

INFORMAL ADVISORY OPINION NOS. 2004-4 THROUGH 2004-15

Approximately three months before the general election, an individual ("complainant") filed a formal Charge against a legislator with the Hawaii State Ethics Commission ("Commission").

The Charge alleged that the legislator participated with other members of the legislator's party to announce their candidacy for public office, and to urge members of the public to vote for the legislator and fellow party candidates gathered with the legislator at the Rotunda of the Hawaii State Capitol. The Charge accused the legislator of misusing a state facility, the Capitol Rotunda, for campaign purposes, in violation of section 84-13 of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS").

HRS section 84-13, the "Fair treatment" section of the State Ethics Code, reads, in pertinent 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 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 Hawaii State Ethics Commission has long maintained that this section of the State Ethics Code prohibits state officials and employees from using state facilities, such as state offices, for campaign purposes.

Pursuant to HRS section 84-31, the legislator was sent a copy of the Charge for the legislator's response, and the legislator filed an Answer to the Charge.

In the Charge against the legislator, the complainant stated that he contacted the Department of Accounting and General Services ("DAGS") and was advised that neither the legislator nor the other legislators involved requested nor obtained a special use permit for use of the Capitol Rotunda for the campaign event.

The Commission contacted a state official who explained that DAGS issues permits for use of the Capitol Rotunda area. Legislators may also ask the Sergeant-At-Arms to set up equipment or make other arrangements when the Capitol Rotunda will be used, and the Sergeant-At-Arms provides such assistance in conjunction with DAGS. The Sergeant-At-Arms did not provide any assistance at the Rotunda for the event in question.

The Commission was also informed that DAGS issues permits for the use of the Capitol Rotunda and other areas, and that administrative rules promulgated by DAGS provide the authority for the issuance of such permits.

Section 3-111-25, Hawaii Administrative Rules (“HAR”), states that “public assemblies, meetings, gatherings, demonstrations, parades, and other such events” of twenty-five or more people at state facilities are allowed subject to the issuance of a permit by the State Comptroller. Section 3-111-26, HAR, states that applications for permits must be in writing, and must be received by the Comptroller at least fourteen business days prior to the date of the activity. The application must set forth the name of the applicant, date, time, duration, nature, and location of the proposed activity, an estimate of the number or persons expected, a statement of equipment or facilities to be used, and other information required by the permit application form. Section 3-111-27, HAR, provides that a person who violates chapter 3-111, HAR, shall be removed from the facility and subject to fines and criminal penalties as provided by law.

The Commission was informed that no permits were sought or issued for the event in this case. If the Rotunda is used without a permit, a DAGS official explained that DAGS generally does not act unless the users are creating a disturbance. If campaigners or disruptive groups enter the Capitol building, DAGS works with State Sheriffs to have them removed.

HRS section 84-13 bars the preferential use of state facilities. Therefore, use of the Capitol Rotunda for campaign purposes is not automatically barred by the State Ethics Code. However, the Commission has long maintained that HRS section 84-13 does prohibit legislators from using state offices or other state facilities for campaign purposes if the offices or facilities exist for the performance of official duties, and are not available for public use.

As the legislator noted in the Answer to the Charge, the Commission has held, in Informal Advisory Opinion No. 2000-2, that “the Capitol grounds are a public forum, and although owned by the State, can be used by anyone for political statements” Informal Advisory Opinion No. 2000-2, did not, however, specifically address the use of the Capitol Rotunda for campaign purposes, but rather grounds around the Capitol. The holding in Informal Advisory Opinion No. 2000-2 was based on the assumption that the Capitol grounds in question were available to all on an equal basis.

The Commission believed that a consideration of the distinction between the use of state offices or other state facilities and the Capitol Rotunda was appropriate in regard to the Charge filed against the legislator. State offices and many other state facilities exist for the purpose of carrying out official business. Use of the Capitol Rotunda is clearly different from the use of a state office or state facility that is used for official business only. The Rotunda is open to the public. People walk through the Rotunda, eat lunch at the Rotunda, meet with friends and business associates at the Rotunda, and so forth. Groups of twenty-five or more may also obtain permits from DAGS to gather at the Rotunda.

In considering the Charge filed against the legislator, the Commission considered how the State Ethics Code applies when use of certain state facilities, such as the Capitol Rotunda, is governed by administrative rules of an agency or other legitimate state policy. The State Ethics Code sets a minimum standard of conduct for state officials

and employees. State agencies can establish stricter standards of conduct than the prohibitions set forth in the State Ethics Code, or establish administrative policies that may make application of the State Ethics Code unnecessary. Use of the Capitol Rotunda is regulated by administrative rules promulgated by DAGS, and those rules appear to be comprehensive and fair, and thus make unnecessary the application of the State Ethics Code in this case.

The State Ethics Commission believes that state agencies can make government facilities available for public use. So long as there is a fair and workable policy in place for the use of a state facility, compliance with HRS section 84-13 is satisfied. In this instance, DAGS has adopted administrative rules that guide the use of the Capitol Rotunda. As long as these rules are administered by DAGS in a uniform manner, the Commission believes there is no need for Commission action.

In this case, there was no evidence that DAGS acted in bad faith or accorded the legislator special treatment. Whether the legislator was in compliance or not with rules administered by DAGS is a matter to be brought to DAGS for its consideration. The Commission therefore concluded that the allegation made by the complainant, that the legislator misused the Capitol Rotunda for campaign purposes in violation of the State Ethics Code, was without merit since DAGS has workable rules in place governing the use of the Rotunda by all in a fair and impartial manner.

Finally, the Commission noted that the Charge filed against the legislator was one of fourteen Charges filed against other legislators based on identical facts. In conducting its investigation, the Commission found that not everyone charged was engaged in the same conduct despite the fact that the Charges were identical. For example, one person charged was off-island at the time of the event at the Capitol Rotunda. Another person charged was not a candidate for election. One Charge referred to one respondent in one sentence, and to another respondent in the following sentence, indicating that the Charges were being written with only changes in the names, without regard to the facts. Thirteen Charges were filed at the same time based on the same facts. The fourteenth Charge was filed five days later. The Commission noted that it appeared that the Charges were produced with nothing more than a mere name change in the Charges, while the same facts and other material remained unaltered. It appeared to the Commission that the Charges were "mass produced," with little or no concern for factual accuracy.

The Commission believes that this Charge was a legitimate inquiry and commends members of the public who bring ethics complaints to the Commission in good faith. However, the Commission discourages the use of ethics complaints as a political tool. The submission of essentially "cloned" complaints to the Commission with minimum attention to the facts of individual cases is a waste of the Commission's resources.

Dated: Honolulu, Hawaii, October 20, 2004.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson
Dawn Suyenaga, Vice Chairperson
Nadine Y. Ando, Commissioner

Note: Commissioner Carl Morton, M.D., was not at the meeting at which the Commission voted to issue this opinion. Commissioner Robert R. Bean participated in the Commission's decision, but was not available for signature.