to produce "absurd" results, such as a commissioner not being allowed to get her driver's license, apply for a water meter or file a police report? Only if we let it.

The county should clarify the section. But it should do so according to the people's will. This is, after all, a representative republic.

The Charter Review Commission put an amendment on the ballot last November that asked if the charter should be amended to expressly permit county board and commission members to appear on behalf of private interests before any county board, commission or agency except the board or commission on which they serve. Voters roundly rejected it 13,751 "no" to 7,133 "yes."

A group of concerned citizens fought this proposed change to Section 20.02D from its infancy. Despite an affirmative advisory opinion in March 2008 from the Ethics Board, some residents argued there is a conflict of interest when commissioners try to wear "multiple hats."

The people have spoken on this issue. Residents want this charter provision applied more conservatively. If a few exceptions are needed to avoid the section becoming "absurd" then the county should draft those and put them up for voter approval.

The county should not try to do the opposite of the people's desire. The voters will see through any clever wording and kill such an amendment.

Let's tighten up 20.02D and lay some ground rules — but make it practical and keep it realistic. It is indeed absurd if a volunteer board member is unable to apply for a driver's license because of a potential charter violation.

But until those changes happen, let's enforce the charter consistently. Qualified volunteers to fill the dozens of important board and commission seats are in short supply on such a small island. Let's make sure we keep the minds of current and potential members open to serving the county.

If the Ethics Board is going to tell Yoshioka to either stop representing KEDB in front of the council or stop volunteering for the Charter Review Commission, then Chun, Hubbard, Lenthall, Nishimitsu and all the others wearing "multiple hats" should either stop representing their private interests or resign themselves

The dysfunctional Board of Ethics

By Walter Lewis

Published: Saturday, October 31, 2009 2:10 AM HST

http://thegardenisland.com/news/opinion/guest/article_54a2fdb5-7cf1-53ce-8725-edc7f473ea50.html

Section 20.02D of the Kaua'i Charter, known as the Code of Ethics, prohibits county officers and employees from representing private interests before county agencies and is an unlikely candidate for prominence.

The Kaua'i Board of Ethics, responsible for the administration of the code, has had in recent years only five cases involving its application. Yet in a period of over 18 months, the board has not finally resolved any of these cases — although two of them were mooted by the resignation of the persons involved from their offices. The performance by the board in its handling of the five cases is a distressing illustration of its dysfunctional nature.

While the board itself has some responsibility for this dismal record, the real problem is deeper.

When the first of the cases arose by the request in early 2008 from an attorney member of a county commission for an advisory ruling by the board regarding his representation of private clients at county agency meetings, the board requested assistance from the Office of the County Attorney on the matter.

The attorney's response in a March 2008 letter was that 20.02D was ambiguous and it should be considered together with certain County Code sections dealing principally with conflicts of interest. Faced with this essentially useless advice, the board gave the requesting attorney a "pass" without explaining the basis for its action.

Three of this year's 20.02D cases arose from complaints heard at the board's June 4 meeting concerning testimony by commission members at county agencies. The board asked the new county attorney for a review of the 2008 opinion and to provide his opinions on three related questions.

The attorney gave a delayed response in a Sept. 3 letter offering some additional discussion but expressing the same views as stated in the March 2008 letter and only a partial response to one of the other three questions.

The crux of the matter is that the county attorney has concluded based on his reading of the section and without any other evidence or rationale that the section's meaning is ambiguous. A number of citizen witnesses have, however, testified that both the language of the section and its intent are clear. One member of the board has declared that the county attorney view is an insult to his intelligence.

Beyond his unsupported finding of ambiguity, the county attorney has failed to give the board any helpful guidance as to what they should do if, as he has instructed them, they are to obey his interpretation. The sole clue he provided was that the board should not read 20.02D in a vacuum and supposedly relevant County Code sections should be considered. This far-from-straightforward advice is essentially meaningless.

At the September board meeting, a proposal was offered to ask the county attorney to explain his position. The proposal was defeated by a 4-to-3 vote of the board.

(Editor's note: The proposal included questions provided by the author, following public testimony and the receipt of a written communication from the author.)

So the dysfunctional board has disabled itself from seeking further clarifying advice from the county attorney and is groping for what to do. A possibility is that the board might consult with another lawyer who could be better qualified. But in real life, on Kaua'i, this won't happen.

One board initiative that has promise is to issue what is now labeled a declaratory order but could be better considered as an interpretive ruling to express how the board intends in the future to treat situations involving 20.02D.

Such an order would require a majority of the often disharmonious board to agree on the meaning of 20.02D terms such as "private interests" and "appear." The fate of the proposed ruling will most likely depend on whether some members of the board will be willing to emerge from the protective cover they have used to date to avoid explaining their vote in the first 20.02D matter considered.

The deputy county attorney assigned to the board has declared that order adoption must be preceded by a public hearing, but has not otherwise rained on it.

It is expected that the county attorney who has caused this paralysis of the Ethics Board is pleased by the present condition. It may serve the political objectives of the person to whom he reports, but he has failed in the performance of the duties of the office he holds.

To serve the public welfare and the citizens of our county which is his ultimate responsibility his duty as county attorney, he should offer to his clients, the officers and managers of this county, responses to their inquiries for legal assistance that provide a fair analysis of the relevant law and then an objective guidance on its application to the actual situation presented.

When our county attorney commands obedience by his clients to the legal pronouncements he issues and they are defective or unintelligible, the process fails. One member of the board has stated that the gap between what the county attorney has said regarding 20.02D and a reasonable interpretation of the applicable law is unbridgeable. Unfortunately, he seems to be right and the function of the Ethics Board has been critically impaired.

The headline of the article in The Garden Island reporting on the September Ethics Board meeting had it about right when it called the debate (or its absence) at the meeting "weirder and weirder."

It is unfortunate and ironic that the current impasse is precluding the board's performance of its duties stated in our charter to assure "a high standard of integrity

and morality in our government service.”

- Walter Lewis is a resident of Princeville and writes a biweekly column for The Garden Island.

***Year of conflicting ethics: ‘Together we can’t’
by Rolf Bieber, published January 5, 2010
The Garden Island Newspaper***

http://thegardenisland.com/news/opinion/mailbag/article_edd7714c-9cb9-5008-afc4-674b12fa1457.html

In January of 2009, I promised the people of Kauai as a Board of Ethics (BOE) member to uphold the Charter and hold myself, my colleagues and all officers and employees of the county accountable to the Code of Ethics.

Mayor Bernard P. Carvalho Jr.’s appointment of me to the quasi-judicial body paid dividends to a public hungry for action beyond political rhetoric. I delivered to you what you deserve from a BOE member — integrity, openness and a political will to enforce the law.

In my single year on the BOE, your view into government achieved unprecedented depths by release of four County Attorney opinions and a significant change in policy regarding the county’s disclosure statements and an advisory opinion given to Charter Review Commissioner Mattie Yoshioka that now correctly supports the plain meaning of Charter Section 20.02 (D). In response, several county commissioners have chosen to resign their posts. These important works and corresponding news stories can be read in detail in *The Garden Island*, at www.kauaiworld.com/sunshine and <http://parxnewsdaily.blogspot.com/>. Yet these significant strides were achieved at a cost.

My cost came in the form of an ousting from the board. Conviction and oath to preserve the Charter soon aligned me against BOE colleagues, mayoral appointees, the Office of Boards and Commissions (OBC), the County Attorney (CA) and apparently Mayor Carvalho himself, who inexplicably refused to reappoint me to the board for a second term.

Perhaps I should have read the writing on the wall my first day.

During Council’s approval interview, Councilman Dickie Chang questioned whether I would be writing letters to the editor of *The Garden Island* while on the BOE. His suggestion was that I should not. This concept, to muzzle a basic tenet of our Constitution, struck me with insult and my response, received solemnly, addressed my First Amendment Right to free speech— a right I enjoy liberally. The law says ethics members are only restricted in political campaigning. Not a problem—for me.

Or that the writing was on the wall within weeks of my appointment when I was encouraged at a Charter Review Commission meeting by OBC Administrator John Isobe to seek out a job in the administration, a computer position with the County (I did not). Or that Mr. Isobe would on several other occasions try

inappropriately to influence me—once, when I requested public documents that could expose members of the administration and commissions he asked that I not share the documents with anyone, and later calling me to meet in his office “to see how things were going” but to actually express his desire for the BOE to reach a “super-majority or unanimous-vote only for release of County Attorney opinions to the public.”

That writing on the wall should have been clear enough months before as the only piece of advice I received from Interim Mayor Kai Po Asing during my 2008 mayoral campaign when he told me, “Don’t rock the boat.”

Why I refused to comply with these things can be explained simply: because to do so would deny you access to the workings of your government and I swore to uphold the law.

Early as an BOE member I contacted newly appointed County Attorney Al Castillo with documentation received from various sources including the county that I determined clearly showed dealings to oust 20.02 (D) from the Charter and a case to uphold the plain meaning of Charter Section 20.02 (D) “*No officer or employee of the county shall appear in behalf of private interests before any county board, commission or agency.*” 2008 had already seen contention between an angered public and the BOE regarding 20.02 (D) then again when the voters rejected change to this Charter section that November.

The voters overwhelmingly supported stricter guidelines by voting down a proposal to allow board & commission members ability to represent private interest before other boards and commissions. In other words, the citizenry likes the prohibition as it stands-- I agreed, despite what a colleague said about voter “knee-jerk, over-reaction”. I believe the voters got it right.

If the voters had passed the changes to the law, none of the following would have occurred, yet little did I know at that time my involvement in county government would soon ignite a firestorm.

In April of 2009, Castillo told me he had meetings with Kauai Circuit Court Judge Randal Valenciano on several occasions concerning 20.02 (D) and that it was clear to him that attorneys like Charter Review Commissioner Jonathan Chun (or later, Lorna Nishimitsu) who represented clients for pay before other commissions were indeed in violation, but Castillo drew the line there. This ethics law would not apply to other non-paid individuals he told me. I questioned him about the failed ballot measure in November 2008 that would have relieved “the other non-paid individuals” (county board and commission members) and the potential for quid pro quo amongst county officers/ employees but Castillo failed to convince me even then, long before our public conflicts stemming from three ethics complaints I’d file later in May 2009 against BOE Vice-Chairman Mark Hubbard and Judith Lenthall and Cost Control Commissioner Lorna Nishimitsu for violation of 20.02 (D).

Castillo for the first time referred to an obscure 1976 Michael Belles document to help make his case, that, upon investigation, mistakenly declared that the “county code interprets the Charter.” No. The code can only supplement, it in no way interprets, yet Castillo would sell this concept like his predecessor to a majority of BOE members with past mistakes to protect.

To counter this I challenged the BOE to examine supremacy laws.

At the time of my first approaching Castillo, the possibilities for positive change in the county were real, many folks who paid attention to such things were hopeful after long years of dismal results and secrecy from prior County Attorneys. BOE attorney Margaret Sueoka, fired by Castillo and replaced by Mona Clark

and Mauna Kea Trask, filed suit against the county. Nobody complained of Sueoka's absence. But, the fact that many of the old-guard remained under Carvalho, like Lani Nakazawa, should have clued us into the fact that nothing significant would change in the CA's office. Yes, we would see some new faces, but...

Now, in retrospect, Castillo made things worse for the BOE than his predecessor. Not only would he scam you with old-school tact like recycling an old opinion into a "new" one with the same confusing outcome, but he'd bully you, too, like telling you that you must comply with his opinion or risk personal liability. This was not your grandfather's CA—or maybe it was.

What's most confounding to me is the vast confusion and conflicting opinions coming out of Castillo's office concerning those 21 plain words in 20.02 (D). Castillo reversed himself from our April discussion and it appeared to me he was making a bid to wipe the books clean of 20.02(D).

All three attorneys that served BOE in 2009: Mona Clark, Mauna Kea Trask and Castillo did an unconvincing job cajoling the board with outlandish arguments, for example "this is the way our county has done things for decades" and "perhaps that sort of thinking applies on the mainland"-- insults of intelligence even to the dullest mind in an argument against upholding plain law to protect a handful of politically privileged associates, campaign supporters and a majority board membership mired in past mistakes. Worse, out of the newly interchangeable-counsel-triplet, supported by the majority BOE membership came a spinning of such fantasy yarn as to confuse plain meaning and basic supremacy law: Castillo and Trask particularly embraced aforementioned "county code interpreting the Charter", "Charter cannot be read in a vacuum" bizarre scenarios conjuring "a chilling effect" on the county that "upholding 20.02 (D) would create 'absurd results' which would keep county officers and employees from applying for building permits, driver's licenses and camping passes"-- all this obscure nonsense in the face of actual, legitimate complaints against three county officers violating a clear prohibition in the Code of Ethics.

The public, outraged and dumbfounded, quickly identified Castillo's dirty tricks and doubletalk and The Garden Island newspaper among other outlets reported it frequently. I was pleased to fight Castillo's rubbish all the way, but it cost me.

After an unceremoniously dumping in December 2009, I asked the mayor what I was supposed to do as a sworn BOE officer when witnessing at Council Budget Hearings and a Budget Committee three county officers violating Charter 20.02 (D). Was I supposed to do 'what has been done for decades' by turning a blind eye?

I told the mayor, I couldn't do it.

Disappointingly, he responded woodenly-- a puppet's recital, "...my commissioners need to work together as a team... I am looking for balance... it's not about me... you shouldn't take this personal." It reminded me of a short, unsatisfying conversation I had with Councilman Daryl Kaneshiro a year earlier-- he too was not smitten with the concept of a democratic process with its pesky checks and balances negotiated through a practice of conflicting ideology as though we must all conform to the wishes of the plantation master.

I insisted on clarification from the mayor but he refused to delve into the subject further and repeated his script, "... as a team... balance... it's not personal..."

The Carvalho Regime: *Together We Can't.*

Worse still, by June's ethics meeting Castillo went beyond the fold by telling us that although the BOE is the client we "must" follow his advice. Thankfully, member Paul Weil, an extremely skillful attorney, did not allow this abuse, but somehow to my dismay Paul did manage to let Nishimitsu off the hook—in his words—a regrettable error. That portion of the June meeting which Hubbard, Lenthall nor I could participate, a confounding deal was struck by the four-member BOE quorum and Castillo: *all three respondents to the May complaints would be found not guilty of violating 20.02 (D) based on a future county attorney opinion.* That's right. As soon as the board "received" an opinion from the CA, the charges would be dropped.

But thanks again to Paul Weil it was not as easy as the status-quo desired. Weil filleted the work product of Castillo & Co. plastering it with the now notorious "fatally flawed" label eventually hashing-out details with Castillo at Weil's home— forging compromise. I respected Weil very much for this move. Not only did he make the extra effort for everyone, but he did it with the best of intentions at a time when the board was torn apart. Weil seemed optimistic. When Castillo agreed and worked to a deal then backed-out by the following ethics meeting leaving Weil to see Castillo's true colors— the attorneys parted in canyon-sized proportions. Weil, not to be played like a sucker, exposed Castillo and Trask, by releasing his email communications publically, understandably, in the name of good governance and transparency (www.kauaiworld.com/sunshine).

During these months of unprecedented openness, confusion and in-fighting within the BOE, I began requesting digital audio minutes from the OBC for the ethics meeting open sessions. The summary minutes supplied by staff approved by the board and posted to the internet paled in comparison to the actual dialog of these hotly contested meetings. The atmosphere at ethics became critically charged and I wanted the verbatim record preserved, especially since the law was being perverted in a very concerted effort between status-quo board members, the CA, and OBC. By this point in time I felt fully alienated by my government chums, Mr. Isobe no longer smiled in passing, Castillo made no eye contact with me at Council meetings and many of my ethics mates resented me for challenging them. BOE meetings became longer and more heated and Chair Leila Fuller who sat to my right grumbled ever more frequently under her breath and became unsympathetic and sometimes mean-spirited toward public testimony.

Even my requests for audio were met with increasingly deflated responses, and worse, "If you keep this up I don't know if we can be friends any longer." the secretary addressed me. A joke— yes but the message was clear:

Bieber's rocking the boat— it's unwelcomed and he must pay.

One way of making me pay was to intimidate me by rallying an "investigation". This investigation, predicated on an inquiry by Vice-Chair Hubbard as to how his name and the names of Judith Lenthall and Lorna Nishimitsu got into the newspaper over ethics complaints never unfurled but remained a dark and misty cloud on the ever growing list of executive sessions. In a weird turn of events, a copy of the board's executive session minutes concerning the investigation turned up in my subsequent BOE package so I read all about what our discombobulated board was up to—again, Isobe was at the forefront ready to assist the investigation with any and all resources available from the OBC, all too zealously the minutes read.

Crazier still was Hubbard's and Lenthall's lame attempt at espionage when during our recusal of the June meeting they attempted a ridiculous display of "good-cop/ bad-cop" to get me to answer questions concerning complaints and names getting into *The Garden Island*. Lenthall did an especially bad job hiding the fact that she was holding her Black Berry device too close to my mouth.

The pinnacle of insanity surrounded the October 2009 BOE meeting. It wasn't enough that the board meetings were now regularly fraught with ridiculous numbers of executive sessions with never enough votes to get into and unclear as to who should participate and who should recuse themselves for conflicts-of-interest or that now the county disclosure statements were examined by the board in open session—a concept unheard of in the history of Kauai County. Or that nobody really understood how the BOE was going to circumvent responsibility of upholding the law concerning the three complaints filed by now *five months* earlier.

No, what happened next was a new journey down another rabbit hole replete in recognition.

October 2009, Deputy CA Mona Clark said in open session that "*private interest*: is defined as anything other than a government entity." This definition was refused all year in not one, but two new county attorney opinions given the board in prior months of 2009, subsequently challenged by the BOE, particularly Weil, and released to the public. The definition of private interest that sprang forth out of the blue like a sunbeam that morning had been denied long before the May complaints that kept the board in fog was now batted about in open session deliberation between board members as if a beach ball. When Clark defined private interest I could not believe my ears—literally, "private interest— a non-government entity". But my joy would soon be countered by Weil. Ironically, this is the one definition where the county attorney got it correct and Weil got it wrong. This definition would set the table not only for future interpretations of 20.02 (D) but what the board currently faces in complaints still pending (for example, Vice- Chair Hubbard as respondent for representing a "private interest" 501(c) 3 before Council). In a further perverse twist, eventually, Lenthall and Hubbard agreed!

Later, I requested the audio just like I had done each month prior wanting to hear those words again, "private interest—a non-government entity" in full audio but to my shock and horror my request had been denied from the OBC. They said the digital audio was not available due to a "flash drive error—no audio".

This meant the entire verbatim record was lost. A question crashed through me immediately: was this done intentionally because of Clark's words?

Shock and horror turned to disgust and suspicion when the following County Council meeting had on its agenda a request from Isobe to destroy audio records. My God, what is going on?

In response to this news I wrote letters to the CA and Council to deny request to destroy any audio records from the BOE because they needed to be preserved in case of any litigation, especially regarding the board's dealing with 20.02 (D). I found the coincidence between my denial of the October audio and this Council request uncanny. How could this be a mere coincidence? To me it wasn't coincidence and felt I needed to confront yet again those whom I shared the public trust. Was this a cover-up? A friend asked me how I thought I could get any kind of support from the CA and Council after all the public scrutiny. Why not just talk to Isobe about the records yourself?

By this time I had lost trust in the OBC Administrator. Certainly the feeling was mutual. Since I came on board, no longer was Isobe able to coerce BOE members into protecting CA work product with a super-majority or unanimous vote, or keep disclosure statements secret, or protect political allies like Mattie Yoshioka with favorable advisory opinions vis-à-vis Jonathan Chun a year earlier. O' the difference a year makes. For Isobe, maintaining a stranglehold on appointees—his kuleana beginning in 2006 under Baptiste was beginning to slip in serious ways.

The more I examined this dynamic, the clearer the idea became-- Isobe's loss is your gain. Or in the case of these records our loss was his gain, so I imagined. For better or worse, I was not going to let BOE records get destroyed without a fight, even if it meant another costly challenge to yet another pillar in the Carvalho regime.

When the agenda item finally came to the floor of Council, a strange thing happened. A letter from the administration suddenly appeared signed by Isobe and Mayor Carvalho wishing to withdraw the agenda item. I was relieved. The records would be saved. But I felt the Council deserved some explanation as to what was happening behind the scenes. After calling for recess, Chairman Asing asked for public testimony. I approached the microphone, introduced myself and disclosed my membership in the BOE.

At this point something terribly surprising happened and if I had anticipated it I would have handled it differently, but I didn't. I had no clue that CA Castillo would cut off my testimony before it started. As soon as I introduced myself, Castillo responded with authority. He stated that I would be in violation of the charter and code if I continued testimony. Time froze. I watched in awe as Castillo grinded this testimony to a halt. I looked at the Council, back to Castillo and then back again—Council sat silently and obediently and as still as I did. Castillo, who has no authority in this situation, boldly challenged me and the Council—gambled, and won, initially anyway. It is the Chairman's prerogative on how to handle public testimony, not the CA. If the Chairman has a question as to the opinion of law concerning testimony he would then ask the testifier to wait a moment while getting legal advice from the attorney. The CA would then offer advice to which the Chairman would respond in conducting the business of testimony. If a testifier chooses, even knowingly, to condemn himself or violate the law he has every right to do so. But the CA may not keep anyone from testimony. It is a violation of one's First Amendment Right of free speech.

Had I anticipated this move by Castillo, I would have put him on the spot and asked what law was being violated by testifying before Council. But I didn't. In my inexperience I backed away and I'll never forget it and always regret not challenging him on the spot.

Fortunately for all of us, Michael Levine of *The Garden Island* did put Castillo on the spot and asked what law I would have violated. Castillo's answer: 20.02 (D) "*No officer or employee of the county shall appear in behalf of private interests before any county board, commission or agency.*" And thankfully, for the public record, Levine printed it.

More importantly, it exposed Castillo as a bad attorney or a political fraud. And if you think there was no political gamesmanship being played there by Castillo considers this: why didn't Charter Review Commission Chairman Sherman Sheraishi from testifying in favor of the Charter Review Commission appointees at the County Council meeting only weeks later in December 2009?

Because Bieber must pay.

None of the progress in ethics could have been successful without keen journalism and those already participating in our special brand of "democracy"—those willing to chance ridicule, or worse, to point out our government's faults and needs for improvement. Attention to detail by Michael Levine, Nathan Eagle at *The Garden Island* and super-heavyweight political reporter Andy Parx at *PNN* as well as other media outlets have supplied the oft needed exposure the people require and the government deserves. And I would be remiss not to mention the public's outcry for justice in testimony and the many letters to the editor during the year. Charter champion Horace Stoessel; Attorney and columnist Walter Lewis; Bruce "No-red-tape" Pleas; Government watchdogs like Glenn Mickens, Ken Taylor, Rob Abrew, Caren Diamond

and many, more have as much to do with recent breakthroughs in government transparency as I do. Yet, current political movements for change are not nearly enough to take us into 2010 and beyond. This government desperately needs more public involvement.

And bravery is required more consistently from the county rank-in-file to the protester on the streets; from reporters and editors of news pages and blogs to a public willing to write letters and give testimony in commissions and Council meetings. Courageous effort is needed from those who strive to sacrifice for honor and dignity and oath to serve the best interest of the most Kauaians. Remember, my brother and sister citizens, like the mayor says, "It's not personal." But I say it's okay to make it so.

Who of you is willing to pay the price for a better government?

Ethics Board has change of heart

New rule: 20.02D applies to everyone

Michael Levine - The Garden Island The Garden Island | Posted: Tuesday, March 16, 2010 11:45 pm

http://thegardenisland.com/news/local/govt-and-politics/article_2d8dcf66-3193-11df-8551-001cc4c002e0.html

LIHU'E — The Kaua'i Board of Ethics put the finishing touches on its year-long conflicts of interest debate Thursday, unanimously voting to define a key term broadly and without exemptions, giving the County Charter maximum impact and placing firm ethical limits on the behavior of county officers.

After a public hearing earlier in the morning meeting at the Mo'ikeha Building, Vice Chair Mark Hubbard led the charge to approve an interpretive rule to clarify the board's position on Charter Section 20.02D, which bars county officials from appearing on behalf of private interests before county boards, commissions and agencies.

"I think it's about time. I'm glad it finally got done. People are wondering, 'How are you going to interpret this? How are we going to behave in the future?'" said Hubbard, who earlier this year was cleared of a May 2009 complaint that he had appeared before the Kaua'i County Council in behalf of the Kaua'i Planning and Action Alliance in apparent violation of 20.02D. "I think this will help."

Previous decisions downplaying 20.02D, including advisory opinions from the Office of the County Attorney that said applying the law could lead to "absurd" results, caused a muddled board position on the section's applicability and led some county volunteers to resign their posts over the confusion.

Asked what advice he would offer to county volunteers who want to know what Thursday's vote means for them, Hubbard said, "I would tell them, with this interpretive rule, it's now different than we've voted in the past, and I would have been in error in going before the County Council. I should not do that again, or I should quit my position on the Board of Ethics. I have a choice."

Board Secretary Paul Weil, who had originally crafted language that would have carved out an exemption for those county officials representing not-for-profit "eleemosynary" (charitable) organizations, seconded Hubbard's motion to approve the rule sans carve-out, crediting his change of heart to an outpouring of public opposition and a 2003 letter authored by the State Ethics Review Commission.

The letter, provided unsolicited by Sen. Les Ihara (D-Kapahulu, Kaimuki, Palolo) to The Garden Island last month and included in the Ethics Board's March packet, said serving even as an uncompensated director of a non-profit corporation does create a "financial interest" because Hawai'i Revised Statutes define that term to include directorship in a "business," and define business to include a corporation, whether operated for profit or not.

"The term 'financial interest' pertains, of course, to having an actual monetary interest in a business, and so

forth, but also includes situations where one is not receiving actual compensation or monetary gain, but the 'interest' in the matter is so strong as to reasonably have a possible effect upon one's decision-making as a state official," the letter says.

The letter identifies fiduciary responsibilities and the potential for a lawsuit as financial interests not generally considered by the general public.

"While such service may appear to be merely the providing of volunteer services as a good citizen, in reality, under the law, there are substantial and real financial interests that a member of the board of directors of a non-profit corporation has, whether the individual is compensated or not," the letter concludes.

Weil said Monday that the letter contains "good reasoning, much better than anything we've received from our own counsel," a shot at the Office of the County Attorney which Weil has said in the past provided "fatally flawed" opinions that failed to "bridge the gap" between 20.02D and the County Code.

Asked by Weil if the letter had been researched or considered in previous opinions or advice to the board, Deputy County Attorney Mona Clark said she had been previously unaware of it.

The board voted 5-0 in favor of the amended interpretive rule, which now defines "private interest" to be "all persons and entities other than governmental bodies." Board members Leila Thompson and Brad Nagano were absent.

Weil said he was "greatly influenced" by public testimony, and said there is time in the future to add exemptions if board members want to do so, but he did not want that issue to stand in the way of progress.

"I had made up my mind fairly early that the carve-outs weren't worth risking the rest of the measure," he said. "If I thought that it would have been strongly possible to pass the overall measure while including the carve-out, I would not have" agreed to remove it.

Weil said the board's new official stance on 20.02D does not necessarily mean that the complaints against Hubbard, former board member Judy Lenthall and former Cost Control Commissioner Lorna Nishimitsu would have been sustained, as each case has its own unique factors and the board had "manifold reasons" for voting to move forward without reprimanding the three.

"There is no simple answer. It's a bit more complex than that, and unfortunately the public in general tries to be simplistic," he said.

Former board member Rolf Bieber, who filed the three complaints last year, testified in favor of the rule without the carve-out, and said Monday that while he is pleased with the board's actions, he remains skeptical.

"Really the proof will be when the board will be faced with a complaint of 20.02, how the board will respond. It's fine that they incorporated this new administrative rule, but the way I feel about it is I will wait and see how the rule and law is applied," Bieber said. "Will the board follow through with the application of the law and rule?"

Hubbard said he would have voted to uphold the complaint against himself had he been given the chance because "I was wrong" to violate the charter when he represented KPAA at the council, but said previous rulings like the one in 2008 to clear former Charter Review Commissioner Jonathan Chun of a similar charge were not mistakes.

"That was the interpretation back then, that was reasonable, that was what a group of people decided," Hubbard said. "This is what another group of people are deciding, and we're moving forward. I have changed my mind, but I don't think I was necessarily in error or (had the) wrong interpretation.

"I think there is not a conflict with me appearing before the County Council on behalf of KPAA, but the charter says we shouldn't do it, so we won't, and we'll see what happens," Hubbard said.

• Michael Levine, assistant news editor, can be reached at 245-3681 (ext. 252) or



Hawaii
COMMON CAUSE
Holding Power Accountable

P.O. Box 22703 • Honolulu, Hawaii 96823 • (808) 275-6275

Web: www.commoncausehawaii.org • Email: info@commoncausehawaii.org

LATE TESTIMONY

House JUD Committee
Chair Gilbert Keith-Agaran, Vice Chair Karl Rhoads

Tuesday 2/1/11 at 2:00 PM in Room 325
HB 468 – County Ethics Commissions

TESTIMONY

Nikki Love, Executive Director, Common Cause Hawaii

Chair Keith-Agaran, Vice Chair Rhoads, and Committee Members:

Common Cause Hawaii supports HB 468, which provides standards for the selection of county ethics commission members to ensure their impartiality and independence.

The current process for appointment seems to create an obvious conflict for those on the county's Ethics Commission. The commissioners are appointed by the Mayor and confirmed by the Council – the very same individuals over which the commissioners have to enforce ethics laws. This undermines impartiality and independence, and does not promote public trust.

This bill would provide a better way – requiring an independent body which would facilitate a more proper selection process.

Mahalo for the opportunity to submit testimony.

Larry Geller
Honolulu, HI 96817

COMMITTEE ON JUDICIARY
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

HB468
JUD
Tuesday, February 1, 2011
2:00 p.m.
Room 325

February 1, 2011

Re: Relating to County Ethics Commissions

LATE TESTIMONY

In Support—With amendments requested

Dear Rep Keith-Agaran, Rep. Rhoads, and members of the Committee:

As a citizen, I am of course concerned that our government act with integrity at every level. Ethics commissions play a key role by enforcing ethics laws and in effect acting as the public's watchdogs over the process of governing. To fulfill this responsibly, ethics commissioners must be independent of those they oversee and act in an impartial manner.

The state of Hawaii has an admirable process whereby an independent body creates a list from which ethics commissioners are chosen. In this instance, and very appropriately, the advice and consent of the Senate is not required.

However, at the county level, the selection is not independent of those who will fall under the scrutiny of the ethics watchdogs. If the mayor appoints and the city councils approve, they are then overseen by the very people they have chosen. We need a better process.

I therefore urge the Committee to pass this bill, but also to resolve, by amendment, the issue of how the independent body will be chosen. At the state level, the selection is made by the Judicial Council, a body which seems to have no counterpart on the county level.

This bill should lead to increased confidence in government on the part of all citizens of Hawaii, but only if the process is as well-designed for the counties as is the state selection process.

This issue should not result, I hope, in rejection of this legislation. Instead, I urge the committee to seek whatever advice is necessary and pass it with an amendment.

Larry Geller