

INFORMAL ADVISORY OPINION NO. 2001-12

A member of the public who was also the president of a citizen's organization filed a Charge against a legislator with the Hawaii State Ethics Commission. In his Charge, the complainant alleged that the legislator had violated the Hawaii State Ethics Code, set forth in chapter 84, Hawaii Revised Statutes ("HRS"), by his actions in conjunction with a public high school baccalaureate service. Pursuant to the State Ethics Code, the Hawaii State Ethics Commission sent a copy of the Charge to the legislator. The legislator filed an Answer with the Commission. In his Answer, the legislator denied that he had violated the Hawaii State Ethics Code. The Hawaii State Ethics Commission reviewed this matter and voted to issue an Informal Advisory Opinion in response to the Charge.

The Charge

The Charge arose out of the legislator's participation in a public high school's baccalaureate service. The high school was located within the district represented by the legislator. The baccalaureate service appeared to have been a religious event. The complainant enclosed a copy of the program with his Charge. The service included religious readings, religious songs, and prayers.

The Charge objected to the legislator's use of government resources to support the baccalaureate service. Specifically, the complainant objected to the legislator's use of state staff, time, equipment, and facilities to invite students to the service. He also objected to the presence of the state seal at the podium during the service.

The Charge claimed that the legislator received a student directory, which is a listing of the names and addresses of all the students at the high school. The complainant claimed that the legislator used this list to send invitations to the high school students and their families. The complainant included a copy of the invitation with his Charge. The invitation was on letterhead that included a heading with the legislator's state title along with the legislator's home address. The invitation was signed with the legislator's state title.

The invitation announced the baccalaureate service and then provided information on confirming attendance. The invitation requested an RSVP and asked participants to call the legislator's capitol office to respond to the invitation. The invitation also requested participants to leave a message with a call back number at the capitol office if no one was there to answer the phone. According to the Charge, a member of the citizen's organization called the legislator's capitol office telephone number and spoke to the legislator's office manager. The Charge claimed that the office manager took this person's reservation information.

According to the Charge, members of the citizen's organization attended the baccalaureate service. They obtained a copy of the program. A copy of the program was attached to the Charge. The program listed the legislator and his office manager as members of the "Baccalaureate Committee." The legislator was presented as giving the "Closing Prayer." The program acknowledged the legislator for his "support and leadership." The members of the citizen organization who attended also noted that the state seal was displayed on the podium throughout the service.

The Charge alleged that the legislator violated HRS section 84-13 by his actions in connection with the baccalaureate service. HRS section 84-13 reads, in relevant part, 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. . . .

The Charge alleged that the legislator violated this section by using state resources in order to distribute invitations and obtain reservations to attend the baccalaureate service. The Charge essentially claimed that this granted an unwarranted advantage to an organized religious activity.

The Answer

In his Answer, the legislator did not dispute the facts related in the Charge. The legislator did clarify his involvement with the baccalaureate service. He explained that the service was the third annual baccalaureate service. The tradition was begun by his predecessor in office. The legislator stated that a committee of high school students approached him and asked if he would continue the practice of helping with the baccalaureate service. The legislator agreed to do so.

In his Answer, the legislator explained that a planning meeting was held prior to graduation. At this meeting, it was decided that the legislator would be responsible for inviting students and receiving their RSVP's. The legislator's predecessor had previously been responsible for inviting people. The legislator explained that he used his predecessor's invitation from a previous year as a template for the invitation. One of the students on the baccalaureate planning committee requested a student directory from the school and provided it to the legislator¹. Approximately fourteen calls in response to the invitation were made to the capitol office.

In his Answer, the legislator stated that he gave the closing prayer at the service. He stated that this was the extent of his participation in the service. The rest of the planning and undertaking of the event was handled by the other members of the committee.

The legislator acknowledged in his Answer that he did receive telephone calls at his state office in response to the invitations that were issued. The legislator claimed, however, that his actions did not violate the Hawaii State Ethics Code. Instead, the legislator said that his actions fell within his duties as a legislator to represent and assist his district.

¹ An issue that was not raised by the Charge was whether the legislator or anyone else, violated HRS section 84-12 in obtaining the class directory. HRS section 84-12, the Confidential Information section of the Hawaii State Ethics Code, reads:

§ 84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

The Hawaii State Ethics Commission was originally informed, by the principal of the public high school, that the class directory is to be distributed at the principal's discretion. The principal's statement was later corrected by an official at the Department of Education. The official informed the Commission's staff that these lists are public information. Based on the official's statement, the Hawaii State Ethics Commission believed that there was no violation of the Confidential Information section of the State Ethics Code.

Analysis

The Charge essentially asked the Hawaii State Ethics Commission to find a violation of HRS section 84-13 as a result of the legislator's use of state resources to support a religious service. The Commission noted that HRS section 84-13 has generally not been interpreted to address the issue of "favoritism" towards general systems of thought or belief. For example, if a legislator, while acting as a legislator, were to express beliefs consonant with his or her political party, then this would generally not be addressed by the Fair Treatment law. On the other hand, if a legislator were to use state resources to perform administrative work for the party, then this would raise issues under the Fair Treatment law. Similarly, if a legislator, while acting as a legislator, were to express himself or herself in a way consonant with his or her personal religious beliefs, then this would generally not be addressed by the Fair Treatment law. However, if a legislator were to use state resources to recruit members for his or her church or perform other functions in support of his or her church, then this could raise issues under the Fair Treatment law.

The Hawaii State Ethics Commission addressed a situation similar to this case in Informal Advisory Opinion No. 2001-9. In that instance, the Charge alleged that a legislator had violated the Fair Treatment section by using state resources to support a Legislative Fellowship Meeting held at the State Capitol. The Hawaii State Ethics Commission concluded that general religious discussion alone would not amount to a violation of the Fair Treatment law. The Commission decided that the issue was more properly addressed by the Establishment Clause of the State and Federal Constitutions, or by other law².

In this case, the Commission also believed that this matter was more properly addressed by the Establishment Clause, or by other applicable law outside of the jurisdiction of the Hawaii State Ethics Commission. It appeared to the Commission that the complainant acknowledged as much in his Charge. He wrote:

The use of government assets and employees for such purely sectarian religious activity violates the Establishment Clause of the First Amendment to the Constitution of the United States, as well as Section Four of the Constitution of the State of Hawaii.

This comment by the complainant supported the Commission's view that his complaint was more properly addressed by these constitutional provisions rather than by the Hawaii State Ethics Code.

The Hawaii State Ethics Commission believed that the complainant's charge did not provide sufficient evidence of a violation of the State Ethics Code. The complainant essentially raised issues regarding the separation of church and state. These were constitutional issues. The Commission noted that such issues have been reviewed extensively and repeatedly by the courts of our country from its inception. The Commission believed that the Attorney General's office was the proper agency to address this particular matter.

² The Establishment Clause of the First Amendment of the Constitution reads, "Congress shall make no law respecting an establishment of religion. . . ." The Establishment Clause of Article One, Section Four of the Hawaii State Constitution reads, "No law shall be enacted respecting an establishment of religion."

The Commission believed that it might be prudent for the legislator to seek the advice of the Attorney General's office in regard to this matter, and in regard to future similar situations. Further, the State Ethics Commission believed that it might be prudent for the legislator to contact the Commission regarding the use of state resources that may appear to raise issues under the provisions of the State Ethics Code.

Dated: Honolulu, Hawaii, December 19, 2001.

HAWAII STATE ETHICS COMMISSION

Cassandra J.L. Abdul, Chairperson
Eloise Lee, Commissioner
Carl Morton, M.D., Commissioner
Dawn Suyenaga, Commissioner

Note: Vice Chairperson Yoshida participated in the Commission's decision, but was unable to be present at the signing of this informal advisory opinion.