

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2004-6

I. Summary

A city employee who is also a practicing attorney may represent criminal defendants who have been charged by the Honolulu Prosecutor with offenses under the state's penal laws, because the proceedings are not against the interests of the city. The city employee however, may not represent defendants charged with offenses under city laws because these proceedings are against the interests of the city. In addition, state law allows the city employee to represent his union and its members in collective bargaining agreement negotiations, arbitrations, and grievance proceedings, even though such proceedings are against the interests of the city.

II. Facts

An employee (Employee) has worked for a city department (Department) since [date]. Employee is also an attorney who has been licensed to practice in the State of Hawai'i since [date]. Employee recently opened his own law office in Honolulu. He attends to his private law practice on his days off from the Department.

From time to time, Employee is approached by potential clients who are defendants in criminal cases being prosecuted by the Honolulu Department of the Prosecuting Attorney (the Honolulu Prosecutor). To date, Employee has declined to represent any of these potential clients. Among the reasons he has chosen not to accept these cases is his uncertainty as to whether his representation would be deemed a violation of the city's ethics laws, inasmuch as his representation might be deemed adverse to the city's interests.

As a city employee, Employee is a member of a public employees union (Union). He intends to approach the Union with a proposal to perform legal work on its behalf. Employee expects such work would include representing the Union in collective bargaining agreement negotiations, and representing individual union members in arbitrations and grievance proceedings. The city would be the opposing party in those matters. Employee has not yet approached the Union with a proposal to provide legal services because, again, he is unsure whether his representation of the union in matters adverse to the city's interests would comport with the ethics laws.

III. Questions Presented

1. Is a city employee, who is also a licensed attorney, prohibited from representing criminal defendants in cases being prosecuted by the Honolulu Prosecutor?
2. Is a city employee prohibited from representing his or her union and its members in collective bargaining agreement negotiations, arbitrations, and grievance proceedings?

IV. Analysis

A. Relevant Ethics Laws

With respect to both of the questions presented, the relevant provision of the Revised Charter of the City and County of Honolulu (RCH) is Section 11-102, which provides, in pertinent part:

No elected or appointed officer or employee shall:

...

(e) Represent private interests in any action or proceeding against the interests of the city or appear in behalf of private interests before any city agency, except as otherwise provided by law.

Similarly, section 3-8.2 of the Revised Ordinances of the City and County of Honolulu (ROH) prohibits city officers and employees from appearing before any city agency on behalf of private interests:

No officer or employee of the city, except as hereinafter provided, shall:

...

(c) Appear in behalf of private interests before any agency other than a court of law, nor shall such person represent private interests in any action or proceeding against the interests of the city in any litigation to which the city is a party[.]

B. Representation of Criminal Defendants

Whether Employee may represent defendants in criminal cases being prosecuted by the Honolulu Prosecutor depends on whether such cases are “action[s] or proceeding[s] against the interests of the city[.]” RCH § 11-102(e); ROH § 3-8.2(c). The answer to that question turns on whether the criminal prosecutions are brought under the state penal laws or city ordinances.

1. Penal laws of statewide application

RCH § 8-104(b) recognizes that the Honolulu Prosecutor derives his/her power to prosecute violations of the state penal laws from the state attorney general: “The prosecuting attorney shall: . . . (b) Prosecute offenses against the laws of the state under the authority of the attorney general of the state.” The city’s power to enact this charter provision is set forth in Hawaii Revised Statutes (HRS) § 46-1.5(17) (“Each county shall have the power to provide by charter for the prosecution of all offenses against the laws of the State under the authority of the attorney general of the State.”).

In *Marsland v. First Hawaiian Bank*, 70 Haw. 126 (1988), the Hawaii Supreme Court discussed the source of the power of the prosecutors of the several counties to initiate and conduct criminal prosecutions. Relying in part on RCH § 8-104(b), it concluded that their power was derived from the state’s attorney general:

The Attorney General is the chief legal officer for the State of Hawaii and has the ultimate responsibility for enforcing penal laws of statewide application. The Attorney General, however, has delegated to the county prosecutors the primary authority and responsibility for initiating and conducting criminal prosecutions within their respective county jurisdictions. Thus, the Prosecutor’s authority to investigate, initiate and conduct criminal prosecutions within the City and County of Honolulu is derived directly from the authority of the Attorney General.

70 Haw. at 130 (citations omitted).

Thus, “[w]hen the Prosecutor conducts prosecutions for offenses against the laws of the state pursuant to Honolulu Charter § 8-104(a), it does so on behalf of all the people of the State of Hawaii.” *Id.* at 133.

Because the Honolulu Prosecutor, in prosecuting violations of the state’s penal laws, is exercising powers derived directly from the authority of the state’s attorney general and representing the interests of “all of the people of the State of Hawaii,” *id.*, it cannot be said that the interests of the criminal defendants are exclusively against interests of the city. Rather, they are against the interests of “all the people of the State of Hawaii.” *Id.* That is not to say that the people of the city, as a subset of the people of the state, do not have an interest in criminal prosecutions. They certainly do. Their interests in criminal prosecutions, however, derive from their status as citizens of the state, rather than as citizens of the city.

RCH § 11-102(e) and ROH § 3-8.2(c) prohibit city employees such as Employee from representing private interests in any actions or proceedings against the interests of the city. The interests of defendants charged with offenses under the state’s penal laws are adverse to the interests of the state. Accordingly, the representation by a city employee of a person who is being prosecuted by the Honolulu Prosecutor for violations of state penal laws is not prohibited by RCH § 11-102(e) and ROH § 3-8.2(c).

2. City laws

The city has the power to “fix a penalty for the violation of any ordinance, which penalty may be a misdemeanor, petty misdemeanor, or violation as defined by general law.” HRS § 46-1.5(14). *See also* HRS § 46-1.5(24)(A) (“Each county may impose civil fines, in addition to criminal penalties, for any violation of county ordinances or rules after reasonable notice and requests to correct or cease the violation have been made upon the violator.”). For example, violations of the standards of conduct concerning campaign contributions and assistance set forth in ROH § 3-8.6(e) are petty misdemeanors. The Honolulu Prosecutor has the power to prosecute these offenses. ROH § 3-8.6(e); *see also* RCH § 8-104(a).¹ The prohibitions of RCH § 11-102(e) and ROH § 3-8.2(c) apply to any actions or proceedings not involving the violation of laws of statewide application, *i.e.*, violations of city ordinances. In those cases, the interests of the represented person are directly and exclusively adverse to the interests of the city.

In sum, as long as Employee’s criminal practice is limited to representing defendants in cases involving offenses alleged under state law, he would not be in violation of RCH § 11-102(e) and ROH § 3-8.2(c). If, however, his practice included representation of persons charged with offenses under city ordinances, he would be in violation of RCH § 11-102(e) and ROH § 3-8.2(c).

C. Representation of the Union

Employee contemplates representing the Union in collective bargaining agreement negotiations and individual union members in arbitrations and grievance proceedings in which the city would be the opposing party. Such representation would, on its face, be inconsistent with RCH § 11-102(e) and ROH § 3-8.2(c), because it would unquestionably be “against the interests of the city.” *See* Advisory Opinion No. 2002-1 (August 27, 2002) (representation of terminated Honolulu Police Department (HPD) officer by reserve HPD officer who was also attorney placed reserve officer in “the position of . . . representing the client against the city’s interest in terminating the officer”).

Despite their apparent inconsistency with RCH § 11-102(e) and ROH § 3-8.2(c), the state laws regarding collective bargaining in public employment (Hawaii Revised Statutes Chapter 89) must be taken into account. Specifically, HRS § 89-3 provides:

Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any and all of such activities, except for having a payroll deduction equivalent to union dues remitted to an exclusive representative as provided in section 89-4.

¹ RCH § 8-104(a): “The prosecuting attorney shall: (a) Attend all courts in the city and conduct, on behalf of the people, all prosecutions therein for offenses against the laws of the state and the ordinances and rules and regulations of the city.”

Inasmuch as RCH § 11-102(e) and ROH § 3-8.2(c) prohibit a city employee from representing a union and its members in the collective bargaining context because such representation is “against the interests of the city,” those laws are inconsistent with HRS § 89-3, which guarantees public employees the right to “assist any employee organization for the purpose of bargaining collectively through *representatives of their own choosing* . . . and to engage in lawful, *concerted activities* for the purpose of . . . *mutual aid or protection*, free from interference, restraint or coercion.” (Emphasis added.) Pursuant to HRS § 89-19, the conflict is resolved in favor of HRS § 89-3:

Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, or rules adopted by the State, a county, or any department or agency thereof, including the departments of human resources development or of personnel services or the civil services commission.

HRS § 89-19. Thus, the state laws regarding collective bargaining in public employment trump application of the city’s laws that would otherwise prohibit a city employee from representing fellow union members in collective bargaining proceedings that are adverse to the interests of the city.

Accordingly, Employee is free to represent the Union in collective bargaining agreement negotiations, arbitrations, and grievance proceedings in which the city is the opposing party.

V. Conclusion

Based on the foregoing, the Commission concludes that:

1. Employee’s representation of defendants in cases involving offenses under the state’s penal laws would not be in violation of RCH § 11-102(e) and ROH § 3-8.2(c). If, however, his practice included representation of persons charged with offenses under city laws, he would be in violation of RCH § 11-102(e) and ROH § 3-8.2(c).
2. Employee may represent the Union in collective bargaining agreement negotiations and individual union members in arbitrations and grievance proceedings.

The Commission emphasizes to Employee that he needs to take special care to keep his private law practice separate from his work as a city employee. In particular, Employee is reminded that conducting private business using city resources is prohibited by RCH § 11-104. One can envision situations, for instance, in which Employee’s co-workers or fellow union members seek his advice as an attorney or want to discuss their cases/grievances while he is on duty. In most instances, responding to these inquiries at work would constitute a violation of RCH §11-104.²

² Section 11-104. Fair and Equal Treatment --

Dated: 6/22/04

/S/

ROBIN DAVID LIU, Chairperson
Ethics Commission

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. (*Reso. 83-357*)