

INFORMAL ADVISORY OPINION NO. 99-6

The State Ethics Commission received a charge filed against a legislator by an attorney on behalf of his client (“complainant”). Pursuant to the Commission’s procedures, a copy of the charge was sent to the legislator for his response. The legislator filed an “answer” to the charge with the Commission. The State Ethics Commission reviewed this matter and issued an informal advisory opinion.

The Charge

The charge alleged that the legislator misused his position and violated conflicts of interests laws in his opposition to a proposed use of the complainant’s land. The land consisted of a historic home located in a residential neighborhood. The land was next door to a church. The complainant sought approval to use the home for commercial wedding services. Both the church and the complainant’s land lay within the same legislative district. The legislator who was charged in this matter represented the neighboring legislative district.

The complainant applied for a permit from a county agency to use the home for wedding services. The legislator opposed the application and took other action that the complainant claimed violated Hawaii Revised Statutes (“HRS”) chapter 84, the State Ethics Code. Specifically, the charge alleged that the legislator violated the State Ethics Code by:

- 1) Using his state office to influence a decision in a public matter in which he had a declared conflict of interest;
- 2) Using state time, equipment, or facilities for private business purposes;
- 3) Failing to disqualify himself or appropriately declare a conflict of interest in a matter in which he and/or his spouse had a substantial financial interest; and/or
- 4) Using his state office to advance the financial interests of his church, attempting to legislate a business advantage for his church in a commercial industry, and attempting to legislate his religious convictions to the advantage of his church and to the detriment of a perceived competitor of his church, in violation of a constitutional requirement of the separation of church and state.

These allegations arose out of three actions that the charge claimed that the legislator took. First, the legislator gave oral testimony before the county agency on the complainant’s application. Second, the legislator submitted written testimony to the agency regarding the complainant’s application. Third, the legislator introduced legislation that sought to ban the use of historic homes for wedding services.

Oral Testimony at the County Agency Hearing

The legislator testified in opposition to the complainant’s application at a public hearing of the county agency. A transcript of the legislator’s testimony was attached to the charge. According to the transcript, the legislator identified himself as a legislator representing his district. The legislator also stated that he was a member of the church and that his spouse was the Director of a school attached to the church.

The legislator then gave three reasons for his opposition to the permit. First, he said that if the permit were granted, it would set a poor land use precedent. The legislator questioned whether the county agency could later deny a permit to conduct weddings to any other house if it granted the permit to the complainant. Second, the legislator testified that there was no reason to grant this permit because there were many religious organizations with facilities at which weddings could be held. The legislator noted that the church was right next door to the complainant's home and that couples could marry there. The legislator also stated that churches and temples were the appropriate places for wedding services. Third, the legislator stated that commercial wedding houses would compete with churches and take funds away from churches. The legislator noted that churches serve the communities with beneficial community programs. He used the neighboring church as an example of a church that served the community by running several community programs.

Written Testimony Before the County Agency

Attached to the charge was a copy of the legislator's written testimony to the county agency. The testimony was written on legislative stationery. It appeared to have been faxed from the legislator's legislative office.

In this written testimony, the legislator again declared that he was a member of the neighboring church's congregation, that his spouse worked as the Director of a school attached to the church, and that he supported a community assistance project of the church. He then stated that the church's finances would suffer if weddings were allowed at the complainant's home. The legislator stated that this would adversely affect both the school and the community assistance project.

Legislation Introduced by the Legislator

The county agency granted the complainant's application for a permit to conduct weddings. After the application was granted, the legislator introduced legislation regarding this matter. A copy of this bill was attached to the charge. This bill amended the historic preservation law by providing that the intensity of use of historic properties shall be in keeping with allowable ranges found in the underlying zoning districts. The stated intent of the bill was to ensure that the use of historic homes was consonant with the surrounding neighborhood use. The bill presented a number of findings that the charge described as "unsubstantiated." These findings set forth the adverse effects of wedding service businesses on surrounding properties. The charge maintained that these findings were speculative because the complainant had not yet begun holding wedding services. The bill and its companion bill were both held in committee.

The legislator also introduced a resolution. This resolution urged the county to ban the use of historic sites as "wedding mills." The charge pointed out that at the time the resolution and the bills were being considered, the complainant was the only historic home with a permit to conduct wedding services. Thus, the charge alleged that this legislation unfairly targeted the complainant.

Answer to the Charge

The legislator filed an answer to the charge. In his answer, the legislator denied that his actions violated the State Ethics Code. The legislator maintained that he acted in his role as a legislator. The legislator stated that he acted as a representative of those in his district who

opposed the land use policy that would be established by the granting of a permit to the complainant. The legislator specifically addressed the four allegations in the charge.

First Allegation

The charge alleged that the legislator used his state office to influence a decision in a public matter in which he had a declared interest. The legislator answered that he did not use or attempt to use his state office to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment for others or for himself. The legislator then made four points to support his position.

First, the legislator stated that the county agency hearing was a public hearing at which anyone could testify. The legislator gave oral testimony and submitted written testimony as would any other member of the public. The legislator stated that he did not have any ex parte communications with any agency officials or employees except to ask about procedural matters. The legislator also stated that, while his views coincided with those of the church, he at no time stated that he was representing the church. The church independently opposed the application.

Second, the legislator stated that his intervention in this matter was prompted by several things unrelated to the church. The first was a letter from a person who lived near both the church and the complainant's home. The legislator attached a copy of this letter to his answer. The person who wrote the letter was one of the spokesmen of a group of people who owned property near the complainant's land. In his letter, the spokesman advised the legislator of the complainant's application and asked for the legislator's position on the matter. This letter was sent to the legislator at his legislative office.

A second neighborhood spokesman was invited by the legislator to review the charge and replied to the charge with a letter of comment that the legislator attached to his answer. In his letter, this person explained that the legislator who represented the district in which the church and the complainant's home were located was busy with a separate matter when the complainant's application was before the county agency. This legislator did, however, submit written testimony to the agency on legislative stationery. The spokesman remarked that his group approached the legislator who was the subject of this charge because they believed that part of the legislator's duties as a legislator was to ensure the welfare of the entire State, and not just his district.

According to the legislator's answer, the second thing that prompted his intervention was the legislator's belief that the county agency's action on the complainant's application would create a poor precedent in land use policy and that this precedent could affect the legislator's district. The legislator attached a copy of an earlier survey that he had sent to the people in his district. The legislator claimed that the survey demonstrated that the biggest concerns of the members of his community were the over-development of land and the preservation of open space. The legislator also remarked that he had a history of testifying on land use matters affecting his district and that his actions in this matter were consistent with his efforts to monitor land use matters that could affect his district.

The third point that the legislator made to support his position that he did not misuse his state office was that there was no financial benefit or unwarranted advantage that was bestowed upon himself, his spouse or his church as a result of his actions. The legislator stated that he received no financial gain for his actions. His spouse's employment as Director of the school was not dependent on the application. The legislator also remarked that his interest as a member of

the church, and his spouse's interest as an employee of the school, were too remote to be directly affected by the application. The legislator also noted that any possible detriment to the church was speculative.

Fourth and finally, the legislator stated that he did not misuse his position merely because he acted on a matter affecting property outside of his district. The legislator claimed that the issuance of the permit would set a precedent that could affect his district. The legislator also stated that his duties encompassed representing all citizens of the State, and not just those in his district.

Second Allegation

The charge alleged that the legislator used state time, equipment, or facilities for private business purposes. In his answer, the legislator denied this. The legislator maintained that he acted in his legislative capacity and so was entitled to use state resources to testify against the application and to introduce legislation regarding the use of historic homes for commercial weddings.

Third Allegation

The charge alleged that the legislator did not disqualify himself or appropriately declare a conflict of interests in this matter. The legislator answered that he was not compensated for his actions. The conflicts of interests laws, therefore, did not require the legislator to disqualify himself.

Fourth Allegation

The charge alleged that the legislator attempted to legislate a business advantage for his church by introducing the bill and the resolution. The charge also alleged that the legislator attempted to legislate his religious convictions in violation of the constitutional requirement of separation of church and state. The legislator answered that in authoring and introducing the bill and the resolution, he was engaged in a legislative function. When a legislator is engaged in a legislative function, the legislator is immune from scrutiny from any tribunal other than the Legislature itself. The State Ethics Commission has no jurisdiction over a legislator who is engaged in a legislative function.

Analysis of the Charge

First Allegation: Misuse of Office

The first allegation in the charge was that the legislator misused his state position to influence the county agency's decision. The State Ethics Commission noted that this appeared to be a claim that the legislator violated HRS section 84-13 in his oral and written testimony before the agency. HRS section 84-13 sets forth restrictions pertaining to a state legislator's or state employee's misuse of official position. This section 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:

- 2) 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.
- 3) 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.
- 4) Using state time, equipment or other facilities for private business purposes.
- 5) 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 transaction which the legislator believes may be affected by legislative action.

In general, HRS section 84-13 bars a state legislator or state employee from misusing his or her state position to grant himself or herself, or anyone else, an unwarranted advantage. The subsections of HRS section 84-13 refer to specific actions that violate this law.

The claim that the legislator violated HRS section 84-13 largely appeared to be based on the belief that he used his state position to inject himself into what was essentially a personal matter. The legislator was a member of the church, his wife was the Director of its school. The complainant may have been seen as a competitor of the church in the commercial wedding business.

Despite whatever personal interest the legislator may have had in the welfare of the church, it was also evident that the complainant's application raised issues of legitimate legislative concern. The legislator indicated in his testimony to the county agency and in his answer that one of his primary reasons for opposing the application was that it would set a harmful precedent. The legislator stated that he was concerned that the land use policy could infiltrate his neighboring district, which also contained historic homes.³ The legislator also listed other reasons for his

³The Commission also reviewed a transcript of the legislator's oral testimony before a second county agency. In that testimony, the legislator focused on the legislative intent behind the Historic Preservation Law, along with his concern about the precedential value of the decision to grant the permit. For example, during the legislator's testimony he remarked:

I would like to say one other thing if I could. I was initially brought into this not because of my relationship with the director of the [school], but because I represent an area that could be affected by this.

I think there's some interesting precedent being considered here. I don't see how - based on what is being approved of . . . how we're to keep other homes that are - that qualify for historic preservation from developing similar kinds of enterprises. You know, there's nothing in this particular - and I don't see how we're going to keep people from developing retail shops, whatever it is that they can, you know, offer as a business to maintain and to preserve the house.

opposition to the permit. The State Ethics Commission believed that a concern for the effect of a land use decision on the legislator's district was a legitimate legislative reason for the legislator's involvement in this matter. The Commission believed that the fact that the legislator may also have had a personal interest in the matter did not remove that matter from legislative concern. Indeed, if the Commission had found a violation here, it would have been, in effect, interpreting the Fair Treatment section of the State Ethics Code as forbidding a legislator from acting when the legislator may have personal financial interests at stake--a situation normally addressed by conflicts of interests laws. However, as will be discussed later in this opinion, the Legislature specifically excluded legislators from coverage by most of the conflicts of interests laws in the State Ethics Code. The Legislature specifically declined to create a law that forbids a legislator from acting when personal financial interests may be at stake.⁴ As a result of the Legislature's decision, the Commission believed it had no power to interpret HRS section 84-13 to require the legislator's recusal in this situation. For this reason, the Commission believed that the legislator's actions in involving himself in this matter could not be viewed as violating HRS section 84-13.

The Commission noted that HRS section 84-13 could also be applied to the manner of the legislator's involvement in this matter. For example, HRS section 84-13 may be violated if a legislator were to use his or her state position to "coerce" a government agency into complying with the legislator's wishes. According to the charge and its supporting documents, in the legislator's testimony before the county agency, he identified himself as a state legislator. The charge made no other claim that the legislator misused his state position in any way. Thus, the charge appeared to claim that it was a misuse of position for the legislator merely to testify and to refer to his state position.

The Commission noted that there was no per se prohibition against a legislator appearing before a county agency. To the contrary, the legislative history of the State Ethics Code acknowledged that legislators were expected to appear before agencies in their legislative capacities. A committee report on the bill creating the State Ethics Code stated:

Legislators are obligated from time to time to appear without compensation for constituents, or in connection with public official or civic matters. Their appearance in such cases is an extension of an obligation of their offices and not in furtherance of their private interests. SC Rep. 367 on HB. 6.

Thus, the State Ethics Code contemplated that legislators would appear before government agencies in their state capacities. To do so was not a per se violation of the State Ethics Code. In order to establish a violation of the State Ethics Code, it was not sufficient to merely put forth evidence showing that a legislator appeared before a county agency. There must have been a showing that the legislator actually misused his or her position in connection with that appearance.

To me there's got to be some kind of connection between the enterprise that's being contemplated and the desire, the intent to preserve. . . . It has been preserved all those years by using it as a business which is was a rental. That's appropriate for residential areas. This is inappropriate.

⁴ S. Com. Rep. No. 670-72, 6th Leg., Reg. Sess. (1972).

In this situation, the legislator testified in a public forum, as did other members of the public. There was no claim that the legislator engaged in any substantive ex parte communications with any member of the county agency. The legislator denied any such communications. In addition, as a member of the state Legislature, the legislator had no authority over the county agency. He did not take any action that directly impacted its budget or operations. For these reasons, the Commission believed that the manner of the legislator's opposition to the permit did not violate HRS section 84-13.

Second Allegation: Misuse of State Resources for a Private Business Purpose

The second allegation of the charge claimed that the legislator violated HRS section 84-13(3) in that he used state time, equipment or facilities for private business purposes. This allegation apparently referred to the fact that the legislator submitted his written testimony to the county agency on state letterhead and that he used his legislative office's fax machine to send the testimony.

HRS section 84-13 would prohibit a legislator from using state stationery and a state fax machine for performing private business work. If the legislator had testified in his private capacity, as a member of the church, then his use of state resources for his testimony would have been questionable. In his answer, however, the legislator maintained that he testified in his official capacity. The legislator claimed that his primary reason for testifying was to prevent the agency from setting a precedent that could apply to historic homes in his district. The legislator also claimed that a member of the public asked for his intervention, and that he had a history of appearing before different agencies on land use matters.

The Commission again believed that while the legislator appeared to have had personal reasons for opposing the permit, he also set forth legitimate reasons for testifying in his state capacity. The Commission believed that it was plausible that the legislator was testifying in his official capacity. For this reason, the legislator was allowed to use state stationery and his state fax machine in order to deliver his testimony.

Third Allegation: Conflicts of Interests

The third allegation of the charge was that the legislator failed to disqualify himself from acting in a matter in which he had a conflict of interests. The Commission noted, however, that certain provisions of HRS section 84-14, the conflicts of interests law, did not apply to legislators. Although two provisions of the conflicts of interests law did apply to legislators, the charge made no claim that the legislator violated those two applicable provisions.

The Commission observed that HRS section 84-14(a) is one of the key provisions of the conflicts of interests law of the State Ethics Code. In pertinent part, this section reads:

§84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest

This section bars a state employee from taking any official state action “directly affecting” a business or an undertaking in which the employee has a substantial financial interest. The term “financial interest” is defined by HRS section 84-3 as follows:

‘Financial interest’ means an interest held by an individual, the individual’s spouse, or dependent children which is:

- (1) An ownership interest in a business.
- (2) A creditor interest in an insolvent business.
- (3) An employment or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property.
- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

Thus, for example, if a state employee’s spouse were employed by a company, then the state employee could not take official state action affecting that company.

The term “employee” is defined by HRS section 84-3 as follows:

‘Employee’ means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges. [Emphasis added.]

The Commission noted that legislators were specifically excluded from the definition of “employee.” HRS section 84-14(a) referred only to employees. This section did not apply to state legislators. This provision of the conflicts of interests law, therefore, did not apply to the legislator.

The Commission also noted that two provisions of the conflicts of interests law, HRS section 84-14(c) and HRS section 84-14(d), did apply to legislators. HRS section 84-14(c) reads as follows:

No legislator or employee shall assist any person or business or act in a representative capacity before any state or county agency for a contingent compensation in any transaction involving the State.

This section bars state legislators and state employees from engaging in certain transactions in which they are paid any contingent compensation. There was no claim that the legislator received any compensation for his actions in opposing the complainant’s application. The legislator denied receiving any compensation in exchange for his testimony. Because there was no indication that he received any compensation, the Commission did not believe that the legislator violated HRS section 84-14(c).

HRS section 84-14(d) also applies to legislators. This section reads as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim or other transaction or proposal in which he has

participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

This section bars state legislators and state employees from receiving compensation to assist or represent others in certain situations. Again, there was no indication that the legislator received any compensation for his actions in opposing the complainant's application. For this reason, the Commission did not believe that the legislator violated this section.

Fourth Allegation: Attempting to Legislate Religious Convictions in Violation of Constitutional Requirement of Separation of Church and State

The fourth allegation of the charge was that the legislator attempted to legislate his religious convictions in violation of the constitutional requirement of separation of church and state. This claim was apparently based upon the statements that the legislator made in his testimony to the county agency to the effect that weddings should take place in spiritual abodes such as churches and temples. This claim, however, lay beyond the jurisdiction of the State Ethics Commission. The State Ethics Commission's jurisdiction in this matter was limited to the application of the State Ethics Code. The State Ethics Commission did not have the authority to determine whether or not the legislator violated constitutional requirements. The complainants needed to pursue this matter in another forum.

Remaining Allegation: Attempting to Legislate a Business Advantage for His Church

The remaining allegation was that the legislator used his state office to advance the financial interests of his church by attempting to legislate a business advantage for the church. The legislator introduced a bill that would have affected the use of historic homes for commercial weddings. This bill did not pass out of committee. The legislator also introduced a resolution urging the county to ban the use of historic homes for commercial wedding services.

This allegation raised misuse-of-position concerns under HRS section 84-13. In regard to this situation, the final paragraph of HRS 84-13 was relevant and informative. This paragraph reads as follows:

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 transaction which the legislator believes may be affected by legislative action.

The Commission observed that this final paragraph provided for immunity for legislators when carrying out their legislative duties. This paragraph stated that the Fair Treatment law of the State Ethics Code may not be applied to a legislator who was acting in the exercise of the legislator's "legislative functions."

The term "legislative functions" was previously discussed by the State Ethics Commission. In Informal Advisory Opinion Nos. 94-25 and 97-4, the State Ethics Commission considered whether legislators were engaged in "legislative functions" in order to appropriately apply HRS

section 84-13. These opinions extensively discussed the application of the “legislative functions” clause of HRS section 84-13.

The Commission’s research, which is reflected in Informal Advisory Opinions Nos. 94-25 and 97-4, clearly indicated that whenever a legislator is authoring, introducing, or voting on bills or resolutions, the legislator is engaged in a “legislative function.” The legislator’s actions are thus immune from inquiry by the State Ethics Commission. For this reason, in this case, the Commission could not apply HRS section 84-13 to the legislator’s actions in authoring, introducing, or voting on bills or resolutions. The Legislature itself has sole jurisdiction over the actions of a legislator engaged in a legislative function. The complainant had to pursue this allegation with the Legislature.

The Commission, by virtue of its informal advisory opinion, dismissed the charge against the legislator. Only two allegations fell within the Commission’s jurisdiction. The first of these was that the legislator misused his position in testifying on a matter before the county agency. However, the Commission believed that the legislator set forth a legitimate reason for interceding in this matter in his legislative capacity. The Commission also noted that the manner of the legislator’s testimony did not appear to violate HRS section 84-13. The second allegation within the Commission’s jurisdiction was that the legislator used state resources while testifying in his personal capacity. There were, however, sufficient indications that the legislator was testifying in his official state capacity. The legislator was therefore allowed to use state resources to support his testimony.

While the State Ethics Commission found no violation of the State Ethics Code in this matter, the Commission noted that when a legislator serves his or her constituents, serves his or her district, or takes action on legislative matters while having a personal or financial interest in the matter itself, allegations of conflict of interests or misuse of legislative position are likely to arise.

The State Ethics Code was created to further the public’s confidence in legislators and state officials and employees. The Commission noted that while legislators are allowed to take action as legislators even when conflicts of interests exist because they serve as the elected representatives of the people, it is not to be unexpected that members of the public may believe that legislators in these circumstances may be acting solely in furtherance of personal or financial interests. The Commission believed that until this problem is effectively addressed, legislators and the State Ethics Commission will frequently have to deal with the type of allegations raised in cases such as this.

The State Ethics Commission believed that there is little doubt that legislators’ actions in conflict-of-interests situations--though allowed by law--still may diminish public confidence in state government. The State Ethics Commission thus believed that legislators and the Commission itself must work toward an appropriate solution to this problem. In the meantime, legislators may wish to consider possible ways to carry out their legislative duties while at the same time minimizing any negative impact on the public’s confidence in state government.

The Commission appreciated the legislator's cooperation in this matter.

Dated: Honolulu, Hawaii, November 24, 1999.

HAWAII STATE ETHICS COMMISSION
Cassandra J.L. Abdul, Chairperson
Ronald R. Yoshida, Vice Chairperson
Carl Morton, M.D., Commissioner
Dawn A. Suyenaga, Commissioner

Note: There was a vacancy on the Commission when this opinion was considered.