

## ADVISORY OPINION NO. 89-1

By letter dated November 2, 1988, a legislator requested an advisory opinion from the State Ethics Commission ("Commission") regarding Advisory Opinion No. 350 and Informal Advisory Opinion No. 22, which both dealt with the issue of the use of official title in conjunction with a campaign endorsement. In the legislator's request for an advisory opinion, the legislator noted that recent comments by the Attorney General regarding the constitutionality of the holdings in these opinions had brought these opinions into question. The legislator thus asked the Commission for clarification regarding the holdings in Advisory Opinion No. 350 and Informal Advisory Opinion No. 22, in light of the Attorney General's remarks. Specifically, the legislator asked the Commission to address the following two questions:

1. May an elected official use the title of his or her office when endorsing a candidate for elective office?
2. May an elected official, endorsing a candidate for elective office, use a legislative assignment title (for example, chairman of the such-and-such committee) in the endorsement?

The legislator also requested that, if possible, the Commission issue a response to the legislator on this matter prior to the opening of the 1989 legislative session.

The State Ethics Code, found in chapter 84, Hawaii Revised Statutes ("HRS"), is a code of conduct for both state legislators and state employees. The term "employee" is defined in Part I of chapter 84 to include elected state officials (other than legislators), state employees, and members of state boards, commissions, and committees. The code of ethics set forth in Part II of chapter 84 contains a provision entitled "Fair Treatment," which reads as follows:

**§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 office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (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.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

Section 84-13 thus prohibits legislators and state employees from using, or attempting to use, their official positions to obtain for themselves or others any "unwarranted" privilege, exemption, advantage, contract, or treatment.

It should be noted that the term "unwarranted" is not defined or in any way limited in chapter 84. It should also be noted that the Legislature has mandated that chapter 84 be "liberally construed" to promote high standards of ethical conduct:

**§84-1 Construction.** This chapter shall be liberally construed to promote high standards of ethical conduct in state government.

Section 84-13 is thus a very broad provision that essentially prohibits the use of official position to give anyone an "unfair" or "unwarranted" advantage.

Although the fair treatment section of the ethics code does not explicitly refer to the abuse or misuse of official position to further or advantage the campaign of an incumbent or candidate for elective office, possible campaign-related abuses of office have frequently been brought to the attention of this Commission. In such instances, the Commission has had to determine whether such activity would be prohibited by the fair treatment section of the ethics code. For example, state employees have on occasion performed campaign tasks (such as selling fundraiser tickets or producing campaign materials) while on state time or with the use of state supplies, personnel, equipment, or facilities. Because the State's resources, which are provided by the taxpayer, are undoubtedly reserved for state or public purposes, the Commission has generally held that state time, supplies, personnel, equipment, and facilities cannot be used to further or advantage the campaign of one candidate as opposed to another. The Commission believes that there is general acceptance of the proposition that campaigning is a private, rather than official, activity. The Commission has thus held that use of state resources for campaigning is generally "unwarranted" and therefore a violation of section 84-13. As a case in point, in Decision No. 2 (rendered in 1985 after a contested hearing), the Commission concluded that a state employee had violated the fair treatment section of the ethics code by having his secretary type up campaign material on a state typewriter during state time on state premises. That the fair treatment section should apply in such instances has not been challenged, nor does the Commission believe that there is any reason to bar interpretation of section 84-13 along these lines.

In Advisory Opinion No. 350 (issued in 1978), the Commission had occasion to address the question of whether a state employee in the executive branch could refer to his state title and agency name without violating section 84-13 when making a campaign endorsement in a campaign flyer. The Commission at that time addressed and disposed of the issue in a paragraph:

It was our view that a state employee might not permit the use of his position title in campaign literature, or for other political purposes. A state employee gains his title and position at the pleasure of the taxpayers to perform services on their behalf. We could not see that the lending of this position title to a person

campaigning for office could be justified as serving the public interest. *It was our finding that position titles might only be used for public purposes.* [Emphasis added.]

In Informal Advisory Opinion No. 22 (issued in 1980), the Commission was called upon to determine whether a legislator could use his or her official title in a campaign endorsement. The Commission stated:

[O]fficials and employees *were elected* and appointed solely to carry out the business of the public. The use of the state seal, state stationery, and the *designation of the official's actual position in government in private matters was not consistent with that purpose.* [Emphasis added.]

Apparently, the Commission at that time was of the opinion that one's official title could be used *only* in the context of official business. It appears that the Commission believed that referring to one's official title in a private context would constitute a *per se* violation of section 84-13 because such usage was "unwarranted" in the sense that official title should be reserved for official business only. Behind this belief was probably the notion that use of official title in private matters might unduly influence those matters.

The holdings in Advisory Opinion No. 350 and Informal Advisory Opinion No. 22 were incorporated, along with holdings in other opinions, into a set of campaign guidelines relating to the misuse of official position for campaign purposes. The Commission when handling requests for advice had occasion to discuss these guidelines with state employees and legislators, and generally had found there was little objection to the guidelines. However, during the election season last year, many objections were made to the Commission regarding the guideline that prohibited legislators from using their official titles in conjunction with campaign endorsements in campaign flyers. Because the Attorney General had also indicated that there were free speech implications, the Commission suspended its restriction on the use of official title in order to reconsider prior Commission opinions.

The objections raised during the last election to the restriction on the use of official title in conjunction with a campaign endorsement were many and were also quite diverse. There were a number of officials and members of the public who felt that there was nothing inherently wrong with mentioning one's official title in a campaign endorsement--that no "unwarranted" advantage would necessarily accrue to the candidate. Some legislators stated that they believed that endorsing candidates was a legitimate legislative function, and thus the use of official title in such an endorsement was proper. Other officials felt that they had a right even in their private capacities to endorse candidates and at the same time indicate what positions they held in government. These individuals argued that the mentioning of their state titles was more for informational purposes, not to necessarily give a candidate an "unwarranted" advantage.

Other officials wondered whether they would be in violation of section 84-13 if when endorsing candidates they made factual statements that might also incidently divulge their positions in state government. Some wondered whether a state official would be in violation of section 84-13 if a candidate mentioned the title of a state official or otherwise referred to a state official's title when commenting on who the candidate's supporters were. Some officials wondered where the line would be drawn between making comments as officials regarding candidates as opposed to making clear campaign endorsements. As mentioned earlier, free speech issues were also raised.

After considering these objections and questions, the Commission realizes that there is extensive disagreement as to whether the use of official title in a campaign endorsement is in fact inappropriate, as well as where lines are to be drawn between proper and possibly improper use of official title in conjunction with a campaign endorsement.

In interpreting and applying section 84-13, the Commission is cognizant of the fact that the term "unwarranted" is not defined in chapter 84 and is therefore susceptible to broad interpretation and application. Further, the Commission is aware of the fact that the ethics provisions in chapter 84 are to be "liberally construed" to promote ethics in state government. Nevertheless, the Commission believes that for an advantage to be deemed "unwarranted" for the purposes of section 84-13, the reasons for such inappropriateness would have to be manifest. The ethics code was enacted to deal with certain obvious and serious problems, where the inappropriateness of the activity is recognized. In interpreting the meaning of the broad term "unwarranted" as intended by the statute, the Commission believes that the term "unwarranted" must be restricted to those situations where the inappropriateness is evident.

Because there is considerable disagreement as to whether the mere mentioning of one's official title in a campaign endorsement is indeed "unwarranted," and because of the complexities involved in line-drawing, the Commission believes that there is an insufficient basis for assuming that section 84-13 as written was intended to prohibit in a *per se* fashion the mere use of official title in a campaign endorsement, particularly in light of the fact that the statute does not specifically address this matter at all. If section 84-13 had intended to deal with this problem, then surely there would have been more guidance in the statute to aid state officials and employees in determining under what circumstances use of title in conjunction with a campaign endorsement would be inappropriate.

With respect to the holdings in Advisory Opinion No. 350 and Informal Advisory Opinion No. 22, the Commission believes that these opinions simply went too far in interpreting and applying section 84-13 to prohibit the mere use of official title in a campaign endorsement. Nevertheless, the Commission believes that other Commission restrictions relating to the misuse of position for campaigning are sound. To the extent that Advisory Opinion No. 350 and Informal Advisory Opinion No. 22 are inconsistent with this advisory opinion, the Commission considers those opinions overruled.

The Commission emphasizes that its finding in this advisory opinion is that the *mere* use of state title (including a legislative assignment title) in conjunction with a campaign endorsement is simply not intended to be prohibited by section 84-13; however, this is not to say that there could never be a situation in which a particular use of official title might rise to the level of a use of position to give someone an unwarranted privilege, advantage, contract, exemption, or unwarranted treatment in violation of section 84-13.

The Commission also notes that while this particular request for an advisory opinion was made with respect to the use of official title by legislators, the holding in this opinion applies equally to state employees as well. It appears to the Commission that section 84-13 simply was not intended to address the mere use of official title by legislators or state employees in campaign endorsements. The Commission notes that the objections raised by legislators and others are also sufficiently valid with respect to state employees. The Commission believes that if there is concern over the use of state title by legislators or state employees when making campaign endorsements, then specific legislation should be enacted to resolve any problems.

Because the Commission finds that section 84-13 was not intended to address the issue of the mere use of official title when making campaign endorsements, it is not necessary for the Commission to address or discuss first amendment issues.

The Commission informed the legislator that it appreciated the legislator's seeking clarification on this matter, and also appreciated the legislator's patience during the Commission's review of the issues addressed above.

Dated: Honolulu, Hawaii, January 11, 1989.

STATE ETHICS COMMISSION  
Laurie A. Loomis, Chairperson  
K. Koki Akamine, Commissioner  
Cynthia T. Alm, Commissioner  
Rev. David K. Kaupu, Commissioner

Note: There was a vacancy on the Commission when this opinion was considered.