

INFORMAL ADVISORY OPINION NO. 17

In July 1976, a member of the public filed a charge against certain state legislators and a state official alleging a violation of the state ethics code. The charge was filed pursuant to rule 5.1 of the Commission's Rules and Regulations. Pursuant to HRS §84-31(b) the individuals charged were afforded an opportunity to present their explanations of the conduct alleged to be in violation of the law. All of the individuals involved took advantage of that opportunity.

Pursuant to the powers granted to the Commission under ch. 84, the Commission conducted an investigation of the subject matter of the charge. The substance of the charge was that the individuals named in the citizen's affidavit violated the state ethics code, particularly HRS §84-13, by using their positions and influence to secure the appointment of an individual to a state administrative position.

In the early part of 1976 a state department had advertised for applicants for this position. Another department participated in the early stages of the selection process by submitting the names of those individuals, among them the appointee, who were deemed to have the minimum qualifications for the position.

Those applications and resumes were forwarded in early March 1976 to a citizens' committee for review and a ranking of the candidates.⁺⁺⁺ The committee decided to interview the five applicants in conjunction with representatives of the facility to which the person finally selected would be appointed. The committee chairman and one other member participated in that interview on behalf of the committee. After discussions with certain other members of the committee by phone, the chairman of the committee notified the department of the selection of the appointee as the committee's first choice. A short time later, the department advised the chairman that the committee should meet formally and consider the qualifications of both the appointee and another of the candidates. That letter indicated ratings of the candidates made by a number of other committees and individuals and listed certain criteria that should guide the committee in its deliberations. Accordingly, the committee held a meeting and recommended the appointee by a vote of five to one. The dissenting vote was cast by the complainant in this matter.

At that meeting the chairman commented that certain state officials were apparently backing the appointee for the position. There was disagreement as to what transpired following that remark; the complainant maintained that he objected to the intrusion of politics into this choice and stated that he would protest the conduct of the meeting. Certain other members of the committee stated that they did not recall that the complainant made any protest of the committee action at that time. The meeting was immediately adjourned and the recommendation was forwarded to the department.

The department officials alleged that they conducted extensive investigations into the work experience of the candidates. They further alleged that as a result of those investigations, the appointee was selected as the leading candidate; this designation represented a significant change from the initial ranking of the candidates. Subsequently, the department, through its director, named the appointee to the position. The complaint followed from that action as the complainant alleged that the unwarranted intrusion of state officials into the selection process resulted in one

⁺⁺⁺This committee sat in an advisory capacity to the director of the department.

of the applicants, whom he believed to be the more qualified candidate, being passed over in favor of the appointee.

Based on the Commission's interviews with the complainant, the state officials charged in the complaint, and certain other individuals, we made the following additional findings of fact:

1. The state official complained against met the appointee at a party during the spring of 1976 at which time the appointee indicated that he was applying for the position. The official offered to make a recommendation to the department on his behalf. He stated to the director that he had known the appointee for thirty years; he also commented as to certain advantages and disadvantages he felt he possessed relative to the position. He had no other contact with any individual in this matter and did not contact the members of the committee.

2. Legislator A was contacted in March of 1976 by the chairman of the committee who advised him that the committee had selected the appointee as its preferred candidate for the position. The chairman asked Legislator A if he could endorse that choice; Legislator A responded that, if the individual met the minimum qualifications for the position, it was his opinion that it would be preferable that a resident of the area be appointed and that on this basis he would endorse the appointee. He communicated this endorsement by telephone to a department official. Subsequently he was contacted by a member of the facility's staff who urged him to rescind his endorsement. On the basis of his review of the resumes of the various candidates, Legislator A advised the chairman and the department official that he was withdrawing his endorsement. This action was taken prior to the appointment.

3. The committee chairman advised Legislator B at some point during the legislative session that the appointee had been chosen by the committee as its preferred candidate. Legislator B had had previous contact with the appointee, and, because he felt that he had good rapport with and concern for the community, spoke to department officials on his behalf. He apparently had no other involvement in this matter.

4. The committee chairman also contacted Legislator C during the session to advise him that the appointee had been selected by the committee as its preferred candidate for the position. Legislator C then contacted the appointee to confirm that he had applied for this position, and then, on his own initiative, spoke to the director of the department to endorse him for the position. He then wrote a letter to the director setting forth his views as to his character and ability.

5. Legislator D spoke to the director on two occasions during the course of the appointment procedure. Pursuant to a request for a recommendation from the appointee, he called the director to indicate that he had known the appointee for many years. He also stated that he was not familiar with his qualifications for the position but could testify as to his character. He later became aware that the appointment might be a sensitive one and contacted the director again to advise him that he should be very careful that the individual selected was qualified for the position. He also contacted the committee chairman to advise him that the procedures followed by the committee in recommending a candidate should be fair and open. The chairman later contacted him to advise him that the committee had recommended the appointee for the position. Legislator D apparently had no further contact with any state officials with regard to this appointment.

The complainant charged that legislators and the state official had violated HRS §84-13 (Supp. 1975), the fair treatment section of the ethics code. That section states:

No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his 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 he inspects or supervises in his official capacity.

The section includes four specific examples of actions that would constitute a violation of the ethics code. No allegation of a violation under those specific examples was made by the complainant. Reference then had to be made to the general language of the section contained in the first paragraph. The allegation, then, was that the individuals charged either used or attempted to use their official positions to secure unwarranted privileges, exemptions, advantages, contracts, or treatment for the appointee.

First, as all the individuals charged were either legislators or employees of the state government they were of course subject to the restrictions of the ethics code. Then, we believed that their action in recommending the appointee for the position did constitute a use of official position though the action involved did not constitute a use of their official authority. Certainly, department officials were aware of their position when they contacted them with regard to this position. It was the Commission's view that the section covers not only the use of official authority, but, as the language indicates, all instances in which a state employee or legislator makes known, impliedly or explicitly, his state position when taking action that is outside the scope of his official duties. It was our view that to give this section a narrower construction would deprive it of a great deal of its meaning and open up a wide range of potential abuse for it would permit individuals the opportunity to use the power of their positions to gain advantages that would not accrue to them without the weight of persuasion that accompanies certain positions in state government. To permit such abuse would greatly undermine the integrity of these offices; it was our view that the language clearly prohibits such abuses. That the Legislature used the phrase "official position" rather than "official authority" testified, we believed, to the correctness of this interpretation. Clearly, many legislators and employees were so well known that they would unavoidably bring their positions with them in many of their activities. This, we felt, was in the nature of such positions and did indeed place a great burden on these officeholders to conduct themselves so as to minimize the possibility that those they dealt with would be intimidated into granting unwarranted advantages to them. We saw this burden, however, as a necessary part of the holding of public office.

However, it was equally clear to the Commission that the use of official position could not constitute a violation of HRS §84-13 unless it was accompanied with an intent to secure something that was unwarranted. In this case, then, we had to resolve whether the giving of endorsements

in behalf of the appointee was an attempt by the individuals charged to secure an unwarranted advantage for him. In this regard we noted the language of HRS §76-92:

No recommendation of any person who applies for examination or appointment to any office or position under this chapter which may be given by an elected officer of the State or any county *except as to the ability or character of the applicant*, shall be received or considered by any person concerned in the giving of any examination or the making of any appointment under this chapter. (Emphasis supplied.)

This statutory provision permits the making of a statement as to the character and ability of an applicant for a civil service position. While this section did not preclude the Commission from finding that an endorsement as to character and ability was in violation of HRS §84-13, it was our view that something more than a mere endorsement must be present to constitute that action as unwarranted within the meaning of HRS §84-13. That is, the mere making of an endorsement, without more, would not constitute a violation of HRS §84-13.

The most significant circumstances surrounding the making of these endorsements were as follows:

1. The state official and Legislators B, C, and D, all had had substantial contact with the appointee prior to their endorsement of him for the position.

2. Legislator A was not personally acquainted with the candidate; he backed him because of his view that there would be a particular advantage in the appointment of an area resident to the position; the endorsement was based on the stipulation that he be a qualified candidate and was communicated to the department in a brief telephone call. Subsequent to the endorsement, and at the behest of the complainant and another party, and prior to the final appointment, he withdrew his endorsement.

3. Legislator C contacted the department director personally and followed up this contact with a recommendatory letter. All of the other individuals charged contacted the department on only one occasion with regard to their endorsements.

4. None of the individuals charged in this complaint contacted the members of the committee with respect to the endorsement of any of the candidates.

5. The appointee was listed as a qualified candidate by the department assisting in this matter. None of the individuals charged contacted this department with regard to the qualifications or appointment of any candidate.

6. At the meeting at which the committee indicated its preference, the chairman stated that he had heard that several legislators were backing the appointee.

The complainant did not present facts that contradicted those set forth above. Nor had a lengthy investigation by the Commission revealed facts to indicate contacts by the individuals charged more extensive than those noted.

In our view, the facts recited led to the conclusion that the individuals charged in the complaint had made simple endorsements of the appointee for the position. We could find in the circumstances of this case not the slightest indication of an intent to intimidate department personnel into appointing him to this position. The contacts involved here were of a limited nature and in one instance, that of Legislator A, the endorsement was actually withdrawn. We could not but be aware that endorsements were a very common and accepted practice. Appointing authorities in both the private and public sectors requested such recommendations from individuals of standing in the community as a matter of course to verify the character of applicants for positions. Applicants themselves widely sought such endorsements, and all of the legislators and state personnel involved here stated that they received numerous requests from constituents for recommendations for job positions both in and out of state government. To prohibit such endorsements would unreasonably restrict access to information needed by appointing authorities and would unreasonably infringe upon the conduct of public officials. We could not agree that the mere making of an endorsement was in and of itself of intimidating effect. We concluded that something more must be present in the circumstances of an endorsement to constitute an unwarranted use of position. We did not find that here.

Accordingly, we found that the complaint in this matter was unfounded and that the individuals charged had not acted in violation of HRS §84-13.

The complainant stated to the Commission that the appointment could not have come about without the interference of the individuals charged. We believed that this contention resulted in part from the fact that personnel records involved in this matter were confidential and therefore had not been fully disclosed to concerned individuals in the community. We were concerned that the integrity of a state department had been called into question by a segment of the community. However, our review of the facts indicated no unethical behavior on the part of the individuals involved. That the department's decision was not in accord with the wishes of a segment of the community could not be taken as evidence that unethical conduct was involved in the decision-making process. And, as indicated, we had found no such evidence.

The Commission was aware that the issue of this appointment was a highly emotional one; this was to be expected in the filling of an important position. In view of this fact, which should have been clear to all the parties involved, it was vital that fairness and the appearance of fairness should have characterized the deliberations involved in the recommendation and selection of a candidate. In this context it was regrettable that the chairman of the committee had commented as to the position of state officials in this matter at the committee meeting at which the committee voted for its preferred candidate. The chairman was not charged with a violation in this matter, and we did not believe that his action would in any event constitute a violation of the code. But it did play a part in undermining the integrity of the appointment process and in raising the appearance of interference by the persons charged in the complaint, that, in our view, did not occur. The result that flowed from these remarks reaffirmed our own experience that the confidence in the governmental process we sought to promote was much more easily lost than gained. As here, even incidental acts might erode that confidence. We stated that public servants at all levels should be sensitive to the effect their actions might have on the attitude of the citizenry towards its government. While the employee might be aware of the facts behind the appearance, the public was not. The employee must realize this and must avoid creating the appearance of improper conduct. Those involved in government might often be too close to the structure to sense how important it was that the structure of government appear fair in its functioning. Both the fact and appearance of fairness were vital to building and maintaining confidence in government.

The Commission received the cooperation of all the individuals involved in this matter, the complainant, the individuals complained against, and other individuals with information of importance in this matter. We also appreciated the concern of the complainant and the effort made by him to present his case before the Commission.

Dated: Honolulu, Hawaii, September 7, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner
I.B. Peterson, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered.