

INFORMAL ADVISORY OPINION NO. 95-5

On July 15, 1994, a private citizen ("complainant") filed a charge against a state employee with the Hawaii State Ethics Commission ("Commission"). The charge concerned events that took place when the employee was the head of a state office. The office was part of a larger department. In December of 1994, the employee left state government with the change in administration.

The complainant was a paid public speaker. His charge concerned a speech that he delivered at a luncheon meeting for a private association in June of 1994. The luncheon was co-hosted by a subcommittee of the association and by another private group. The complainant spoke about the mismanagement of an industry by the employee's state department and by a corporation.

The charge alleged that upon learning that the complainant was scheduled to speak at the luncheon, the employee and an officer of the corporation contacted the association to pressure the association into cancelling the speech. The complainant alleged that the association's president described these calls as coercive.

The association received state contracts from the employee's department. The complainant alleged that this made the employee's calls to the association coercive. He further alleged that by attempting to interfere with his speech, and by making it known to the association that she disapproved of the complainant as a guest speaker, the employee misused her state office in violation of the State Ethics Code.

In accordance with section 84-31(b), Hawaii Revised Statutes ("HRS"), the Commission sent a copy of the charge to the employee. The employee responded to the charge in a letter to the Commission. The Commission investigated the charge. On February 1, 1995, the employee and the complainant appeared separately before the Commission to discuss the charge.

The section of the State Ethics Code that was relevant to the charge was section 84-13, HRS. That section states as follows:¹

§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

Section 84-13, HRS, prohibits an employee from using or attempting to use one's official position to grant anyone, including oneself, an unwarranted advantage.

The complainant alleged that by attempting to interfere with his speech, the employee sought the following unwarranted advantages:

1. To eliminate criticism of the employee and her department;
2. To eliminate criticism of the relationship between the employee's department and the corporation;
3. By eliminating criticism and controversy, to secure the employee's appointment as head of her department; and
4. To retaliate against the complainant for his past criticism of the State's efforts with respect to a particular industry.

The employee responded to the charge by explaining that she first learned in May of 1994 that the complainant was scheduled to speak on a particular topic. Based on the title of the speech and on previous comments by the complainant, the employee felt that the complainant would

present, in the employee's words, "a distorted and outdated interpretation of the facts, ignoring the dedication of many people to strengthen the relationship between the industry and government."

The employee's department contracted with the corporation to promote an industry. The employee explained to the Commission that in the months preceding the complainant's speech, the employee and others in her department had worked hard to negotiate a new contract with the corporation. The employee also was planning a conference to address the future of the industry in the State. The employee hoped to include as participants in the conference representatives from the private business sector, government, and the industry.

These efforts had resulted in a more positive working relationship between the employee's department, the corporation, and the industry. The employee believed that the complainant's presentation would focus only on past problems and past criticisms of the department and the corporation. The employee felt that this would not be a fair representation of facts in light of recent developments. Therefore, the employee contacted the president of the association that was sponsoring the luncheon to convey her concerns.

The employee did not ask the president to cancel the complainant's talk. The employee did ask that someone from the corporation be allowed also to speak at the luncheon in order to present both sides of the issue. She also suggested that an alternative topic be considered if both sides of the issue were not to be presented. The employee added that her efforts were intended to broaden the speech by presenting another point of view rather than to restrict the speech, as claimed by the complainant.

The association's president confirmed this information. He reported to the Commission's staff that the employee spoke with him by telephone shortly after the association announced the complainant's speech. The president said that the employee expressed concern about the complainant's negative views of the department and the corporation.

The president stated that the employee did not ask him to cancel the complainant's talk but asked instead that the association modify the format to allow for a panel discussion or for another speaker to present the point of view of the department and the corporation. The president responded to the employee's suggestion by telling her that the agenda had been set, that flyers had gone out to announce the luncheon, and that he would not agree to a change in the format.

The president also informed the Commission's staff that the association received about five percent of its income from the employee's department as a result of two contracts totalling approximately \$130,000. Neither of these contracts was administered by the employee's office. The president said that the association had no dealings with the employee in connection with these contracts. The president stated that neither he nor the employee even mentioned these contracts in their conversation about the complainant's speech. The contracts were not linked to the employee's request for a change in format. The president said that he did not feel that the employee attempted to intimidate or coerce him into making the change she requested. He did not believe that his refusal to change the program would result in some negative effect on the association from the employee's department or from the employee.

The president stated that out of concern for the employee's point of view, he decided to publish an article about the speech in a publication produced by the association. The article stated that while the association did not endorse or necessarily agree with the complainant's position on certain issues, the association asked the complainant to speak in order to provoke discussion and stimulate new ideas. The article also stated that the association would provide equal time (apparently on another occasion) for opposing points of view.

The employee also contacted the chairman of a subcommittee of the association. The chairman had arranged for the complainant to speak at the association's luncheon. In a telephone call to the chairman, the employee asked that her department be permitted to present its views at the luncheon. The employee did not ask the chairman to cancel the complainant's talk.

The chairman confirmed this information to the Commission's staff. He said that the employee expressed concern about the complainant's presentation. The employee told the chairman that a good relationship had been developing between the employee's department, the corporation, and the other private group that was co-hosting the luncheon. The employee said that it would be a good idea if the department could present its own speaker at the luncheon. The chairman reported telling the employee that the agenda had already been set and that no change would be possible at that late date. The chairman also informed the Commission's staff that he did not believe the employee was attempting to intimidate him into complying with her request. The chairman said that contrary to feeling intimidated, he was amused by the employee's call.

The Commission also obtained information from an officer of the corporation. The complainant's charge alleged that the officer also attempted to have the complainant's speech cancelled by the association. The officer stated that she attempted to change the luncheon program to include a speaker from the corporation. The officer telephoned the president of the private group that was co-hosting the luncheon with the association. He referred the officer to the chairman of the association's subcommittee. The officer spoke to the chairman and to one of his staff members. The chairman rejected the officer's suggestion. The officer also telephoned the association's president, who likewise rejected the suggestion.

It appeared that the officer made several telephone calls to the co-hosts of the luncheon to attempt to change the program. The officer stated, however, that she did not speak with the employee regarding this matter and did not place these calls pursuant to the employee's request or direction.

The complainant delivered his speech as originally scheduled at the association's luncheon meeting. His topic remained the same. The association made no changes to the presentation.

The Commission's investigation did not support the charge filed against the employee. The complainant alleged that the employee violated section 84-13 of the ethics code by attempting to stifle criticism of herself and her department, thereby increasing the likelihood of her appointment as head of the department. The complainant further alleged that the employee tried to interfere with his speech to retaliate against him for criticizing the State. The Commission saw no evidence of this in its investigation.

The Commission noted that at the time of her telephone calls to the association and its subcommittee, the employee was aware that her tenure with state government would end a few months later with the change in administration. This seemed contrary to the charge that the employee's actions were intended to benefit her state career.

The employee explained the purpose of her calls to the association. She wanted to show that contrary to the complainant's views, a more positive working relationship existed between the State, the corporation, and a particular industry. This action appeared to the Commission to be consistent with the employee's state duties and the functions of her state office.

The employee's office was responsible for planning the development of an industry. Its duties included implementing state policies and directions for the industry; coordinating agencies and advising the private sector in the development of industry-related activities and resources; and establishing an information and educational program to inform the public about the industry. In addition to these duties, the office was authorized to contract with the corporation to help promote the industry.

The office played a pivotal role in coordinating the development of the industry. This required the employee to work closely with the corporation, the association, and other groups on many industry-related subjects.

Given the employee's broad responsibilities, it did not appear to be outside the scope of the employee's state duties for her to have contacted the association to discuss the complainant's presentation. The speech concerned the industry and the State's management of the industry. It also concerned the employee's state department and the relationship between the department and the corporation. These were all subjects directly related to the employee's state office.

The employee informed the association that she disagreed with the complainant's views about her state department and the corporation. She asked that another speaker be allowed to present the views of the department and the corporation on this subject. These facts did not, in the Commission's opinion, establish that the employee violated section 84-13, HRS, by attempting to use her official position to obtain an unwarranted advantage.

In support of his charge, the complainant stressed that the association received state funding through contracts with the employee's department. The complainant stated that this placed the employee and her department in a position of power when dealing with the association. He alleged that it was per se coercive for the employee to have contacted the association regarding the complainant's speech.

The Commission understood the complainant's concerns. The Commission noted that state officials should always be sensitive to the power of the State's purse strings when dealing with individuals who receive state contracts. The ethics code prohibits a state official from using the State's contracting authority to coerce unwarranted privileges or advantages from others.

In this case, however, there was no evidence that the employee used or attempted to use her agency's contracting authority to coerce the association into complying with her request. The employee's office did not administer the department's contracts with the association. The employee had no involvement in those contracts on behalf of her department. The employee contacted the association to discuss a matter that was relevant to the employee's office and unrelated to the association's contracts with the department. In her conversations with the association's president and subcommittee chairman, the employee made no references to the association's contracts. Finally, and most significantly, neither the president nor the chairman perceived the employee's calls as being coercive or intimidating.

Section 84-31(b), HRS, authorizes the Commission to investigate charges of alleged violations of the ethics code and to render an informal advisory opinion to the alleged violator. If the Commission determines that there is probable cause to believe that a violation of the ethics code has occurred, the Commission may proceed to a hearing on the matter.

The Commission did not find that there was probable cause to believe that the employee violated the ethics code. Accordingly, the Commission determined that further proceedings were not warranted in this case.

The Commission thanked the employee for her cooperation during the Commission's investigation of this matter. The Commission stated that it appreciated the employee's patience during its consideration of this case.

Dated: Honolulu, Hawaii, August 30, 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 during the discussion and consideration of this Informal Advisory Opinion.