

INFORMAL ADVISORY OPINION NO. 96-1

The Hawaii State Ethics Commission ("Commission") received information with respect to three separate situations involving a departmental manager. After investigation, the Commission charged the manager with violations of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS").

The first charge alleged that the manager solicited subordinate employees during an office meeting to hold signs for political candidates. Those who did so would receive free tickets to a sporting event. This meeting was held on state time and in state facilities. Several hours later, when none of the subordinates had volunteered to hold signs, the manager told the subordinates that he and two other department employees were going to hold signs. One of those he mentioned was his supervisor and thus in a supervisory position with respect to the subordinates he was addressing. This second incident also occurred during state time and in a state building.

Additionally, two subordinates advised the Commission that during the second incident the manager told them that those who did not volunteer would be on the deputy director's "X list." These subordinates felt the comment was threatening. The manager admitted making a reference to the deputy director's "X list," but asserted that what he said to his subordinate employees was that anyone who actually volunteered to hold campaign signs but failed to show up would be placed on the deputy director's "X list."

The manager also contended that the purpose of telling the subordinates about the sign holding was not so much for the purpose of obtaining campaign assistance as it was to offer the subordinates the opportunity to attend the sporting event for free.

The relevant section of the State Ethics Code was §84-13, HRS, which reads in pertinent part:

§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.

Section 84-13, HRS, prohibits a state employee from using his or her position to obtain an unwarranted advantage or benefit for any person. This section of the State Ethics Code also specifically prohibits the use of state time, equipment, or facilities for a private business purpose. The Commission has determined in prior rulings that campaigning and campaign-related activities

are private business purposes for purposes of the State Ethics Code. The Commission thus believed that the manager's solicitation of campaign assistance from his subordinates on state time and in a state office was violative of §84-13(3), HRS. The Commission also believed that the manager gave the political candidate an "unwarranted advantage" by using state time and state facilities and the manager's state position as a supervisor to obtain campaign volunteers. The Commission believed this was violative of §84-13, HRS.

Although the manager contended to the Commission that he did not intend to coerce his subordinates into volunteering to hold campaign signs with the comment about being placed on the deputy director's "X list," at least two of his subordinates did consider the remark to be threatening. Because the manager and his subordinates had different perceptions about the remark, and because of the lack of any other relevant evidence, the Commission did not conclude in this opinion that the manager did in fact threaten his employees into holding campaign signs.

The Commission noted, however, that supervisors must be vigilant in their dealings with subordinates on matters not related to work, because of the very real danger that subordinates will interpret words or actions as intimidating or threatening, and they may feel that they must respond in a specified manner or risk retaliation with respect to their state employment.

Of equal concern and import to the Commission was the fact that the manager contended that he did tell his subordinates that if they agreed to hold campaigns signs but did not show up as promised, they would then be placed on the deputy director's "X list." The Commission believed that this comment itself could also be found to be threatening and intimidating, since the only apparent way that the deputy director could retaliate against subordinates would be through their state employment. Because of the nature of the language, and under the circumstances, the Commission hesitated to find that the manager was seriously earnest in suggesting that there would be any retaliation for those who did not show up at the designated time. The Commission believed, however, that again as a supervisor, one must be vigilant with respect to one's comments, especially if affecting the conditions or terms of a subordinate employee's state employment appears to be the likely avenue of possible retaliation.

The Commission also charged the manager with two other incidents of violations of §84-13, HRS. Because these incidents are similar, they were discussed together. In the manager's dealings with the Commission, he admitted to both of these charges. On one occasion, the manager used state time and a state computer to write and print documents for a football betting pool, and on another occasion, he used the same computer to produce documents for a golf tournament that was being conducted by a private business organization. Both the football betting pool and the golf tournament constituted private business purposes under the State Ethics Code. The Commission believed that the use of state time and state equipment for the football betting pool and for the golf tournament was violative of §84-13(3), HRS. Since the participants in the football betting pool and the golf tournament gained an unwarranted benefit in having the documents produced on state time with state equipment, the Commission believed the actions were also violative of §84-13, HRS.

In his dealings with the Commission, the manager admitted to the charges made by the Commission, with the exception of the alleged threat to his subordinates with respect to their holding campaign signs. He also cooperated with the Commission's investigation, responding to both the Commission's Charge, and the Charge and Further State of Alleged Violation. He also met

with the Commission's staff on two occasions and appeared before the Commission to make a statement and respond to questions.

Although the Commission had the authority to pursue matters to a formal, contested-case hearing, the Commission believed that in this case proceeding to a hearing was not warranted. The Commission believed that the campaigning and use of state time and equipment were not in and of themselves extensive enough to warrant further proceedings. Further, the true nature of the alleged "threat" was unclear. The Commission had, however, the authority to issue an informal advisory opinion, and believed that an informal advisory opinion was appropriate to address the issues in the case and to provide guidance.

The State Ethics Commission determined to issue an informal advisory opinion in this case because the Commission believed it still needed to emphasize that campaigning may not take place on state time or in state facilities, and that state time and state equipment may not be used for private business activities. Further, §84-13, HRS, can easily be violated when a supervisor urges subordinates to perform chores unrelated to state employment, especially if language is used that may be construed as threatening or intimidating.

The Commission noted that the manager was no longer in state service, but believed it was important to issue this informal advisory opinion in this case because of the issues involved. Termination of state employment does not automatically result in the termination of Commission proceedings. Further, those who leave state service may, at a later time, again become employees or officers of the State.

DATED: Honolulu, Hawaii, March 13, 1996.

STATE ETHICS COMMISSION

Leolani Abdul, Chairperson
Arlene Kim Ellis, Commissioner
Bernard E. LaPorte, Commissioner
Carl T. Sakata, Commissioner

Note: Commissioner Sharon "Shay" Bintliff resigned from the State Ethics Commission prior to the date of this Informal Advisory Opinion. The vacancy has not as yet been filled.