

**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**



**ADVISORY OPINION NO. 178**

This opinion is in response to a request for the Ethics Commission [Commission] to advise a councilmember whether he may retain as his senior aide [aide] a person who is a candidate for a seat on the City Council [Council].

As the aide's appointing authority, the councilmember may decide whether or not being a candidate is compatible with his aide's official duties. The Corporation Counsel has advised that a full-time appointed employee, such as an aide has the right to be a candidate, but he may not use City time to do so. If the aide wants to campaign full-time, he may use paid vacation time, if accrued, or unpaid leave if the councilmember permits. However, the Commission does not believe that the councilmember should allow him to be a candidate because the potential for real and apparent conflicts is substantial. For the purposes of this opinion, "candidate" means a person who has (A) 1) announced candidacy and 2) held a fund-raising event; (B) given consent for any other person to receive contributions or make expenditures to aid the person's nomination for election, or election, to office; or (C) filed nomination papers for an office for themselves. If a person has completed the actions in (A) or (B) before January 1 of the year of the election, the person becomes a candidate effective January 1 of the year of the election.<sup>1</sup>

The Commission bases this opinion on the following facts:

A member of the Council is a candidate for mayor in the election to be held (date). In (date) the member will file as a candidate and resign from the Council in accordance with

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<sup>1</sup>This definition of candidate substantially corresponds to Section 11-191(3), Hawaii Revised Statutes, relating to elections generally. This section states:

"Candidate" means an individual who seeks nomination for election, or election to office. An individual is a candidate if the individual does any of the following:

- (A) Files nomination papers for an office for oneself within the county clerk's office or with the chief election officer's office, whichever is applicable; or
- (B) Receives contributions in an aggregate amount of more than \$100, or makes or incurs any expenditures to bring about the individual's nomination for election, or election, to office; provided that in no event shall a person be deemed a candidate by reason of the provisions set forth in this subparagraph and subparagraph (C) until January 1 of the year that person runs for election; or
- (C) Gives the individual's consent for any other person to receive contributions or make expenditures to aid the individual's nomination for election, or election, to office.

the resign-to-run provision of the State Constitution. The City Clerk has indicated that a special election to fill such a vacancy would be scheduled on the same day as the mayoral election, (date).

The councilmember's senior advisor plans to be a candidate for the anticipated vacancy on the Council. He will announce his candidacy, begin campaigning, and hold fund-raising events before the end of (date). He will file as a candidate in July (date) for the election in September.

The threshold legal question presented is whether a City employee may be a candidate for elective City office. The Corporation Counsel believes that an employee may do so, provided 1) the employee confines campaigning to non-City working hours; 2) the employee uses vacation time, if accrued, for full-time campaigning; and 3) in accordance with Section 13-119, Revised Charter of Honolulu 1973 [RCH], which prohibits dual positions, the employee resigns from the appointed position if elected.

Because the Commission responds to ethical questions remaining after the Corporation Counsel decides legal questions, only questions under the City's standards of conduct are before the Commission. These questions are

- 1) Whether being a candidate for elective office is a prospective employment for which negotiations have begun and therefore a "financial interest" under Section 6-1.1(6), Revised Ordinances of Honolulu 1978 (1983 Ed.) [ROH]; and if so,
- 2) Whether the financial interest of prospective elected office is compatible with the official duties of a senior advisor to a member of the Council under Section 11-102.3, RCH.

Section 11-102.3, RCH, provides the general rule and states in pertinent part as follows:

No elected or appointed officer or employee shall ... [e]ngage in a business activity or transaction or have a **financial interest**, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties. (Emphasis added)

Under Section 6-1.1(6), ROH, "financial interest" includes a prospective employment for which negotiations have begun.<sup>2</sup>

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<sup>2</sup>Section 6-1.1(6), ROH, states:

"Financial interest" means an interest held by an individual, the individual's spouse, or minor children which is: (A) an ownership interest in a business; (B) a creditor interest in an insolvent business; (C) an employment, or **prospective employment for which negotiations have begun**; (D) an ownership interest in real or personal property; (E) a loan or debtor interest; or (F) a directorship or officership in a business. (Emphasis added).

The Commission believes campaigning for elected office is a prospective employment for which negotiations have begun for the following reasons:

A person seeking appointed employment in the private or public sectors may submit an application and be interviewed by the prospective employer. Whether or not he is hired and the terms of employment, such as compensation, are subject to negotiation. The Commission believes this kind of prospective employment was clearly intended to be within the definition of "financial interest" under the standards of conduct. For example, if an elected or appointed officer or employee is negotiating for employment with a business in the private sector, such officer or employee may not take official action<sup>3</sup> concerning that business without real or apparent conflicts of interests arising.

In contrast, a person seeking elected employment submits an application in the form of filing for candidacy and is interviewed by the prospective employer, the public, in the form of campaign activities. Conceptually, the negotiations for employment by the public as an elected official may include the candidate's position on campaign issues. As a practical matter, however, whether or not a candidate is elected may depend on what promises the candidate makes to financial or political supporters. Consequently, promises to donors or political supporters are also part of the negotiation in which a candidate participates.

On the other hand, this contrast is not sufficient to distinguish elected employment from appointed employment for the purposes of the standards of conduct. In either instance, the applicant/candidate is seeking employment. If the candidate is not also seeking employment, then the City's standards of conduct would not apply to any elected or appointed officers or employees seeking elected employment. Such a result is not equitable. For example, if the standards of conduct did not apply in this manner to appointed employees seeking elected office, such employees would be able to barter their official actions for political or financial aid in an election without consideration of the standards of conduct. Therefore, the Commission believes that being a candidate for elected office is a prospective employment for which negotiations have begun and therefore a financial interest, which may be incompatible with official duties.

Accordingly, the second question is whether the financial interest of a prospective employment as an elected official is compatible with the official duties of an aide to a member of the Council.

In general, the Commission believes that being a candidate for any elected office is not compatible with the official duties of a full-time appointed employee. In particular, any member of a Councilmember's staff, such as an aide, should not be a candidate for another seat on the Council. The two positions are inherently incompatible given the numerical and physical confines of the City's legislative branch. Although the question of compatibility does not depend on consideration of other standards of conduct, in this instance real or apparent conflicts of interest under three other standards of conduct clarify the high degree of incompatibility likely if

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<sup>3</sup>"Official act" or "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. Section 6-1.1(8), ROH, Am. Ord. 84-83.

the councilmember's aide is a candidate for the Council.

First, Section 11-102(2), RCH, prohibits the use of confidential information for personal gain.<sup>4</sup> Because a senior aide's official duties include advising a councilmember on all matters coming before him for his official action, the aide has access to a myriad of confidential information, including the traditionally sensitive area on Oahu of land use and zoning. The temptation to use such information for personal benefit is the primary reason City officials and employees in sensitive positions, such as senior aides, are required to inactivate real estate sales or broker licenses. Similarly, an aide campaigning for any elected office has greater financial and political needs than one who is not. The corollary is that access to confidential information creates a greater temptation. Therefore, the increased potential for use of confidential information indicates incompatibility sufficient to warrant the councilmember not allowing his aide to campaign for elected office.

Second, in general, Section 11-103, RCH, prohibits any elected or appointed officers or employees from granting special privileges to any person.<sup>5</sup> A violation of this standard of conduct may arise, or appear to arise, if the councilmember allowed his aide to campaign on City time. For example, if an aide usually works forty hours a week, Monday through Friday from 8 a.m. to 5 p.m. with an hour for lunch, the time available for campaigning is limited to evenings and weekends. The Commission believes that campaigning cannot be so limited and therefore that the time requirements of campaigning is the second basis for advising him that being a candidate is not compatible with a senior aide's duties. Please note that the Corporation Counsel's opinion also includes this restriction of campaigning to non-City time.

Third, Section 6-1.2(1), ROH, prohibits City officers or employees from participating in official action affecting a matter in which they have a substantial financial interest,<sup>6</sup> such as

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<sup>4</sup>Section 11-102(2) states:

No elected or appointed officer or employee shall ... [d]isclose confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.

<sup>5</sup>Section 11-104, RCH, states:

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

<sup>6</sup>Section 6-1.2(1), ROH, states in relevant part as follows:

No officer or employee of the City, except as hereinafter provided, shall ... [p]articipate in any official action directly affecting a business or matter in which (A) he has a substantial financial interest ... provided that a councilman is not precluded from voting on such matter before the Council so long as a written disclosure has been made in the event there is a conflict of interest involving this subsection and relating to such matter.

The exception granted to members of the Council does not extend to such members' senior aides.

election to the Council. A violation of this standard of conduct may arise, or appear to arise, if the councilmember's aide advises him in a matter affecting a current or potential financial or political supporter in his campaign for election to the Council. Given the breadth of this possibility, ethical considerations would require his aide to abstain from advising him concerning all matters where his own personal interests differ from his interests as a councilmember. This result would render ineffective his services to him as an aide. Therefore, under this standard of conduct the official duties of aide and campaigning for election to the Council are incompatible for a third reason independent of the other two bases.

In conclusion, a councilmember's aide has the right to become a candidate for the Council while retaining his current position. Ethically, however, two questions of first impression are presented. The first is whether candidacy for elected office is future employment for which negotiations have begun and therefore a financial interest. The Commission believes a candidacy is such a future employment for equitable reasons. The second is whether such a financial interest is compatible with the official duties of an aide to a councilmember. The Commission believes it is not, and three other standards illustrate the high degree of incompatibility. First, a City employee, such as a councilmember's aide, may not disclose or use confidential information for personal benefit. Yet he may be tempted to or inadvertently do so in a campaign because the personal interest in being elected is great. Second, a City employee may not use City assets, such as working hours, for personal use. Yet any full-time appointed employee would need to do so because a campaign could not be limited to evenings or weekends. Third, a City employee may not participate in matters in which he has a substantial financial interest, such as matters affecting potential political supporters or financial donors in a campaign for elective office. Yet not so participating would require the councilmember's aide to abstain from giving advice in a potentially wide variety of matters. Hence, he would be rendered ineffective as a councilmember's aide. For these reasons, the Commission advises that an aide to a councilmember not be allowed to be a candidate for any elected office, especially for a seat on the Council.

Dated: November 23, 1987

JANE B. FELLMETH  
Chair, Ethics Commission