

INFORMAL ADVISORY OPINION NO. 2000-1

Through its chair, an organization filed a formal charge with the Hawaii State Ethics Commission. The charge essentially alleged an improper use of state resources and facilities in support of the re-election campaign of a certain state official (hereinafter "Official").

The charge related to an event attended by government workers prior to election day in 1998. The Official spoke at this event. Pursuant to state law (Hawaii Revised Statutes section 76-102) and collective bargaining agreements incorporating this law, state employees who were members of the Hawaii Government Employees Association (HGEA) union and the United Public Workers (UPW) union were at the event. The event was characterized as an "informational and educational" meeting allowed by Hawaii Revised Statutes ("HRS") section 76-102. HRS section 76-102 provides as follows:

Meetings. Each department shall permit its employees to attend informational and educational meetings conducted during working hours by duly recognized governmental employee organizations, provided that these meetings shall permit the attendance of members and nonmembers and shall be scheduled for periods of not more than two hours once every three months at times which do not interfere with the normal operations of the respective departments.

The charge characterized the union meeting and the event as a "campaign" event. This characterization resulted from the fact that union officials present at the two-hour event praised the Official and urged his re-election. The charge noted that the Official himself informed the state employees in attendance that if re-elected, he would work to get funding for negotiated pay raises for public workers.

The charge acknowledged that the release of state employees to attend the union meeting incorporating the event was "nominally justified" in accordance with HRS section 76-102, but contended that the event was in actuality a campaign rally. The charge concluded:

State employees, on State time, were released from their productive activities . . . to attend a partisan event. . . . The taxpayers of Hawaii have been robbed.

The charge did not specifically name a respondent. The charge appeared to accuse a particular department head of releasing state employees from their regular state duties for campaign purposes. The department head in question had the authority to release state employees for union meetings pursuant to HRS section 76-102. Pursuant to HRS section 84-31, the department head was sent a copy of the charge for his response. He filed an answer with the State Ethics Commission.

In his answer, the department head claimed that he released the employees pursuant to state law (HRS section 76-102) and collective bargaining agreements between the State and the HGEA and the UPW. He explained that the union event that he allowed state employees to attend occurred during the American Federation of State, County, and Municipal Employees (AFSCME) convention, which was being held at the Hawaii Convention Center. He wrote in his answer that he was told that the purpose of the union event was to gather State and City and County HGEA and UPW employees in one joint AFSCME meeting for two hours, as allowed by law, in order for these employees to hear an official proclamation to be read by the Official. He stated that the meeting was also intended to allow national and local AFSCME leaders to address the state employees. He wrote that the traditional option would have been to hold a dozen or so meetings with fewer

employees attending each meeting. The HGEA and the UPW asked for one meeting instead. He stated that it was an extremely rare occasion for the AFSCME leadership to be in Honolulu, and thus he granted the unions' special request. In his directive to state agencies regarding the release of state employees, the department head also noted that all employees could not be released at one time because of state operational needs. (On the other hand, staggered meetings on different dates and at different times allow for the release of all employees at one time or another to attend union meetings.)

The department head also stated that HRS section 76-102, the law that required the State to release employees for "informational or educational meetings," did not allow the State to pre-screen or otherwise approve a union's agenda for its meetings. The department head stated that the unions have taken the position that the First Amendment bars the State from censoring topics of concern to union membership at union meetings. State law is silent as to what type of information may be imparted at "informational or educational" union meetings. The department head stated that he did not know what would occur at the event when he directed that state employees be released.

The charge raised issues under HRS section 84-13, a part of the State Ethics Code. The State Ethics Code is set forth in chapter 84, HRS. HRS section 84-13, in relevant part, states 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:

.....

- (3) Using state time, equipment, or other facilities for private business purposes.

The State Ethics Commission has consistently maintained that the unwarranted use of state resources for political campaign purposes violates the State Ethics Code's Fair Treatment law. If the department head authorized the release of state workers on state time for campaign purposes without any legal justification, then his actions would have raised issues under HRS section 84-13. The Commission believed, however, that the department head did not violate the Fair Treatment law in this case.

The department head appeared to have had little choice in deciding to authorize the release of the state employees in this case. HRS section 76-102 requires that employees be released to attend "informational and educational meetings" conducted during work hours by recognized unions. The term "informational and educational" is not defined in the law. In his answer, the department head maintained that the unions have taken the position that, pursuant to the First Amendment, they may discuss anything at these meetings.

The State Ethics Commission requested an opinion from the Department of the Attorney General concerning HRS section 76-102. The Commission asked the Attorney General whether a union could campaign for the election of particular candidates, or campaign for the passage of particular ballot issues at a meeting of state employees held pursuant to HRS section 76-102. The Department of the Attorney General replied with an opinion stating that HRS section 76-102 allowed

unions to campaign for candidates and ballot issues at these meetings. Thus, the Department of the Attorney General did not construe the term “informational and educational meetings” to exclude campaigning by unions.

The information that the State Ethics Commission received from the department head and from the Department of the Attorney General indicated that the department head did not have the option of refusing to authorize the release of state employees. State law required the release. Even assuming that the department head knew that there would be campaigning at the meeting, the Department of the Attorney General’s opinion indicates that the department head would be taking a considerable legal risk by not authorizing the release of the state employees. The current law apparently allows the unions to campaign at these meetings.

The department head pointed out in his answer that the unions’ request for the leave was somewhat unorthodox in this case. Normally, the practice was to hold several meetings during staggered dates and times in order to assure operational coverage in state offices while allowing all state employees to attend the union meetings. In this case, the unions asked for the release of state employees on one date at one time to coincide with the reading of an official proclamation and to allow national and local AFSCME leadership to address the workers. While the release in this case was unusual, it appears to have been still in keeping with state law. The practice of staggering the meetings was put in place to allow for all employees to attend union meetings while providing for operational coverage for state government. In his directive authorizing the release in this case, the department head allowed the release only so long as there was adequate operational coverage. His authorization was consistent with HRS section 76-102.

State law apparently required the department head to release state employees even if he was aware that the unions might campaign during the union meetings. Further, the unions apparently did not clear the content of their meetings with the department head before the meetings. The unions have taken the position that their presentations at these meetings are protected by the First Amendment. For this reason, the unions believe that they do not need to inform the State about the content of their meetings.

The Commission believed that the department head did not violate the State Ethics Code by releasing state employees to attend a union meeting held in conjunction with this event. The department head was required by state law to authorize the release of the state employees at the unions’ request. State law apparently allows unions to campaign at these meetings.

In light of the fact that the Department of the Attorney General informed the Commission that HRS section 76-102 allows unions to request the release of state employees to attend meetings at which the unions engage in campaigning, the Commission did not believe that the department head violated the State Ethics Code by authorizing the release of state employees to attend an event held pursuant to HRS section 76-102.

Nevertheless, the Commission shared the complainant’s concern about this type of event. The Commission did not believe that state resources (namely, taxpayer dollars) should be used to subsidize partisan political campaigning. The Commission believed that the public did not expect that its state employees be subjected to partisan political campaigning during state work hours. The Commission introduced legislation to amend HRS section 76-102 in the 2000 legislative session to prevent the use of taxpayer dollars to subsidize such political campaigning. In the

Commission's view, such legislation would enhance the public's confidence in ethical state government.

The State Ethics Commission would like to address comments regarding the time and effort expended by its staff to complete its investigation, bring this case to the Commission for deliberation, and issue this opinion. It is important to acknowledge that these charges and the issues they raised did not lend themselves to a quick and simple resolution. Rather, these charges raised complex legal, evidentiary, and procedural issues and concerns that were time-consuming to research and resolve. The procedures the Commission observed included but were not limited to: adequate time afforded to the respondent to answer charges; soliciting additional information and evidence from the complainant; following up with unresponsive parties; independent verification of information; researching the legislative history of HRS section 76-102; and First Amendment issues that arose in this case. The Commission also sought further evidence independent of the complainant and respondent.

The Commission appreciated the department head's patience and cooperation in its review of this matter. The Commission also appreciated the assistance of the Department of the Attorney General. It is the Commission's hope that an amendment to HRS section 76-102 will ensure that this type of practice is eliminated. The State Ethics Commission believes that taxpayer dollars should not be used in an unfair manner to subsidize one particular candidate's campaign for election to office.

Dated: Honolulu, Hawaii, April 5, 2000.

HAWAII STATE ETHICS COMMISSION
Cassandra J.L. Abdul, Chairperson
Ronald R. Yoshida, Vice Chairperson
Eloise Lee, Commissioner

Note: Commissioner Dawn Suyenaga and Commissioner Carl Morton, M.D. were not at the meeting at which this opinion was approved and signed.