

INFORMAL ADVISORY OPINION NO. 2004-2

The Honorable Linda Lingle
Governor
State Capitol, 5th Floor
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Governor Lingle:

On April 12, 2004, the Hawaii State Ethics Commission ("Commission") received a formal, sworn charge filed against you by Ms. Faith Tomoyasu, a public school educator. In her charge, Ms. Tomoyasu alleged that you had violated the State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS"), by using state employees and state resources on behalf of a private nonprofit corporation known as the "Citizens Achieving Reform in Education" ("CARE"). CARE had originally been formed by you as an advisory group, but became a nonprofit corporation on December 31, 2003. CARE then filed with the Internal Revenue Service for status as a 501(C)(4) organization, which would allow the organization to lobby.

On April 14, 2004, the Hawaii State Ethics Commission received a second formal, sworn charge filed against you by Alexander C. Santiago, the Chair of the Democratic Party of Hawaii. Mr. Santiago essentially raised the same allegations in his formal charge as did Ms. Tomoyasu.

The facts of this case are not in dispute. CARE did in fact file with the State on December 31, 2003, to incorporate as a nonprofit corporation. On its filing, CARE listed as its address the Office of the Governor. CARE then applied to the Internal Revenue Service for status as a 501(C)(4) organization, which would allow it to lobby.

It is also undisputed that your Chief of Staff, Mr. Bob Awana, performed work on state time, as well as in your office, in support of CARE. A number of other state employees in your office also spent state time performing work for CARE. This work included maintaining the web site for CARE on the State's web site, and soliciting donations for CARE. CARE also used a state telephone number in your office as its telephone number, and CARE's e-mail contact was a state employee in your office. CARE was also allowed to use a fax number in your office.

In February, CARE registered with the State Campaign Spending Commission as a political action committee. There is no doubt, therefore, that from December 31, 2003, CARE functioned as a private nonprofit entity.

The State Ethics Code prohibits state resources from being used in a preferential manner for private business purposes. HRS section 84-3 defines a "business" to include a corporation, whether or not operated for profit. For purposes of the State Ethics Code, CARE was a business, and, as such, could not be accorded any unwarranted privileges or unwarranted use of state resources.

The Fair Treatment section of the State Ethics Code, HRS section 84-13, prohibits state officials from using their positions to give any entity or business any unwarranted advantage or preferential treatment. This prohibition includes the use of state time,

equipment, or other facilities for private business purposes. The prohibition on the use of state resources for private business purposes appears in HRS section 84-13(3). The Fair Treatment section, in its entirety, 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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

The State Ethics Code clearly prohibits state resources from being used in a preferential manner to support a private entity or business. For this reason, state resources could not be used to support CARE. The use of state resources to support CARE constitutes violations of HRS sections 84-13 and 84-13(3) of the State Ethics Code. The Hawaii State Ethics Commission believes, therefore, that you violated HRS sections 84-13 and 84-13(3) by allowing state resources to be used to support CARE once CARE became a private entity.

That being said, the Hawaii State Ethics Commission strongly commends you for your full cooperation in addressing and resolving this matter. In the following paragraphs, the Commission will set forth the steps you have taken to responsibly address this case.

After the first formal charge was filed on April 12, 2004, the Hawaii State Ethics Commission's executive director met the next day with your Chief of Staff, Mr. Bob Awana, and his assistant. Mr. Awana had requested the meeting with the executive director. The executive director discussed the case with Mr. Awana for approximately two hours, and informed Mr. Awana that there appeared to be an apparent violation of the State Ethics Code, and therefore the use of state resources for CARE should be terminated. The following day, you took this action, and the use of state resources in support of CARE stopped.

When formal charges are filed against a state official or state employee, the State Ethics Code requires that the state official or state employee be given an opportunity to respond to the charges. Thus, you were given an opportunity to respond to the charges by way of a written answer. You requested an extension to May 30, 2004, in which to respond to the charges. This extension was granted to June 1, 2004, since May 30 fell on a Sunday, and May 31 was an official holiday.

You filed your answer to the charges on May 28, 2004. In dealing with the formal charges filed against you, you retained attorney Kenneth S. Robbins to represent you in this matter. Mr. Robbins, after consultation with you, submitted your answer on your behalf.

On May 7, 2004, Mr. Robbins contacted the Commission's executive director, and the executive director and Mr. Robbins discussed the case at length. The executive director discussed with Mr. Robbins ways in which this case might be resolved, and Mr. Robbins conveyed this information to you.

The Hawaii State Ethics Commission has reviewed your answer to the formal charges, and the actions that you have taken to address this case, and concludes that the actions you have taken to address this case are sufficient for the Commission to terminate any further proceedings. HRS section 84-31(b) allows the Commission to issue an informal advisory opinion in response to, and in order to dispose of, a formal charge filed with the Commission. The Commission has taken this action in this case, and believes that no further proceedings are warranted.

The Hawaii State Ethics Commission believes that you have responsibly addressed its concerns in this case. The Commission notes that your first action was to end the use of state resources for the benefit of CARE immediately after being informed that there was a probable violation of the State Ethics Code. In your answer, through your attorney, you state that you regret not seeking the advice of the Commission before utilizing state resources for CARE. You apologized both to the Hawaii State Ethics Commission and to the people of Hawaii for the use of the state resources for CARE, and acknowledged that you had violated the State Ethics Code by using state resources for CARE once it became a private entity.

Furthermore, you promptly obtained restitution from CARE for the state resources that were utilized in support of CARE. Mr. Awana calculated the state time used in support of CARE, as well as the square footage of state office space, and the cost of other state resources that were utilized in support of CARE. You thus submitted with your answer a check from CARE in the amount of \$29,843.33 to be paid to the State to reimburse the State for the state resources CARE received. The amount of this restitution appears accurate to the Hawaii State Ethics Commission. The Commission thus believes that the restitution you have tendered is appropriate.

Because you have acknowledged infractions of the State Ethics Code, have apologized, have obtained restitution, and through your attorney have consented that the informal advisory opinion in this case along with your answer and a copy of the check are to be made public, the Hawaii State Ethics Commission believes that these measures taken by you in a forthright and expeditious manner are to be commended, and that further proceedings are not warranted under these circumstances. The Commission notes that you have acted responsibly during the course of this case, and furthermore, Mr. Awana and

your attorney, Mr. Robbins, have been forthright in their dealings with the Commission on your behalf.

The Commission notes that in your answer, you set forth mitigating circumstances indicating that your use of state resources for CARE was done, to your mind, in order to serve the public good. You have stated that you were unaware of any ethics violations, and that your intentions were certainly not to violate the State Ethics Code, but to serve the public. The state resources that you used for CARE were used openly, and thus it appears to the Hawaii State Ethics Commission that there was no knowing attempt on your part to violate the State Ethics Code.

The Hawaii State Ethics Commission, however, believes that you should have perceived an ethics issue with regard to the use of state resources for CARE once it became a private entity – especially one that lobbies and exists as a political action committee. The Commission hopes in the future that you more fully scrutinize such matters.

In closing, the Hawaii State Ethics Commission again commends you for your prompt and responsible actions taken in addressing this case. Because you have acknowledged that you have violated the State Ethics Code, have apologized, have obtained restitution for the State, have indicated your regret for your actions, and have stated that this opinion may be made a matter of public record, along with your answer and the check from CARE, the Commission believes that any further action by the Commission is unnecessary and would constitute a waste of taxpayer dollars and Commission resources.

For the record, we are attaching your answer to this informal advisory opinion as Exhibit A, and the copy of the check for restitution as Exhibit B. In accordance with your instructions conveyed through your attorney, this informal advisory opinion and the attachments will be made a matter of public record.

Dated: Honolulu, Hawaii, June 3, 2004.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson
Dawn Suyenaga, Vice Chairperson
Nadine Y. Ando, Commissioner
Eloise Lee, Commissioner
Carl Morton, M.D., Commissioner