

INFORMAL ADVISORY OPINION NO. 95-4

The State Ethics Commission issued a charge against a state official. The Ethics Commission charged the official with a violation of Hawaii Revised Statutes ("HRS") section 84-13, the Fair Treatment section of the State Ethics Code. The alleged violation arose out of the use of state resources for private work at the official's residence. As a result of the charge, the Ethics Commission rendered an Informal Advisory Opinion.

This matter arose out of events that began some time ago. Acting in her state capacity, the official initially wrote to the director of a state department. In her letter, the official noted that, pursuant to a departmental program, state resources were being used for maintenance work in a state park. The official asked to use the resources for maintenance work at a different public site. The director of the department forwarded the official's letter to the division that administered the program.

The subject program was intended to benefit, among others, the community in general. Work done under the program was intended to improve the community. State resources were used to clean parks and schools, repair and paint public buildings, or buildings belonging to private non-profit organizations. Resources could not be used to work on any project that resulted in a commercial or personal benefit to anyone. Cleaning and restoring the public site mentioned in the official's letter met program guidelines and the project was approved.

State resources were used for this project. According to the state employee in charge of the site work, toward the end of the work day, the state official visited the site and informed him that she had another project for the program. The employee said that the official described the project as a project in a state park. The employee suggested that the official put in a second request to use state resources.

Approximately two weeks later, the official made a second request to use state resources under the program. The official telephoned the employee in charge of scheduling work for the program and told him that she had another community project for the program. The employee later told the Commission that the official described the project as work in a state park. The employee stated that he considered the official's request to be an extension of her first request because work at the public site had not been completed. The employee told the Ethics Commission that the official gave him the work site address. The employee said that the official did not tell him that this was the address of the official's personal residence in the state park.

The official and her sister resided in the park. They jointly held a 30-day revocable permit to one of the parcels in the park. The site on which the official resided encompassed approximately 4 acres. It was basically oblong in shape. It was bordered on the makai side by a highway and on the mauka side by a river. The official's residence was located at the south end of the parcel and her sister's home at the north end. The south tip of the parcel was bordered by a bridge near the official's house. Between the official's home and her sister's home, was a clearing stretching from the highway to the river, gradually tapering to the bridge.

The employee in charge of scheduling dispatched state resources for work at the site. The employee in charge of the work at the site was interviewed by the Commission's staff. He reported that when he arrived the official greeted him, introduced herself by her state title and then explained the scope of the work. The work to be done included clearing the parcel of brush and of hau that was creeping up on the land from the direction of the river. The employee said that he was instructed to remove brush from the clearing and cut back the hau encroaching on the property from the river.

The employee stated that he asked the official if she would like the crew to cut back the hau on the mauka side of the property from the clearing, to the south, past the house, and to the bridge. This would involve cutting the hau in a line running parallel to the river. The official agreed to this. The employee said that he suggested this because it would give the property a neater appearance. During an interview with the staff of the Commission, the official acknowledged that the employee suggested cutting the hau this way and that she agreed to his suggestion. In response to the

employee's suggestion and the official's approval, state resources were used to cut the hau from the clearing to the bridge. According to the employee at the site, this entailed cutting hau that was either touching the official's house or growing over the house above the roof line. The employee said that state resources were used to clear the hau touching the house as well as to clear hau and other vegetation extending to a distance of 15 to 20 feet from the house. Resources were also used to cut down brush in the clearing and cut the grass alongside the highway. The project took three days.

On the afternoon of the first work day the official telephoned the state employee in charge of administering the park. In an interview with the staff of the Commission, the park administrator stated that the official asked him for a State Parks truck and crew to haul away the debris and cuttings collected that morning. The administrator, who was familiar with the park, expressed reservations to the official about using a State Parks truck and crew to clear land to which the official personally held a permit. According to the administrator, the official represented to him that some of the debris had come from the river. Debris from the river could be considered the State's responsibility. Rather than debate the matter with the official, the administrator sent a State Park crew to haul away the cuttings. In an interview with the staff of the Commission, the administrator stated that while it was possible that some of the cuttings may have come from the river or from the water line outside the parcel, his primary motivation for sending the truck and crew was to avoid an argument with the official. During an interview with the staff of the Commission, the official acknowledged that she called the administrator and asked him to send a State truck for the debris. The official said that she had originally intended to use her own truck to haul the debris, but that her truck had been out of service for several months.

The administrator also sent a crew and truck on the second work day. He refused, however, to send a State Park truck and crew on the final day of work. He stated that he concluded that after two loads of debris had been hauled away from the parcel, any further debris had to have come from the land rather than from the river. Based upon statements made by the employee in charge of work at the site, it appeared that none or very little of the cuttings came from the river. He said that state resources were not used to cut hau from the river or the river banks. During an interview with the official, she also stated to the staff of the Commission that state resources were not used to remove any hau from the river.

After the work was completed, the official asked for an advisory opinion on the question of whether the use of the state resources was appropriate. As the staff of the Commission began to collect information for the advisory opinion, it became evident that a charge would be the more appropriate vehicle for addressing this situation. The Ethics Commission issued a charge against the official. The charge alleged that the official violated HRS chapter 84, the State Ethics Code, by using the program to remove vegetation on land to which she held a permit. Pursuant to HRS section 84-31(b), a copy of the charge was sent to the official for her response. In her response, the official indicated that she disagreed with the charge, but that she was willing to reimburse the State for the cost of the resources used.

The charge alleged that the official violated HRS section 84-13 of the state ethics code. In relevant part, this section reads:

§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, contract, or treatment for oneself or others....

This section would forbid a legislator or employee from using his or her position as a legislator or employee to grant himself or herself or anyone else an unwarranted benefit.

The staff of the Commission spoke to the official several times about this matter. In addition, the official and her private attorney appeared before the Commission to discuss the use of the state resources. The official made a number of arguments to support her view that she did

not breach the State Ethics Code by using state resources to clear land to which she held a permit. These arguments merited considerable consideration by the Commission.

The first and principal argument that the official advanced for the use of state resources to clear the land was that the land was cleared for the purpose of building a canoe hale. The canoe hale would be part of a community project and would not benefit the official personally. Therefore, according to this reasoning, clearing the land was the State's responsibility.

The establishment of a canoe hale was one method for the official to fulfill her obligations under a lease with the State. According to the park administrator, residents of the park had signed long term leases with State. The Ethics Commission reviewed a copy of the lease that the official signed. The document leased property in the park to the official. In return, rather than paying lease rent, the official was required to contribute 25 hours of in-kind services to the State each month for the purpose of implementing a Park Interpretive Program. The program was intended to allow visitors to the park to experience different aspects of Hawaiian culture. The in-kind services included enterprises in the park such as agriculture, archeological site development, creation of educational materials, food preparation, Hawaiian crafts, health practices, hiking, historical preservation, music and dance, land and recreation, ocean and recreation, and visitor center. Canoe paddling was specifically mentioned as an acceptable method of achieving the service requirement. The official owned several canoes and had long expressed an interest in establishing a canoe hale. The official wished to locate the hale in the clearing near her house. The canoes would be launched from the river running alongside the mauka border of the property. The official apparently wished to have brush removed from the clearing and hau cut back towards the river so that she could get started on the canoe hale.

Although it was at least arguable that the construction of a canoe hale on the official's permit land would serve a community purpose, there were some discrepancies between the official's plan to establish the hale and the manner in which events occurred. First, the Park Interpretive Program was not in effect at the time the land was cleared. According to the park administrator, and to state documents, the program and the service requirements were to take effect after the residents were established on their leased parcels. After the leases were signed, there was to be a delay in implementation of the in-kind service requirement in order to give the residents time to build houses on their lots, after the installation of infrastructure. After a lease was signed, there was to be a one year grace period before the service requirement would go into effect. In addition, there were some problems with the official's particular lease. According to the park administrator, the official's service requirement would not come into effect until the problems with her lease were resolved.

Although a canoe hale might have been a welcome addition to the Park Interpretive Program, at the time the land was cleared, the program was not yet in effect. Indeed, there was no decision as to whether a canoe hale would in fact benefit the community. There was also no decision as to where the hale should be located. Thus, the Commission believed that it would be difficult to maintain that the clearing of the official's land was part of the community project outlined by the Park Interpretive Program.

The second discrepancy between the plan for the canoe hale and the actual events was that the area cleared by the use of state resources was not adequate for a canoe hale. As reported by the employee in charge of the work at the site, state resources were used to clear brush from the clearing near the official's house. They were also used to cut hau back from the land towards the river. They were used to cut hau near the clearing and then to the south, past the house and to the bridge. The official planned on placing the canoe hale in the clearing. Thus, it was necessary to remove brush from the clearing. The official envisioned launching the canoes from the river near the clearing. At that time, the river was overgrown with hau. The official mentioned to the staff of the Commission that it would have been difficult to paddle a canoe in the river because of the amount of hau in the river. The hau extended on to the banks of the river and inland to a depth of approximately fifteen feet. State resources were used to cut back only a few feet from the land towards the river. At some places where the hau was thinner, it was possible to clear a path to the

river. However, the main effort was concentrated not on clearing a path to the river, but on cutting back several feet of hau in a line running parallel to the river and ending at the bridge at the end of the property. State resources were also used to cut the hau that was growing up against the official's house. The employee in charge of work at the site suggested to the official that the hau be cut in this manner in order to give the property a neater appearance. The official agreed to this. The employee in charge of the work did not recall ever being informed that the land was being cleared in order to build a canoe hale.

It appeared to the Commission that the work actually done was not conducive to establishing a canoe hale. State resources were not used to clear a path to the river and no hau was removed from the river. Instead, hau was cleared from the interior of the property, including hau growing near the official's house. This was done for the purpose of beautifying the property. The official informed the staff of the Commission that, after the work had been completed, it was still not possible to launch a canoe from the property.

The second argument that the official advanced was that it was the State's responsibility to clear the stream. For this reason, the official maintained, it was appropriate to use state resources to clear the hau encroaching on the land from the stream. The Commission received information that indicated that the State had indeed taken the responsibility for clearing hau from the river and the banks of the river in certain areas in the park. The Commission was furnished with copies of a contract between the State and a private company to clear the river of vegetation, debris and sediment along a 500 foot segment of the river beginning approximately 3900 feet upstream from the official's parcel to a distance to approximately 4400 feet upstream from the official's parcel. The Commission's staff interviewed the park administrator and the manager of the park about the clearing of the river. Both explained that the upstream area of river was considerably narrower than the downstream area. The objective of the clearing was to remove obstructions in the river that created a danger of flooding in that area. The downstream region of the park did not present a flooding danger. For this reason, it was not a priority to clear hau in the area near the official's property.

In addition, although it may have been the State's responsibility to clear hau from the river, this did not appear to be the work that was done with the state resources. State resources were used to remove hau from the inland portion of the property and remove brush from the clearing. According to both the official and the employee in charge of work at the site, hau was not removed from the river or from the banks of the river.

The official's third argument appeared to be that because the park was state property, the State should maintain all the land in the park. While the official was correct in her claim that the park was State property, the official held a revocable permit to the site in the park at which she resided. The permit allowed the official to occupy the land on a month-to-month basis. The permit granted the official the right to use and occupy the parcel for residential purposes and also for general agricultural purposes. The permit required the official to keep the premises and improvements in a clean, sanitary and orderly condition. The permit essentially operated as a lease. It granted the official possession of the land in exchange for a monthly fee. Under the terms of the permit, the official was responsible for the condition of the premises. The park administrator confirmed to the staff of the Commission that it was the responsibility of the permit holders to care for the area covered by the permit.

The official mentioned that, despite the terms of the permit, the State had never and, in her view, would never require her to cut and clear the hau and other vegetation that was removed. Thus, the official argued, there was no personal benefit to her because she was not required to clear the brush. This argument was not persuasive to the Commission. In the first place, the provisions in the permit made it clear that the official was responsible for maintaining the property in a clean, sanitary, and orderly condition. Although the State may not have attempted to enforce the permit provisions, the fact remained that responsibility for the maintenance of the premises was the official's and not the State's. In the second place, even granting that the State would not require

the official to clear the land, it was still apparent that clearing the land bestowed a benefit upon the official. As the resident on the land, it was useful or advantageous to the official to have the land cleared.

The fourth argument the official advanced for the use of the state resources was that clearing the parcel served general beautification purposes. It enabled travelers on the highway to better view the river across the parcel of land. The Commission believed that while this might be true, it did not follow that state resources could be used to clear the parcel. The Commission believed that any resident of the State could argue that the clearing of his or her land would enhance his or her community. Obviously, however, state resources could not be used for this reason alone.

Finally, the official mentioned that the State approved the project. Thus, it was argued, the project must have met program guidelines. However, according to the employee in charge of scheduling for the program, the official did not inform him that the work site was also the site of the official's personal residence in the park. According to the employee, the official described the work to be done as a project in the park. The employee interpreted the request as an extension of the work already done on the public site that was the subject of the official's original request. The employee emphatically stated to the Commission's staff that if the official had told him that the work site was the site of her personal residence, he would not have allowed the program to take on this project. The director of the department also informed the staff of the Commission that if he had known that the land was the site of the official's private residence, he would not have allowed the work to have been done. According to these officials, they did not know that the work site was also the official's permit area. The Commission believed that without this information, they could not have made an informed decision as to whether the project met the program guidelines.

In this situation, for the reasons discussed, the Ethics Commission believed that the official's actions appeared to be violative of HRS section 84-13. By using her state position to secure state resources to clear land to which she held a permit, the official appeared to have granted herself an unwarranted personal benefit. It was the Commission's understanding that the department had presented the official with a bill for the use of the resources. The Commission believed that the official should pay this bill. The Commission stated that if the Commission received a copy of the official's cancelled check showing payment to the department, then the Commission would not pursue this matter further. Otherwise, the Commission stated that it might deem it necessary to take further action on this matter.

The Commission did appreciate the patience and cooperation the official had shown during its review of this matter. The Commission also appreciated the official's taking the initiative by requesting an advisory opinion as to the propriety of the use of state resources to clear vegetation from her land. However, after reviewing the facts of the case, The Commission was of the opinion that the use of state resources appeared to be violative of HRS section 84-13. The Commission stated that it would await word on the payment of the bill.

Dated: Honolulu, Hawaii, July 19, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J.L. Abdul, Vice Chairperson
Sharon "Shay" Bintliff, Commissioner

Note: There were two vacancies on the Commission when this Informal Advisory Opinion was signed.