

INFORMAL ADVISORY OPINION NO. 2000-2

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 state facilities in support of the re-election 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, who was up for re-election, spoke at this event, which was held on the grounds of the State Capitol Building. 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 reads 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.

Pursuant to HRS section 76-102, state employees were allowed to attend the event.

The charge characterized 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 informed the state employees in attendance at the event that if re-elected, he would work to get funding for negotiated pay raises for public workers.

The charge acknowledged that the release of union state employees to attend 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 the Official, who spoke at the event, of misusing state resources for campaign purposes, in violation of the State Ethics Code. The State Ethics Code is set forth in chapter 84, HRS. Pursuant to HRS section 84-31, the Official was sent a copy of the charge for his response. The Official did not file an answer to the charge.

The event occurred during the time of the American Federation of State, County, and Municipal Employees (AFSCME) national convention, which was being held at the Hawaii Convention Center. According to a state department head who had the authority to release (and did release) state workers to attend this event, the department head was told that the purpose of the event was to gather State and City and County HGEA and UPW employees in one joint AFSCME meeting for two hours, as allowed by HRS section 76-102, in order for the Official to read an official proclamation. The department head informed the State Ethics Commission that the

union meeting was also intended to allow national and local AFSCME leaders to address state employees.

It appears that the Official's participation in this event was in his official capacity. The charge stated that the Official spoke at the event, and alleged that the Official violated the State Ethics Code by making at least one campaign statement at the event. The Commission interpreted the charge as alleging that the Official misused state resources for a campaign purpose in violation of the State Ethics Code's Fair Treatment law.

In relevant part, HRS section 84-13, the Fair Treatment law, 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:

.....

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

The Commission has consistently taken the position that the Fair Treatment law bars state officials and employees from using state resources in an unwarranted manner for campaign purposes. The charge cited a newspaper article which reported that the Official stated at the event that if re-elected, he would work to get funding for negotiated pay raises for public workers. The newspaper did not directly quote the Official.

Through its staff, the Commission several times attempted to obtain additional information from the complainant about the Official's statements at the event. The chair of the organization that filed the charge (the complainant) was present at the event. She informed the Commission that the union speakers at the union meeting engaged in campaign rhetoric. However, she said that the Official's election-related comments amounted to no more than one sentence.

On its own initiative, the Commission obtained a transcript of a television news broadcast concerning the union event. According to this transcript, the Official made the following statement:

You know this is my 24th year in public office and every election this union has been with me. We have won seven elections in a row and now we are going to win the eighth.

There was no specific context given for this statement in the broadcast. The transcript indicated no other election-related statements by the Official.

The department head who released state workers to attend the event pursuant to HRS section 76-102, was present at the union event and provided an account to the Commission of the Official's statements at the event. The department head stated:

[The Official] thanked the employees for their hard work and cited several instances where state employees were recognized by federal agencies for exemplary accuracy or work. Department of Human Services' food stamp program and social workers, business and economic development's programs winning national recognition, and Hawaiian home lands for their historic federal agreement were some of the examples cited.

He also thanked employees for all the work they have done through these years in coping with the state budget problems, layoffs, cuts in resources, etc.

From a discussion on collective bargaining issues, he also said that it appears we will have a budget balance this year and next and that he will resubmit the signed union contract to the next legislature for funding. Of course in order for [him] to send a budget message to next year's legislature he would have to be re-elected. He indicated that if re-elected he would support the pay raise.

I did not perceive his extemporaneous speech as "blatantly political" because [he] spoke about labor-management issues, state budget projections, and recognizing the employees for their dedication. These are topics the unions would probably discuss in their informational and educational meetings.

The department head's account essentially corroborated that of the chair of the organization that filed the charge.

Information received by the State Ethics Commission indicated that the election rhetoric that occurred at the union event was engaged in by the union speakers. Any culpability on the Official's part would extend only to his own actions at the union event. The information provided to the State Ethics Commission indicated that the Official made two statements related to the upcoming election. The substantial campaign-related remarks appear to have come, not from the Official, but from union speakers.

It was possible to read the charge as less concerned with the Official's particular statements than it was with what the complainant perceived as the political nature of the event. The State Ethics Commission shared the complainant's concerns about situations in which a union asks for the release of state employees pursuant to HRS section 76-102, and then uses the resulting meeting as an opportunity to engage in political campaigning at taxpayers' expense. HRS section 76-102 requires that employees be released to attend "informational and educational meetings" conducted by duly recognized unions during state work hours. The term "informational and educational" in HRS section 76-102 is not defined. The department head responsible for releasing state workers to attend these meetings 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 held pursuant to HRS section 76-102. The Department of the Attorney General replied with an opinion stating that HRS section 76-102 allows unions to campaign for candidates and ballot issues at these meetings. Thus, state law apparently allows unions to campaign at informational and educational meetings held pursuant to HRS section

76-102. HRS section 76-102 apparently allows state employees to be released from their regular responsibilities in order to attend these meetings at which campaigning may occur.

The State Ethics Commission did not believe, for reasons more fully discussed below, that the Official's actions at the union event amounted to a violation of the State Ethics Code. It appeared that the Official made only two election-related statements.

At the same time, the State Ethics Commission did not believe that state resources (namely, taxpayer dollars) should be used to subsidize political campaigning. The Commission introduced legislation in the 2000 legislative session to amend HRS section 76-102 to bar the use of taxpayer dollars to subsidize a candidate's political campaign.

The charge also appeared to allege that state time and state facilities were improperly used by the Official in making a campaign statement. However, as an elected official, the Official was exempted from any rules or laws regarding "state time" by HRS section 80-4. Further, the Capitol grounds are a public forum, and although owned by the State, can be used by anyone for political statements. The Fair Treatment section bars the "preferential" use of state facilities. The State Ethics Commission concluded that there was no "preferential" use of the Capitol grounds in this case, as it appears that the grounds are available to anyone wishing to hold a similar event.

The State Ethics Commission noted that elected officials, when appearing at events in their official roles, might at such events make statements in reference to their own re-election. In fact, questions relating to their own re-election may be asked of elected officials at such events. Depending on the context, the State Ethics Commission will not generally find a political comment or two to be violative of the State Ethics Code unless the elected official takes unwarranted advantage of (1) the state time of others, (2) state equipment, (3) state facilities, or (4) his or her state position for campaign purposes. Obviously, there is a fine line between a few comments in a certain context and what may indeed amount to a "misuse of position."

In any event, in this case, the state employees were out of their state offices legally in accordance with HRS section 76-102. The event took place at a public forum. The Official was not subject to laws regarding the use of "state time." Further, the State Ethics Commission did not believe that the Official misused his position as a state official in the context of this case by making two comments that were political in nature.

As noted above, the Official was not subject to laws regarding "state time." Thus, the Official also apparently had the right to shift from his official role to his status as a candidate for election (or to his status as a private individual) so long as he was not abusing the state time of others, state facilities, or other state resources.

In this case, the State Ethics Commission believed that the heart of the problem stemmed from HRS section 76-102, which appears to allow state employees to be at union meetings where state employees will be asked to support certain candidates. The State Ethics Commission hoped to have HRS section 76-102 amended during the 2000 legislative session so that unions--rather than taxpayers--would pay for any partisan campaign activities that take place during union meetings convened under HRS section 76-102. The State Ethics Commission believed that such an amendment would greatly enhance the public's confidence in fair and ethical government.

The State Ethics Commission would like to address comments regarding the time and effort expended by its staff to complete the investigation, bring the 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 State Ethics Commission appreciated the Official's patience during 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 prevent situations such as this from occurring in the future.

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.