



# HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

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## **Resolution of Charge 2013-2**

(Charge No. 13-Cg-12; David Behlke, Respondent)

November 20, 2013

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On September 18, 2013, the Hawaii State Ethics Commission (“Commission”) issued a charge (“Charge”) against David Behlke, a faculty member of Kapiolani Community College (“KCC”) and the director of Koa Gallery, KCC’s art gallery, for violations of the fair treatment provisions of the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”). The Commission issued the Charge based upon information obtained from its investigation of a complaint against Mr. Behlke. The Charge alleged that Mr. Behlke improperly used his position as director of the Koa Gallery to direct Koa Gallery staff to perform private business tasks for him that were unrelated to Koa Gallery operations. The Charge also alleged that Mr. Behlke improperly utilized Koa Gallery equipment, supplies and other resources for private business purposes. The Charge further alleged that Mr. Behlke, in a private capacity, hired subordinate Koa Gallery staff for private business matters in violation of the statute’s provision that prohibits a supervisor from entering into substantial financial transactions with subordinate employees.

Although he denies knowing that his actions may have violated the State Ethics Code, Mr. Behlke does not contest the Charge and the allegations contained therein. As part of a negotiated resolution, Mr. Behlke paid an administrative fine of \$2,000 to the State’s General Fund.

### **Alleged Facts; Information Obtained from the Commission’s Investigation**

In his capacity as Koa Gallery director, Mr. Behlke was the supervisor to all Koa Gallery staff, all of whom were part-time employees and KCC or University of Hawaii students. Mr. Behlke was responsible for managing Koa Gallery, including but not limited to hiring and managing Koa Gallery’s employees. Mr. Behlke approved the payroll and work schedule for employees. He also had the authority to terminate the employment of Koa Gallery employees.

In addition to being Koa Gallery’s director, Mr. Behlke was also privately employed as the director or curator of Pauahi Tower Gallery, a private art gallery in downtown Honolulu. Mr. Behlke was also a professional artist who participated in art shows and generated private art business revenue through the sale of his personal art, including commissioned pieces of art.

It appears from the Commission's investigation that Mr. Behlke directed subordinate Koa Gallery staff to perform tasks that were unrelated to Koa Gallery business on state time, sometimes using Koa Gallery equipment, facilities or other resources, in order to promote or further Mr. Behlke's private art business interests. These tasks included:

- Directing employees to use state time and Koa Gallery computers and other equipment to scan his business checkbook register and to transmit an electronic copy of the checkbook register to his personal accountant;
- Directing an employee to use state time to mat and mount his personal art;<sup>1</sup>
- Directing an employee to use state time to retouch, edit, and/or resize electronic images of his personal art using a Koa Gallery computer and to transmit the images of his art to a news reporter writing a story about his art;
- Directing an employee to use state time and a Koa Gallery computer to create a list of stained glass pieces he intended to purchase for his personal art;
- Directing an employee to use state time to work on and complete one of his personal art pieces;
- Directing an employee to use state time to pack his personal art pieces for shipment to a neighbor island art gallery exhibiting his art;<sup>2</sup>
- Directing employees to assist him in preparing his response to a HART application<sup>3</sup> request for artist proposals;
- Directing or causing Koa Gallery's website to publicize or promote his art displayed at a private university art gallery;
- Directing or causing Koa Gallery's blog to publicize or promote his art displayed at Pauahi Tower Gallery;
- Directing or causing Koa Gallery office space to be used as a drop off and pick up point for artists displaying their art at Pauahi Tower Gallery; and
- Directing an employee to use state time to take digital photographs to create a "historical record" of his personal art.

It further appears from the Commission's investigation that Mr. Behlke privately hired subordinate Koa Gallery employees and paid them from his personal funds.

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<sup>1</sup> A Koa Gallery employee stated that Koa Gallery supplies (cardboard matting and "coreboard" backing material but no framing materials) were used for matting and mounting purposes; Mr. Behlke stated that he purchased these supplies with his own funds. Although the Commission's investigation was not determinative of this issue, even assuming that Koa Gallery supplies were used, the costs of such supplies appear to be relatively minor.

<sup>2</sup> Mr. Behlke stated that this task did not involve Koa Gallery supplies and that he paid for the actual shipping costs from his personal funds.

<sup>3</sup> The Honolulu Authority for Rapid Transportation ("HART") had issued an "Art-In Transit Call for Artists," seeking proposals from artists for art at future rail stations.

Specifically, it appears that Mr. Behlke hired a Koa Gallery employee to help him prepare Pauahi Tower Gallery exhibitions. It also appears that he hired another Koa Gallery employee to install a commissioned stained glass mural at a Honolulu residential building and to help him prepare Pauahi Tower Gallery exhibitions.<sup>4</sup>

### Application of the State Ethics Code

To achieve the underlying purpose of creating a code of ethics applicable to state employees, the Hawaii State Constitution mandates that the legislature adopt a code of ethics applicable to all state employees. Haw. Const. Art. XIV. In accordance with and pursuant to the constitutional mandate, the State Ethics Code establishes standards of conduct for state employees that the legislature deemed necessary to preserve the public's confidence in public servants.<sup>5</sup> Consistent with that mandate, the State Ethics Code provides that the Commission must liberally construe the provisions of the State Ethics Code "to promote high standards of ethical conduct in state government."<sup>6</sup>

### HRS sections 84-13 and 84-13(3) (Fair treatment)

The fair treatment law, HRS section 84-13, prohibits an employee from using or attempting to use his state position to secure or grant "unwarranted privileges, exemptions, advantages, contracts, or treatment" for himself.<sup>7</sup> In general, the fair treatment law prohibits a state employee from using his state position to grant anyone an unwarranted benefit or preferential treatment. The four subsections of this law refer to specific activities that violate the fair treatment law. HRS section 84-13(3), one of the four subsections, specifically prohibits a state employee from using state time, equipment, or other facilities for private business purposes.

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<sup>4</sup> The Charge also alleges that Mr. Behlke made a \$1,000 personal loan to this student-employee in violation of HRS section 84-13(4). Mr. Behlke stated he lent the money to cover the student-employee's tuition and that he never expected the loan to be repaid.

<sup>5</sup> Preamble, HRS Chapter 84.

<sup>6</sup> HRS section 84-1.

<sup>7</sup> HRS section 84-13 states:

**§84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's official position.
- (2) A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

It appears from the Commission's investigation that Mr. Behlke used state time, or caused state time to be used, for his private business purposes. The tasks that Mr. Behlke directed Koa Gallery employees to perform all appear to have been related in some manner to Mr. Behlke's private art business as a professional artist. Some of the tasks, such as directing employees to scan his business checkbook register or directing staff to assist him with the HART application, appear to have been related to accounting for or generating business revenues. Other tasks appear to have been involved with the production of his personal art pieces -- in essence, his art business's "inventory" -- such as "finishing" pieces or matting and mounting pieces. Other tasks appear to have been aimed at promoting Mr. Behlke as a professional artist, such as submitting digital images for a newspaper article featuring his art, publicizing exhibitions displaying his art, or creating a digital library of his art. Many of these tasks also involved the use of state equipment or other state resources such as the Koa Gallery website and blog. Koa Gallery space was also used as a drop off and pick up point for Pauahi Tower Gallery artists, apparently in connection with Mr. Behlke's private business interest as Pauahi Tower Gallery curator.

Mr. Behlke, in his capacity as Koa Gallery director, supervised the Koa Gallery employees, directed the employees' work assignments and, ultimately, determined their continued employment. He also had authority over the use of Koa Gallery equipment and facilities. In this situation, it appears that Mr. Behlke used state resources or caused state resources to be used for his private art business, and that the allegations set forth in the Charge, assuming the allegations in the Charge to be true, are sufficient for the Commission to conclude that Mr. Behlke violated the fair treatment provisions of HRS sections 84-13 and 84-13(3).

#### HRS section 84-13(4) (Fair treatment)

HRS section 84-13(4), also part of the fair treatment law, prohibits a state employee from soliciting or engaging in a substantial financial transaction with a subordinate or with someone who is supervised by the state employee.<sup>8</sup> HRS section 84-13(4) is specifically intended to prevent potential abuses when an employee in a position of authority engages in a substantial financial transaction with a subordinate or a person or business who the employee inspects or supervises in the employee's official capacity. The law prohibits these financial transactions due to the unequal bargaining relationship between the parties.

HRS section 84-13(4) prohibited Mr. Behlke from hiring his subordinate employees for private outside work. In this case, the allegations as set forth in the Charge, assuming those allegations to be true, are sufficient for the Commission to conclude that Mr. Behlke violated HRS section 84-13(4) by engaging in substantial financial transactions with subordinate employees.

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<sup>8</sup> See footnote 7, above.

### Negotiated Resolution of Charge

The Commission and Mr. Behlke negotiated a resolution of the Charge and his alleged violations of the State Ethics Code arising from his use of state time, equipment, facilities, and other state resources for private business purposes, and from his entering into substantial financial transactions with subordinate employees.

Mr. Behlke said that he was unaware that the State Ethics Code prohibited him from asking subordinates to do “personal favors” for him or from hiring them to do outside work. Mr. Behlke stated that he would not engage in these activities in the future, and he expressed a desire to learn from the situation.

In considering the totality of facts and circumstances, including Mr. Behlke’s payment of the \$2,000 fine, the Commission believes that the resolution is reasonable, fair, and consistent with preserving the public’s confidence in government employees. The Commission believes that no further action against Mr. Behlke is warranted with respect to the Charge, and hereby determines that these matters are closed.