

INFORMAL ADVISORY OPINION NO. 2003-1

I. Introduction

The Hawaii State Ethics Commission ("Commission") received a formal Charge filed against a state official from a member of the public. After receiving this Charge, the Commission received another formal Charge filed against the same state official. Both of these formal Charges concerned the same factual situation. They were later formally consolidated by the Commission. Both of these formal Charges are addressed together by the Commission in this Informal Advisory Opinion.

Both Charges complained that the state official used subordinate state officials and employees in criticizing the views of a candidate for statewide elective office. The criticism by the state official was directed primarily at a piece of the candidate's campaign literature. The state official's criticism was based on research done by subordinate state officials and state employees on state time at the request of the state official. The state officials and state employees also used state equipment and state facilities in performing their research. Both Charges contended that the state official's use of state resources to critique the candidate's campaign literature was a violation of the Hawaii State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS"). In the state official's Answer to the Charges, the state official essentially contended that the critique of the campaign literature was a legitimate function of the official's state position, and thus it was appropriate to use state resources for the critique.

II. Procedural History

The first Charge was filed with the Hawaii State Ethics Commission shortly after the state official publically released the state official's critique of a piece of campaign literature of the candidate. Pursuant to HRS section 84-31(b), a copy of the first Charge was sent to the state official for the state official's response. The second Charge was filed a few days later. A copy of the second Charge was sent to the state official for the state official's response.

The Commission requested from the state official a written Answer to the Charges to be due a few weeks after the first Charge was filed. Approximately a couple of weeks later, the Commission held an adjudicatory meeting and voted to issue a formal resolution defining the nature and scope of its inquiry into this matter as required by HRS section 84-31(a)(4). The resolution authorized the Commission to subpoena witnesses, administer oaths, take testimony, and require the production of books or papers relative to this matter. After the resolution was issued, the Commission began issuing subpoenas to witnesses and for documents. The Commission issued seven subpoenas in regard to witnesses and documents. In addition, the Commission met with the state official and with the candidate.

Shortly before the due date, the state official filed an Answer in response to the Charges. The state official was represented in the matter by an attorney. In the state official's Answer, the state official stated that state law gave the state official the right and the responsibility to critique the campaign literature as part of the state official's official duties. Thus, the state official believed that the state official's critique of the campaign literature was a legitimate function of the state official's office.

During the two months after the Charges were filed, the Commission's legal staff interviewed subpoenaed witnesses under oath and received subpoenaed documents. About one month after the Charges were filed, one of the members of the State Ethics Commission voluntarily disclosed that the Commissioner's spouse was an unpaid volunteer for the candidate's campaign. The Commissioner stated that the Commissioner and the Commissioner's spouse did not discuss politics, and did not necessarily share political views. The Commissioner added that various members of the Commissioner's family openly supported different candidates, but that the Commissioner did not.

In response to the Commissioner's disclosure, about ten days later, the attorney representing the state official sent a letter to the Commission requesting that this Commissioner be recused from the case. This position was based on a reading of the "Code of Judicial Conduct" for Hawaii state judges and on Hawaii case law, as well as the fact that the Commissioner's spouse had made significant campaign contributions in a prior election to the candidate. The Commission responded by questioning the application of the Code of Judicial Conduct to a commissioner of the State Ethics Commission. The Commission concluded that neither Hawaii case law nor the Code of Judicial Conduct required the Commissioner to be recused. The staff of the Commission also advised the Commissioner that the conflicts of interests provisions of the State Ethics Code did not require recusal.

At a meeting held about one month after the state official filed the state official's Answer to the Charges, the Commission issued a "Further Statement of the Alleged Violation" against the state official. This document was issued pursuant to HRS section 84-31(b), and was the result of the Commission's assessment that there was "probable cause" to believe that a violation of the State Ethics Code might have occurred. This document was signed by three Commissioners, the minimum number needed to validate a formal act by the Commission. A copy of the Further Statement of Alleged Violation was sent to the state official for response, in accordance with the procedures set forth in the State Ethics Code. The Commission requested a response from the state official within approximately three weeks. Through the state official's attorney, the state official requested an extension to respond to the Further Statement of Alleged Violation. Because the Commission's Rules, which have the force and effect of law, provided for an automatic fifteen-day extension upon request, the extension was granted.

As stated above, the Further Statement of Alleged Violation was signed by three members of the Commission. One of those who signed was the Commissioner whose recusal had been requested. About two weeks after the Further Statement of Alleged Violation was issued by the Commission, the state official filed an affidavit with the Commission requesting this Commissioner's recusal from the case. At a Commission meeting held about a week later, this Commissioner declared that the Commissioner did not want the issue of the Commissioner's recusal to interfere with the proper disposition of this case, and voluntarily withdrew from further consideration of the case. At this meeting, the remaining members of the Commission (four members) approved by a unanimous vote a motion stating that it did not believe that the Commissioner's recusal was legally required. This vote was taken in response to the state official's affidavit asserting that the Commissioner was legally required to be recused.

In the afternoon of the last day of the extension granted by the Commission, the state official filed an Answer to the Further Statement of Alleged Violation. After this Answer was filed, three full business days remained prior to the General Election. The state official included in the state official's Answer a motion for the withdrawal of the Further Statement of Alleged Violation on the grounds that the recused Commissioner, who had signed the document, should have been disqualified from doing so, based on a conflict of interests, as previously described above in this opinion. The state official claimed that the Further Statement of Alleged Violation was, because of the alleged conflict of interests, not signed by a "majority" of the Commission and, consequently, was not valid. The Commission voted to deny the state official's motion. The Commission concluded there was no legal basis to require the Commissioner's recusal, and thus the Commissioner's vote on the Further Statement of Alleged Violation was valid, and thus the document was valid.

In the state official's Answer to the Further Statement of Alleged Violation, the state official again maintained that the state official's actions were part of the legitimate functions of the state official's state office. The state official set forth affirmative defenses, both relying on the contention that certain laws allowed for the state official's critique of the candidate's campaign literature.

At a meeting held approximately two weeks after the state official filed the state official's Answer to the Further Statement of Alleged Violation, the four remaining members of the State Ethics Commission considered the state official's Answer. Pursuant to HRS section 84-31(c), the Commission needed to make a second "probable cause" determination at this point in order to proceed to a formal, contested-case hearing in this case. At this Commission meeting, a majority of the Commission was unable to reach a consensus as to whether or not there was "probable cause" to believe that a violation of the State Ethics Code had occurred. Two of the four Commissioners considering the case, Commissioners Yoshida and Morton, strongly felt that there was probable cause, and that this matter should proceed to a formal, contested-case hearing in order to determine whether or not the State Ethics Code had been violated by the state official. The remaining two Commissioners were equally convinced that there had not been a showing of probable cause. This deadlock was resolved at a subsequent Commission meeting held approximately four weeks later. At that meeting, the Commission voted to issue this Informal Advisory Opinion.

III. Facts

The Charges took issue primarily with the state official's critique of a piece of the candidate's campaign literature. The campaign literature was issued by a candidate who was a member of a political party that opposed the state official's party. The candidate's literature outlined the candidate's campaign platform.

The state official responded to the candidate's campaign literature by directing other state officials and employees to research the probable consequences of ideas set forth in the campaign literature. The state official disseminated a critique of the campaign literature, based on the research of subordinate state officials and employees, publically. State officials, employees, state time, state facilities, and state equipment were used in regard to the preparation and public release of the critique.

IV. The Pleadings

A. The Charges

1. First Charge

The first Charge filed with the Commission was brief. This Charge essentially contended that the critique of the candidate's literature, undertaken as it was by state employees on state time, violated Hawaii Revised Statutes chapter 84, the Hawaii State Ethics Code. This Charge alleged that the critique of the candidate's campaign literature was a campaign activity.

2. Second Charge

The second Charge was more detailed than the first Charge, but essentially made the same allegations. The Charge stated that the campaign literature outlined the candidate's campaign platform. The second Charge stated that, almost immediately after the campaign literature was released, the state official directed a state employee to use state time and resources to analyze certain aspects of the literature. The second Charge claimed that this employee, and other state employees, used state time and state resources for this analysis.

B. The State Official's Answer

Through his attorney, the state official filed a timely Answer to the Charges. The Answer addressed both Charges. In the state official's Answer, the state official first set forth the facts of the situation.

The state official explained that the candidate's literature solicited support for the candidate's campaign for office and contained proposals affecting many areas of government. The state official noted that the analysis done by subordinates was based on non-confidential information.

The Answer then presented defenses to the allegations in the Charges. These defenses were based on laws that the state official asserted allowed for the critique of the campaign literature.

The Answer acknowledged that the State Ethics Code prohibited the use of state resources for campaign purposes. The state official claimed, however, that in this case the state official was discussing matters of public policy and that the discussion of the campaign literature was part of the state official's state duties. The state official claimed that this was an exercise of the state official's duties and First Amendment rights and could not be limited by the State Ethics Code.

C. The Further Statement of Alleged Violation

After investigation, and after reviewing the Answer and the comments that the state official made in person before the Commission, the Commission voted to issue a Further Statement of Alleged Violation. This document consisted of a number of counts, each of which alleged a violation of the State Ethics Code. The counts basically alleged that the state official had violated HRS section 84-13

and HRS section 84-13(3) by misusing the state official's state position to critique the candidate's literature for a campaign purpose, and by directing state officials and employees to do research for the critique on state time, with the use of state facilities, state equipment, state personnel, state supplies, and state stationery. The Commission also alleged that the State Seal had been misused for campaign purposes. The campaign purpose was to diminish the candidate in the eyes of voters.

D. The State Official's Answer to the Commission's "Further Statement of Alleged Violation"

In the state official's Answer to the Commission's Further Statement of Alleged Violation, the state official repeated the defenses raised in the state official's first Answer. The thrust of the state official's Answer was that the state official was exercising legitimate governmental functions in commenting on the candidate's campaign literature.

The state official's Answer stressed that the state official's purpose in critiquing the candidate's campaign literature was not political. The state official explained that the state official's purpose was to enter into a policy debate over how the State could best maintain services and other governmental functions.

V. Analysis

A. The State Official's Affirmative Defenses

The crux of the two Charges was the allegation that the state official directed that state time, equipment, facilities, and personnel be used to assist in the critique of the candidate's campaign literature, and that this critique constituted a campaign task. HRS sections 84-13 and 84-13(3) prohibit a state official or employee from using state resources for political campaign purposes. These sections of the State Ethics Code read 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 noted that HRS section 84-13 prohibits the use of one's state position in order to give anyone an unwarranted benefit or advantage. In the past, the State Ethics Commission has frequently interpreted this section as prohibiting the use of one's state position in order to, in an unwarranted manner, advantage or disadvantage a candidate for political office. HRS section 84-13(3) prohibits the use of state resources for private business purposes. The Commission has consistently held that this section prohibits the use of state resources for political campaign purposes (see, for example, Informal Advisory Opinion Nos. 99-3, 2000-1, and 2000-2). The

Charges alleged that, by directing state employees to analyze the candidate's campaign literature, the state official violated HRS section 84-13 and HRS section 84-13(3).

In the state official's Answers, the state official set forth defenses to the allegations. The state official did not deny that the state official directed that state resources be used for the critique and its publication. The state official essentially asserted, however, that the critique and its release were not campaign tasks. Instead, the state official argued, they were part of the state official's official duties, and within the state official's Free Speech rights.

The Commission noted that the State Ethics Code did not prohibit the state official from expressions the state official saw fit to make in accordance with legitimate official duties. However, HRS sections 84-13 and 84-13(3) prohibited the use of state resources for political campaign purposes. Any other interpretation of the law would allow an incumbent to throw the State's considerable resources behind the candidate of his or her choice with impunity. Simply put, the Commission believed that our system of government did not allow incumbents to use the resources of government in order to perpetuate themselves or to promote the candidates that they favored. While state officials could generally express themselves in any manner that they wished in accordance with their legitimate official duties, they could not direct that state resources be used to support or oppose particular candidates.

The Commission did not mean to suggest that the State Ethics Code prohibited the state official from making statements that might be critical of candidates, or that were otherwise political in nature. The State Ethics Code speaks only to the misuse (or attempted misuse) of state position and state resources. For example, the Commission believed that the law would not necessarily prohibit the state official from making critical remarks about a candidate during an election campaign, so long as such remarks fell within the ambit of official duties and did not constitute a campaign task. However, if an official were, for example, to direct the state print shop to print out pamphlets criticizing a candidate's campaign platform, then the Commission believed that this would raise serious concerns under the State Ethics Code.¹

B. The State Ethics Commission's Concerns

In its review of the Charges filed against the state official, the State Ethics Commission focused on two main issues. The first issue was whether the state official's use of state resources to critique the candidate's campaign literature and then to publicize the critique was a legitimate use of state resources for a state purpose, or, instead, whether it was a misuse of state resources for a political

¹ It is clear from case law that the United States constitution forbids the use of public funds to support the election of candidates. See, for example, Anderson v. City of Boston, 380 N.E.2d 628 (1978), Stanson v. Mott, 130 Cal. Rptr. 697 (1976). The Office of Campaign and Political Finance of Massachusetts issued an Interpretive Bulletin in November 1995, Revised August 19, 1997. In this Bulletin, the Office relied upon the Anderson case to conclude that, although public resources cannot be used for any political purpose, an official may, to a limited extent use public resources in order to respond to criticism. Such a response must be reasonable and proportionate in scope to the criticism. [Emphasis added.] In addition, public resources may not be used to attack the candidacy of an opponent. IB-95-03, Office of Campaign and Political Finance, Commonwealth of Massachusetts.

campaign purpose. The second issue that concerned the Commission was whether or not the critique was carried out in a fair and impartial manner.

1. Was the Critique a Legitimate Use of State Resources for a State Purpose?

The Commission noted that, in general, the state official had the right to comment on matters of public concern and could use state resources to address matters of public concern. One of the key questions before the Commission was whether or not the state official's use of state resources in this case was legitimate, or whether, instead, it was a misuse of state resources for a political campaign purpose. After a review of the facts, the Commission believed that the facts supported the view that the critique was for a campaign purpose.

2. Was the Analysis Carried Out in a Fair Manner?

The Commission had even more serious concerns here. HRS section 84-13 would require that all candidates be treated fairly. It appeared clear to the Commission, however, that this candidate was not treated in the same manner as other similarly situated candidates by the state official.

VI. Issuance of an Informal Advisory Opinion

HRS section 84-31(b) allows the Commission to conclude a case that has been initiated by a formal Charge with an "informal advisory opinion." The Commission may also proceed to a public, contested-case hearing if the Commission believes that "probable cause" of a violation of the State Ethics Code exists after the Commission reviews an Answer to the Commission's Further Statement of Alleged Violation. The purpose of a contested-case hearing would be to formally determine by adjudication whether the State Ethics Code had, in fact, been violated.

In this case, Commissioners Yoshida and Morton strongly believed that a formal, public contested-case hearing was clearly warranted. In fact, Commissioners Yoshida and Morton strongly believed that doing less constituted an abrogation of the Commission's responsibilities. However, the two other Commissioners strongly believed that an informal advisory opinion was warranted in this case due to the novel issues the case presented. To avoid an unresolvable deadlock, Commissioners Yoshida and Morton reluctantly agreed to the issuance of this informal advisory opinion under these circumstances.

VII. Conclusion

The State Ethics Commission believed that the state official's actions in this case raised serious concerns under both HRS section 84-13 and HRS section 84-13(3). These sections prohibit a state official or employee from misusing his or her position to benefit or disadvantage a candidate for political office, and prohibit the use of state resources for political campaign purposes. The state official directed that state resources be used to analyze the candidate's campaign literature. The Commission had serious concerns as to whether this was a legitimate use of state resources in terms of the facts of this case. The circumstances surrounding the critique of the candidate's campaign literature tended to indicate that there were political motivations at work. In addition, it appeared to the Commission that the critique was performed in an unfair manner in violation of the State Ethics

Code. The State Ethics Commission believed that the candidate was clearly not treated in the same manner as the other similarly situated candidates. The state official's actions in this respect raised grave concerns under the Fair Treatment section of the State Ethics Code.

Dated, Honolulu, Hawaii, January 31, 2003.

HAWAII STATE ETHICS COMMISSION
Ronald R. Yoshida, Chairperson
Nadine Y. Ando, Commissioner
Eloise Lee, Commissioner
Carl Morton, M.D., Commissioner

Note: Vice Chairperson Dawn Suyenaga did not participate in the issuance of this Informal Advisory Opinion.