

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2004-4

I. Summary

City officers and employees may not make political endorsements that give a special advantage to political candidates or campaigns or that might reasonably be interpreted as official endorsements by the city or one of its agencies. In most cases, the mere identification of a city officer's or employee's official title or position, without more, will not be prohibited. However, endorsements that go beyond the mere identification of one's title or position are likely to imply an official endorsement by the city or one of its agencies and would be prohibited.

II. Facts

On July 3, 2003, the Ethics Commission (the Commission) received a request for advice asking whether under the city's ethics laws city employees and officers are prohibited from identifying their official titles or positions when endorsing candidates for elective offices. There are no advisory opinions directly on point. The past practice of the Commission has been to informally suggest to city officers and employees that they not add their official titles or positions to political endorsements.

III. Issue

Are city officers and employees prohibited from using their official city titles or positions when endorsing candidates for elective offices?

IV. Discussion and Analysis

A. The City's Fair and Equal Treatment Provision

Section 11-104 of the Revised Charter of Honolulu (RCH), which reflects the city's fair and equal treatment policy, provides:

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.

Our analysis of whether city officers and employees violate RCH § 11-104 by using their city titles or positions in political endorsements starts with the basic premise that candidates typically seek such endorsements precisely because they are perceived to have value in the minds of voters and therefore might give the candidate an advantage over his or her opponent in an election.¹ In some cases, the endorsement of a city officer or employee might create a false impression that it reflects the position of the city itself. In such cases, the endorsement would clearly give the candidate a “special . . . advantage . . . beyond that which is available to” his or her opponent. RCH § 11-104.

The plain language of RCH § 11-104 therefore could be read to ban city officers or employees from using their official titles or positions in political endorsements. *See*, Advisory Opinion No. 2002-5 (December 17, 2002) (RCH § 11-104 “prohibits the use of a city officer’s or employee’s position or time or any other city resource for political purposes.”). Under such a strict construction, the use of one’s official title in a private political endorsement would constitute a *per se* violation of RCH § 11-104.

We are constrained, however, from giving RCH § 11-104 such a literal reading by the fundamental rights of freedom of speech guaranteed by the First Amendment to United States Constitution and the Constitution of the State of Hawaii.

B. Constitutional Limits

The United States Supreme Court has long-recognized that an employee does not abandon his or her First Amendment rights simply by agreeing to work for a public entity. A city therefore may not discipline an “employee on a basis that infringes that employee’s constitutionally protected interest in freedom of speech.” *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 2896 (1987); *see also*, *Connick v. Myers*, 461 U.S. 138, 143-44, 103 S.Ct. 1684, 1688-89 (1983) (noting the Court’s longstanding rejection of Justice Holmes’ comment that a police officer “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).

At the same time, however, the realm of protected speech for public employees is much narrower than that for the general public. *See Connick*, 461 U.S. at 144, 103 S.Ct. at 1688-89; *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35. Thus, government entities may constitutionally restrict certain political activities, including political speech, of their employees. For instance, in *United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880 (1973), the Supreme Court upheld the validity of the Hatch Political Activities Act, 5 U.S.C.A. §§ 7321- 7327 (1980) (“Hatch Act”), finding that federal employees could constitutionally be prohibited from taking formal positions in political parties, from undertaking substantial roles in partisan political campaigns and from running for office on partisan political tickets. 413 U.S. at 565, 93 S.Ct. at 2890.

¹ We recognize that the seeking of this competitive political advantage does not necessarily mean that the endorsement of political candidates by government employees or officials is without benefit to the general public. “Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions[.]” *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1886 (1994) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572, 88 S.Ct. 1731, 1736 (1968)). Thus, the identification of a government officer’s or employee’s official position in a political endorsement may, in some cases, help to inform the public debate.

In general, the government's restrictions on a public employee's freedom of speech are subject to a balancing test: the employee's interest in commenting on matters of public concern is weighed against the interest of the government as an employer in promoting the efficiency of the public service it performs through its employees. *Pickering v. Board of Education, supra*. "The balancing test differs depending upon the type of expression, the nature of the agency, and the context in which the expression is made." Advisory Op. 2002-5 (Dec. 17, 2002) (quoting *Martin v. Lauer*, 686 F.2d 24, 31 (D.C. Cir. 1982)).²

C. The Mere Use of One's City Title or Position in a Political Endorsement Is Not Prohibited by the City's Fair and Equal Treatment Policy.

We conclude that the use of an officer's or employee's name and official title or position in a private political endorsement does not constitute a *per se* violation of RCH § 11-104. Determinations as to whether political endorsements by city officers and employees violate the city's fair and equal treatment policy should ordinarily be done on a case-by-case basis. A blanket prohibition, by definition, would be enforced regardless of the particular circumstances and without specific findings that in all cases the city's interests clearly outweigh the individual's constitutional free speech rights. In our view, that would be unconstitutional. *See Pickering v. Board of Education, supra*.

While we recognize that determinations as to whether political endorsements by city officers and employees comply with the requirements of RCH § 11-104 should ordinarily be based on the facts of individual cases, we conclude that, in most cases, the mere identification of a city officer's or employee's official title or position, without more, is permissible under RCH § 11-104. That is, absent exceptional circumstances, city officers and employees may identify themselves by their official city titles and positions when making political endorsements.

We find support for our position in an opinion of the Hawaii State Ethics Commission (HSEC). The HSEC has opined that the fair and equal treatment provision in the state's ethics code (Hawaii Revised Statutes (HRS) § 84-31)³ does not "prohibit in a *per se* fashion the mere use of official title in a campaign endorsement[.]" HSEC Advisory Opinion No. 89-1 (January 11, 1989). The HSEC, however, was careful to note that its advisory opinion was limited to the finding that the "*mere* use of state title (including a legislative assignment title) in conjunction with a campaign endorsement is simply not intended to be prohibited by section 84-13" and that it did not mean that "there could never be a situation in which a particular use of official title might rise to the level of a

² RCH § 6-1112(2), which sets forth in some detail the boundaries of permissible political activity for city civil service employees, reflects this constitutionally-required balancing of the employee's constitutional rights against the city's interests in the efficient functioning of a merit-based civil service. In pertinent part, RCH § 6-1112 (2)(a) provides that "[n]o person in the civil service shall (1) use official authority or influence for the purpose of interfering with an election or affecting the result thereof; (2) use official authority or influence to coerce the political action of any person or party[.]" Notwithstanding these restrictions, RCH § 6-1112 (2)(b) provides that the "foregoing prohibited activities shall not be deemed to preclude the right of any person in the civil service to vote and to express opinions as such person chooses on all political subjects and candidates or to be a member of any political party, organization or club."

³ Hawaii Revised Statutes § 84-31: "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[.]"

use of position to give someone an unwarranted privilege, advantage, contract, exemption, or unwarranted treatment in violation of section 84-13.”

V. Conclusion

We conclude that RCH § 11-104 does not require an across-the-board ban on using one’s official title or position in a political endorsement. We further conclude that, in most cases, the identification of a city officer’s or employee’s official title or position, without more, is permissible under RCH § 11-104.

We wish to be clear about the limits of this opinion. While the mere identification of a city officer’s or employee’s official title or position is generally allowed in political endorsements, this general rule is still subject to exceptions in specific cases – *i.e.*, in certain exceptional circumstances, even the mere use of one’s official title or position in an endorsement could constitute the granting of a “special” advantage to the recipient of the endorsement in violation of RCH § 11-104. City officers or employees intending to add their official titles or positions to endorsements should seek advice from the Commission in doubtful cases. Further, nothing in this opinion should be construed as granting the license to go beyond the simple identification of one’s official title or position in an endorsement. To the contrary, endorsements that go beyond the mere identification of one’s title or position, such as wearing official uniforms in connection with campaign activities, are likely to imply official endorsements by the city and would therefore be prohibited under RCH § 11-104.

Dated: April 21, 2004

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ROBIN DAVID LIU, Chairperson
Ethics Commission