

INFORMAL ADVISORY OPINION NO. 2008-1

The Hawaii State Ethics Commission received a sworn Charge filed against a legislator by an elected state official (“official”). In the Charge, the official alleged that the legislator had violated both the “Fair treatment” section of the State Ethics Code and the conflicts-of-interests section of the State Ethics Code. The State Ethics Code is set forth in chapter 84 of the Hawaii Revised Statutes (“HRS”). The “Fair treatment” section of the State Ethics Code is set forth in HRS section 84-13, while the State Ethics Code’s conflicts-of-interests law is set forth in HRS section 84-14.

In the Charge, the state official alleged that the legislator’s violations of the State Ethics Code were described in a series of news articles. These articles were attached to the Charge. The news articles stated that, in effect, because much of the authority to determine certain legislative matters rested with the legislator, the legislator was able to raise an unusually high amount of campaign donations from certain organizations interested in the legislative matters.

The news articles mentioned that other legislators were also involved in the legislative matters in question, including both House and Senate members. However, the news articles stated that the legislator had a significant amount of discretionary authority regarding the legislative matters, and the news articles implied that this authority allowed the legislator to receive significant campaign contributions from organizations interested in the legislative matters.

In accordance with the State Ethics Code, a copy of the sworn Charge was sent to the legislator, in order to afford the legislator an opportunity to respond to the Charge. The legislator filed an Answer to the Charge with the Hawaii State Ethics Commission through his attorney.

The legislator’s Answer categorically denied the assertions made by the state official. The legislator’s Answer asserted that the Charge did not set forth sufficient facts supporting any violations of the State Ethics Code, but merely attached newspaper articles to support the allegations in the Charge. The legislator believed that this made the Charge “frivolous.” The legislator also stated that he believed that the Charge was filed primarily for political purposes, with the upcoming election in mind. The legislator stated that there was nothing in the news articles to indicate that the legislator had acted in a manner contrary to the requirements of the State Ethics Code.

In the legislator's Answer, the legislator also pointed out that he acted, with regard to the legislative matters in question, in his legislative capacity, and that other legislators in the House and Senate were also involved with these matters. The legislator also noted that the state administration also reviewed the legislative matters, and that, with respect to the Legislature, the finance committees made the final determinations as to the matters, not the legislator.

With respect to the news articles, the legislator asserted in his Answer that the news articles insinuated that he misused his position as a legislator, with respect to the legislative matters in question, in order to influence those interested in the matters to make campaign contributions to him. The legislator pointed out that the news articles, however, presented no evidence to indicate that the legislator had violated any provisions of the State Ethics Code. The legislator further stated that neither the news articles nor the complaint presented any evidence of a quid pro quo relationship between campaign contributions and actions taken by the legislator affecting the legislative matters in question.

In his Answer, the legislator also noted that his success in raising campaign donations was attributable to the work of his campaign fundraisers. The legislator stated that his campaign fundraisers had many reasons to support him, aside from the legislative matters in question. In his Answer, the legislator did acknowledge that his campaign fundraisers did solicit campaign donations from organizations interested in the legislative matters in question. However, the legislator denied any impropriety on his part.

With respect to this case, the applicable provision of the State Ethics Code was HRS section 84-13, the "Fair treatment" section of the State Ethics Code. HRS section 84-13 reads, in its entirety, 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.

This section of the State Ethics Code bars legislators from misusing, or attempting to misuse, their official positions to grant to themselves or others unwarranted advantages or preferential treatment.

With respect to the conflicts-of-interests section of the State Ethics Code raised in the Charge, the Commission noted that this section of the State Ethics Code does not apply to legislators, and thus was not further addressed by the Commission. The Commission has long maintained that the conflicts provision in the State Ethics Code would conflict with the doctrine of "legislative immunity," set forth in Article III, Section 7, of the Constitution of the State of Hawaii. Thus, it has been the view of the Commission that conflicts-of-interests must be handled by the respective houses of the Legislature.

In order to resolve this case, the Commission's executive director met with the legislator's attorney, and also spoke with the elected official who filed the Charge, and reviewed the pertinent information submitted to the Commission. This case was then presented to the Commission for consideration at one of its adjudicatory meetings.

HRS section 84-31(b) allows the Commission to resolve a charge with an "informal advisory opinion." While the Commission may dismiss a case for lack of evidence or, when appropriate, proceed to a formal, contested-case hearing, the Commission also has the authority to issue an "informal advisory opinion" to address a charge.

The Commission will issue an informal advisory opinion in addressing a charge in order to explain the application of the State Ethics Code for the benefit of state officials, employees, and the public when there are reasons for not proceeding to a formal hearing, or when dismissing a case would prevent the Commission from explaining certain aspects of the State's ethics laws. In accordance with the State Ethics Code, an informal advisory opinion must be redacted as to the identity of the respondent in a charge case, and made public. The redacted opinion, when made public, serves an educational purpose. An "order to dismiss" does not become public, and thus does not afford the Commission an opportunity to explain the application of the State Ethics Code to anyone other than the respondent.

In this case, the Commission found that there was no evidence to support a violation of HRS section 84-13. A violation of HRS section 84-13 would need to be supported by sufficient evidence of a quid pro quo, coercion, or some actual misuse of position. HRS section 84-13 is not, and was never meant to be, an “appearance of impropriety” law. Thus, the Commission found that HRS section 84-13 was not violated by what appeared to be a mere correlation between the legislator’s duties as a legislator and the legislator’s ability to raise campaign funds.

In this case, although the legislator raised significant campaign funds partly from solicitations made by his campaign fundraisers to organizations interested in the legislative matters in question, the Commission found no evidence that any of the contributions were coerced, nor any evidence of a quid pro quo.

Legislators frequently solicit campaign contributions from lobbyists, their clients, and others who have business before them. Campaign fundraisers often take place during critical times during the legislative session. While these practices may raise issues of concern, the Commission noted that until laws are written to change the mechanism for raising campaign contributions, the mere correlation between legislative actions and success in raising campaign funds, without evidence of coercion or a quid pro quo, or any other evidence of a misuse of position, cannot, by itself, constitute a violation of HRS section 84-13.

Although the Commission found no violation of the State Ethics Code in this case, the Commission believed that the Charge itself was not frivolous. The circumstances of the case, the Commission believed, would have led a reasonable person to conclude that a violation of the State Ethics Code might have occurred. However, as noted above, the Commission determined that more than a mere correlation of events is necessary to support a violation of HRS section 84-13.

Dated: Honolulu, Hawaii, April 7, 2008.

HAWAII STATE ETHICS COMMISSION

Robert R. Bean, Chairperson
Jerrold A. Fuller, Commissioner
Mark E. Brasher, Ph.D., Commissioner
David J. Randell, M.D., Commissioner

Note: Vice Chairperson Maria Sullivan was not present at the meeting during which this Informal Advisory Opinion was considered.