

INFORMAL ADVISORY OPINION NO. 99-3

The Hawaii State Ethics Commission (“Commission”) received a formal charge filed against a legislator by an organization through the organization’s executive director. The charge alleged that the legislator had violated Hawaii Revised Statutes (“HRS”) section 84-13, a part of the State Ethics Code, by using his official position and official state stationery “to engage in electioneering.”

The charge arose as a result of a “News Release” issued by the legislator a few days before the 1998 general election. The News Release was issued on what would appear to have been official state legislative stationery for news releases. The top of the News Release carried the state seal, below which appeared the name of the particular house of the legislature that the legislator served. Below the name of the house of the legislature that the legislator served appeared in capital letters the words “State of Hawaii,” together with the address of the State Capitol. The News Release also listed the legislator’s official title, along with his state telephone number, state fax number, and state E-mail address. Given the information on the stationery, the Commission concluded that there could be little doubt that the stationery the legislator used for his News Release was meant to be and constituted official state stationery.

The organization in its charge asserted, as stated above, that the News Release violated HRS section 84-13 because the legislator used his official position and official stationery to engage in “electioneering.” 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.

HRS section 84-13 prohibits the “use” or “attempted use” of a legislator’s official position to obtain “unwarranted” advantages or treatment for oneself or others. HRS section 84-13(3)

specifically prohibits the use of state time, equipment, or facilities for any “private business” purpose.

The State Ethics Commission has long interpreted HRS section 84-13 to prohibit the use of one’s official position, the state seal, and state stationery for campaign purposes. Similarly, the State Ethics Commission has interpreted HRS section 84-13(3) to bar the use of state time, equipment, or facilities for campaign purposes. The State Ethics Commission has also concluded that HRS section 84-13 in general bars the use of all state resources for campaign purposes, with the exception that a particular state resource may be used for campaign purposes if the resource is equally available to all candidates.

The basis of the organization’s charge was that the legislator’s News Release constituted a misuse of his official stationery and a misuse of his official position for political purposes, namely, to criticize one candidate for elective office (Candidate “A”) and to praise the candidate’s opponent (Candidate “B”) in an attempt to give Candidate B an advantage in the general election of November 3, 1998. The News Release dealt with the recent purchase of a residential lot by Candidate A in the legislator’s district. Among other things, the News Release suggested that Candidate A purchased the lot because Candidate A knew he would not be re-elected to office, and thus was purchasing a lot for a home site for his upcoming “retirement” from public office.

The legislator responded to the charge by letter. In his response, the legislator denied any violation of any of the provisions of the State Ethics Code, which are set forth in chapter 84, HRS. The legislator contended that the purpose of his News Release was to inform the public of Candidate A’s purchase of real property in his district, and to “welcome” the candidate to his district. The legislator also stated that his News Release was within the exercise of his legislative functions to welcome the candidate into his district and to comment on legislative matters. The legislator denied that the News Release was in any way issued for campaign or election purposes.

The organization in a letter filed its own response to the legislator’s response to the charge. In this response, the organization again argued that the purpose of the News Release was campaign-related, and was issued to give Candidate B an advantage over Candidate A. The organization reasserted its belief that the legislator had violated the State Ethics Code by using his official position and official stationery for campaign purposes. A copy of the organization’s letter was sent to the legislator by the State Ethics Commission, but the legislator did not file any response to the letter.

Since the legislator asserted that one of the main purposes of his News Release was to “welcome” Candidate A into his legislative district, the State Ethics Commission believed it was necessary to ask Candidate A for his views regarding the legislator’s News Release. Candidate A submitted a letter to the State Ethics Commission. In the letter, Candidate A agreed with the organization that had filed the charge, and asserted that the legislator’s intent in issuing his news release was clearly political. The State Ethics Commission forwarded a copy of Candidate A’s letter to the legislator. The legislator did not file any response to Candidate A’s letter.

The legislator thereafter appeared before the State Ethics Commission to discuss the charge filed against him. Although by law proceedings at this stage are confidential for the purpose of protecting the good reputation of a respondent during the early stages of an investigation, the State Ethics Commission opened this session to the public upon the legislator’s request to the Commission to do so. During the legislator’s appearance before the Commission, which lasted for

about one hour, the legislator refuted the correspondence from the organization, as well as the correspondence from Candidate A. The legislator emphatically and categorically maintained that his News Release was not for a “campaign purpose,” nor was it issued in any way to affect Candidate A’s bid for re-election.

After the legislator’s appearance before the State Ethics Commission, the Commission reviewed the case and voted to issue a “Further Statement of Alleged Violation” against the legislator. The State Ethics Commission has the authority under law to issue a “Further Statement of Alleged Violation,” together with the original charge, if the State Ethics Commission finds “probable cause” to believe that the State Ethics Code has been violated.

In its Further Statement of Alleged Violation, the State Ethics Commission alleged that the legislator had, by virtue of his News Release, violated HRS section 84-13 by using official stationery with the seal of the State of Hawaii for a campaign purpose, namely, to further the candidacy of Candidate B while at the same time criticizing Candidate A.

The legislator was personally served, as is required by law, with a copy of the Further Statement of Alleged Violation. The legislator was informed that failure to file an Answer to the Further Statement of Alleged Violation within twenty days would constitute a “default,” in accordance the Rules of the State Ethics Commission.

Within twenty days of personal service, the State Ethics Commission received neither an Answer from the legislator to the Further Statement of Alleged Violation, nor any other correspondence or contact. The legislator was contacted concerning his not filing an Answer, and was given a twenty-day extension in which to file an Answer. Again, no Answer nor any other correspondence was filed by the legislator within this time period. Nor did the legislator contact the Commission during this time period. The legislator was subsequently contacted again and given another opportunity to file an Answer to the Further Statement of Alleged Violation. The State Ethics Commission thereafter received an Answer from the legislator to the Further Statement of Alleged Violation.

The legislator’s Answer to the Further Statement of Alleged Violation was reviewed by the State Ethics Commission. After reviewing the legislator’s Answer, and further considering the facts of this case, the State Ethics Commission voted to terminate this case by issuing an informal advisory opinion to the legislator. The Commission under law has the authority to issue an informal advisory opinion after a charge has been filed with the Commission. The issuance of an informal advisory opinion is generally in lieu of issuing a Further Statement of Alleged Violation in a particular case. However, the State Ethics Commission believes that it has the authority to issue an informal advisory opinion even after it receives an Answer to a Further Statement of Alleged Violation. After receiving an Answer to a Further Statement of Alleged Violation, the State Ethics Commission must under law determine whether “probable cause” still exists in order for the Commission to proceed to a formal, contested-case administrative hearing, to be held in accordance with chapter 91, HRS, for the purpose of determining whether any ethics laws have in fact been violated.

After reviewing the legislator’s Answer and further considering the facts of this case, the State Ethics Commission decided to issue an informal advisory opinion to the legislator in order to resolve the case. The Commission determined that the facts of the case did not warrant

deliberation as to whether “probable cause” existed for the purpose of proceeding to a formal hearing.

In its charge, the organization contended that the legislator used his official position and official stationery for a campaign purpose. The legislator strongly denied this, contending that his News Release was a “welcome” to a new constituent, and further contending that the News Release discussed matters within the purview of the legislator’s legislative functions. The legislator vigorously maintained that his News Release was not for a campaign purpose.

Despite the legislator’s statements that his News Release was not issued for a campaign purpose, the Commission did not accept the contention that the legislator’s News Release had nothing to do with the election. To the contrary, the Commission believed that the News Release was issued primarily for the purpose of criticizing Candidate A, while at the same time praising Candidate B.

The Commission believed that the title of the legislator’s News Release itself was clearly political, in that it forecasted the sure defeat of Candidate A. The Commission noted that since the legislator’s News Release was issued four days before the general election, referring in a close election race to the sure defeat of a candidate could only be for the purpose of political gain. The News Release went on to state that the legislator was pleased that Candidate A had made prudent “retirement” plans for life after November 3, when Candidate B would be elected. The Commission believed that this was clearly promotion of a candidate, and not “news.” In his News Release, the legislator went on to state that with Candidate B’s election to office, Hawaii’s economy would improve. The legislator stated in his News Release that he believed that Candidate A purchased land in his district because land values would go up if Candidate B were elected to office. This statement by the legislator appeared to imply that even Candidate A saw the advantage of a victory by Candidate B. The Commission had difficulty seeing this as anything but electioneering.

In reviewing the News Release, it was apparent to the Commission that the legislator used Candidate A’s purchase of a lot as a springboard to criticize him as a candidate while praising Candidate A’s opponent. The Commission believed that this was the primary purpose of the News Release, and the Commission saw nothing else in the News Release to conclude otherwise.

The Commission fully understood that the legislator had every right to campaign for candidates, and to exercise his First Amendment rights in the process. However, the Commission noted that free speech rights do not include the right to the unwarranted use of state resources.

The Commission noted that state legislators may use their official positions and official stationery only for legitimate legislative functions. Such functions do not encompass campaign chores, nor the use of state resources for personal business purposes. The Commission noted that there are legal limitations as to what a legislator may do as a legislator, and stated that legislators would be wise to consider the scope and limitations of their legislative functions.

The State Ethics Commission has long maintained that the state seal, state stationery, and one’s official position may not be used for campaign chores. The Commission has maintained that if state stationery is to be used, it must be used for official purposes only. The Commission has long advised that campaign material must be removed from official correspondence.

Although the legislator maintained that he did not use any state time, equipment, or facilities in “issuing” his News Release, the News Release did carry the legislator’s official state address, state telephone and fax numbers, and state E-mail address. By providing this information in the News Release, the Commission believed that the legislator had encouraged the use of state time, equipment, and facilities to be used for those who wished to respond to his News Release.

While the State Ethics Commission believed that the News Release was issued primarily and substantially for a campaign purpose, the Commission believed that this case should be addressed by advice from the Commission, rather than by the Commission proceeding to a formal hearing. The Commission believed that matters of concern to the legislator’s district did legitimately fall within the purview of his “legislative functions.” The Commission noted that the purchase of land by Candidate A, or anyone else for that matter, may raise a legitimate issue for a legislator representing the district where the purchase takes place. However, when addressing such a matter, the Commission noted that a legislator must take care that comments about the matter are consonant with one’s legislative duties, rather than for campaign purposes. The State Ethics Commission was established specifically to issue advisory opinions to state officials and employees in regard to such matters. The Commission noted that state officials and employees should seek the advice of the Commission in such cases, to avoid running afoul of the State’s ethics laws.

In issuing this informal advisory opinion, the Commission also addressed a procedural matter the legislator raised during his appearance before the Commission. During his appearance before the Commission, the legislator raised the issue of his being allowed at some point to question both the executive director of the organization filing the charge as well as Candidate A. However, the Commission believed that this step was only warranted if the Commission were to proceed to a formal hearing, where the organization’s executive director and Candidate A would likewise have the same right to question the legislator.

The Commission believed that the organization that had filed this charge with the Commission did so in good faith and for amply sufficient reason, and was to be commended for its interest in high ethical standards in state government.

The Commission also appreciated the legislator’s responses to the concerns of the organization and the State Ethics Commission both in writing and before the Commission, and stated that it hoped the legislator understood that the News Release raised legitimate concerns about the use of official stationery for campaign purposes.

Dated: Honolulu, Hawaii, July 21, 1999.

HAWAII STATE ETHICS COMMISSION
Cassandra J.L. Abdul, Chairperson
Ronald R. Yoshida, Vice Chairperson
Bernice Pantell, Commissioner
Dawn A. Suyenaga, Commissioner

Note: Commissioner Carl Morton joined the Commission after the discussion and consideration of this matter.