

## INFORMAL ADVISORY OPINION NO. 20

The Ethics Commission charged a legislator with a violation of HRS §84-13 for allegedly using his state position to attempt to gain favor for a person who wished to apply for a specific state position.

The legislator was notified of this charge by certified letter and informed then that, pursuant to HRS §84-31(b), he could meet with the Commission to explain the conduct alleged to be in violation of the law. Informal hearings were held in connection with this matter and he appeared, with counsel, to testify. We then issued this informal advisory opinion pursuant to HRS §84-31(b).

The series of events that led to the present action began when a state agency placed an advertisement in a state bulletin soliciting applications for a position in the agency. The responsibility of the position was to direct a certain program. The advertisement indicated that applications would only be accepted until a certain specified date.

Prior to the time the ad was placed, administrators and employees in the agency had been debating the place the program should occupy in the division as well as the title that should be given to the administrator who had charge of it. Certain people were of the view that the program should not be involved with activities that were not directly related to the primary mission of this agency. Ultimately the position title was changed. But the debate over both of these matters was still going on as the events detailed below were unfolding. Nor had the matter been completely resolved at the time the opinion was issued.

In addition, there had been arguments within the department over the organizational structure of the division this position was to be attached to. At the time the ad was placed in the bulletin this matter had also not been settled; the ad was apparently placed without the division chief, who had been recently appointed, being fully aware of the serious arguments that had been ongoing on this particular issue.

Following the deadline for application, a particular potential applicant (Applicant A) contacted the division chief to indicate that he was interested in applying for the position. The division chief indicated, however, that the deadline for application had passed and that he could not accept a late application. There was disagreement as to what was actually said during this conversation but no disagreement over the fact that it did take place. There was no further contact between these two individuals.

It was shortly after this incident occurred that the legislator and the division chief discussed the matter of the late application at a meeting that took place at the State Capitol. It was this meeting that became the focus of the charge that had been filed against him.

There was considerable agreement between the two over what actually transpired at this meeting but there was also disagreement on certain essential points. The division chief was attending a committee meeting, a committee on which this legislator sat as a member. It was either during the hearing itself or following its adjournment that the two met outside the hearing room. It was the division chief's recollection that an individual came up to him during the hearing and advised him that the legislator wanted to see him. It was the legislator's recollection that the meeting took place totally by chance. There were no bystanders and thus no one who could give an independent version of what actually transpired.

The division chief's testimony was that the legislator advised him that he had to find a loophole through which the application could be accepted because Applicant A's hiring was part

of a deal. He also stated that the legislator advised him that he should contact a certain high-ranking administrator in the department to find such a loophole.

The legislator's version of this meeting is that he stated to the division chief that Applicant A was interested in the position but that he, the legislator, understood that he had not applied in time. The legislator then informed him that if there was any way in which he could accept a late application he would appreciate him giving this applicant due consideration. He conceded that he did suggest that the division chief talk to the high-ranking administrator to learn if other division chiefs had, in the past, accepted late applications.

Our primary task here was to determine the facts of that conversation and to decide, on the basis of our judgment on that point, whether the legislator's conduct constituted a violation of HRS §84-13, the fair treatment section.

That section provides:

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.

This matter, however, was complicated by the fact that a number of events took place subsequent to the conversation at the Capitol that concerned the hiring of this division level position. We set forth these events in some detail because they indicated an atmosphere that existed at the department that was of significance in this matter.

Shortly after the Capitol meeting had taken place an administrative officer in the division was advised by the associate director of personnel for the department that all hiring procedures for the position must stop. He stated that there was a need to establish uniformity for this position in the department.

On the next night the department head learned of rumors that the position was to be re-advertised. He also learned at that time of the conversation between the legislator and the division chief. He directed the division chief to proceed with the selection without re-advertising so long as the position and the salary were to remain basically the same. Soon thereafter, the division chief informed his immediate superior about the incidents that had occurred to that point. His supervisor took him to see a staff member to the board that advised this department; the staff member stated that he had indeed heard rumors that the appointment of this particular person to the position was part of a deal. The staff member later confirmed this incident though he stated that he could not recall from whom he had heard these rumors.

Several weeks later, a personnel officer advised the division chief that the search could now continue with a change of title. The position was placed on a different salary scale. While the new range would include the salary originally advertised for the position, it would be difficult for any candidate to qualify for it. All candidates for the position were notified of this change; none withdrew their applications.

One month later, the division chief chose the top two candidates after a series of interviews.

Two months after this action, the division chief recommended that his supervisor appoint the top candidate to the position at the salary originally advertised. On the same date letters of regret were sent to the unsuccessful candidates for the position.

At about this time; however, the supervisor resigned and was replaced by an individual in the department who was not aware of the facts in this matter. Accordingly, he testified that on the basis of what he saw to be serious technical flaws in the selection process for this position, he refused to accept the division chief's recommendation. His own recommendation was that the position should be re-advertised with the proper title and description. Eventually, the top candidate grew tired of waiting for action on this matter and applied for and accepted another state position which was not as attractive.

Ultimately, the position was re-advertised and filled, although the original candidates, including the finalists, were not notified of the re-advertising. Applicant A applied for the position but was not selected. Later, and before the position was filled, the division chief was questioned about this matter at a legislative hearing and revealed the content of his conversation with the legislator. It was on the basis of this report that the Commission began to look into this matter.

We discussed the incidents related above with a number of persons in this department and others; in the course of these conversations certain additional factors and attitudes came to light that are of significance.

It became quite clear that an awesome rumor mill operated in this large department. In addition, there was widespread belief that significant matters were generally decided on the basis of political factors rather than on the merits. In this particular case, for example, there was apparently widespread belief that the second phase of the selection process was fixed and that the choice was a forgone conclusion. It appeared that a number of persons held back from applying because they felt it would be a fruitless effort. Ironically, it was fairly clear to us that the second phase of the hiring process was totally free of interference and that the choice that was finally made was based only upon the merits of the candidates. Nevertheless, it was quite clear that this attitude about the position persisted.

Every department official and employee we spoke to indicated that legislators quite regularly called upon department administrators with various recommendations. At the same time, these officials stated that, generally, no particular pressure was placed upon them to follow these recommendations. But we also heard testimony that some agency administrators often saw and responded to political implications in the decisions they made whether there was actually the fact of such political interference or not. The matter of political influence and interference in the department had apparently become a phobia. And there could be little doubt but that there was public feeling about this as well.

Finally, our interviews also indicated to us that at the beginning of this process many people felt that the delays and confusion simply resulted from an administrative mix-up; it was stated that such mix-ups occurred with regularity. It was only at the later stages, when no action was taken on the division chief's recommendation to hire the top candidate, that people began to believe that the candidate was being victimized by political gamesmanship.

We pointed out to the legislator that if one took the conversation that occurred between him and the division chief and placed it in the atmosphere we had described it was not hard to understand why it had raised a question in many people's minds as to whether the administrative mix-up was coincidental with that conversation or was manipulated by one or more persons to purposely interfere with the selection process.

Our conclusion on the question that was directly raised for our determination by these factors was as follows:

There being no independent evidence as to the content of the conversation which occurred between the legislator and the division chief and, further, there being no evidence of actual political interference in the selection process, it was our view that there was insufficient evidence upon which to base either a finding of a violation of the statute or a motion to proceed further to a formal charge proceeding.

However, we noted that our failure to find a violation or to proceed to a formal charge proceeding should not be taken as indicating either that it was our view that the division chief had acted unreasonably when he interpreted the legislator's comments to him as being an attempt to influence him improperly or that the administrative problems in this matter were simply a matter of a mix-up and lack of communication and not at all a result of political interference. Finally, we said that our action here should not be interpreted as condoning the legislator's conduct in this matter.

The only firm conclusion we could make was to note that the person finally chosen for the position was chosen honestly and on the basis of his merits alone. He himself had been in no way involved in any of these events nor did it appear that the division chief was in any way influenced to favor any particular candidate. We also noted that the final selection was made after this matter had already been made public.

We were very much concerned about the implications of this case for the department and the conduct of its affairs and its relationship with the legislature. We could not ignore the fact that the department's reputation in the community had been at a low ebb; we commented that if the facts of this case were an illustration of department processes then the criticism leveled at the department had not been unfounded.

We noted that legislators and, for that matter, all public officials, might make recommendations as to the abilities of individuals who were applying for state positions. In a previous case concerning the legitimacy of such recommendations, Informal Advisory Opinion No. 17, we had found that, so long as the recommendation was nothing more than that and did not evidence an attempt to improperly influence a final decision, the recommendation itself was proper. In that case, however, the recommendations had been nothing more than testimony as to the abilities and character of the employee involved.

On the basis of the legislator's own testimony, however, it appeared to us that he had gone further than to simply make a recommendation as to the ability and character of Applicant A. Since he had already been aware of the fact that the application had been rejected by the division chief, he was doing more than making a recommendation as to Applicant A's qualifications. He conceded that he had asked the division chief if he could accept the late application. Further, his recommendation to the division chief that he speak to one of the highest ranking officers in the department could reasonably have been taken as a threat by him. The division chief's subsequent actions, some of which were detailed above, indicated the weight he had given to the legislator's words.

The legislator's action, in our view, had been very close to being in violation of the statute. However, as we had stated above, without independent corroborating evidence of the additional testimony given by the division chief, we did not feel that there were sufficient grounds upon which to base a finding of a violation of the statute. We did feel strongly, however, that his

action had been unwise and that it had contributed to the public doubts that arose over the integrity of the selection process. But for his conversation with the division chief, the administrative problems that had arisen in the selection process would have appeared to have been nothing more than that. But that conversation when mixed in with the other events we had described created a picture of political interference. Whether or not they were correct in their judgments, it is clear that many people in the department believed that there was just such interference in the attempt to complete the hiring of this position.

We expressed the view that all legislators and other high-ranking public officials had to frankly face the situation that this department found itself in. There could be no question but that there was widespread belief that political interference played a large role in department decisions. Whether or not this was true we could not say. But the appearance itself was damaging and if that appearance was to be diminished we felt that legislators had to conduct themselves very cautiously with respect to the department and that the department had to begin to exercise a greater independence of individual legislators. The cure for this crisis of confidence in our judgment was for department officials to make decisions on the basis of the merits alone and to ignore the political implications of the matters that came before them. This particular case was an excellent illustration of the fact that numerous department administrators were paralyzed by what they saw as the political implications of the matters that came before them for decision. The long delays and the lack of decisive action in this particular instance had been a direct result of this kind of attitude. If administrators had taken decisive action the problems would have been resolved at an early time, the original candidate would have been selected, and the legislator's name would not have been subjected to the questioning it had now undergone. In a word, there was no substitute for decisive and strong action. It was this kind of action in the kind of circumstances that obtained here that would raise the standing of the department.

We thought it was important to the well-being of the department that legislators limit their input into decisions on personnel. It was obvious that legislators had to be in contact with the department to learn about programs they were interested in so that they could make informed judgments. Recommendations of individuals for department positions, however, particularly high-ranking ones, could only cause further difficulty for the department. We could not document that there had been a high degree of political interference in department decisions but common sense indicated that at some point this had indeed been the case. Whether or not it was so at the time of this opinion, there was an appearance of it and that appearance was destructive.

The department's standing was important to legislators and the community and, of course, to department administrators and personnel. But if the department was to maintain and improve itself and establish the reputation it wanted for itself, then all involved had to share the responsibility for the situation and take positive steps to see that things were changed for the better.

Dated: Honolulu, Hawaii, November 30, 1978.

STATE ETHICS COMMISSION  
Paul C.T. Loo, Chairman  
Audrey P. Bliss, Commissioner  
Gary B.K.T. Lee, Commissioner

Note: Commissioner Dorothy K. Ching disqualified herself from consideration and preparation of this opinion. There was one vacancy on the Commission.