

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion 2009-4**

**I. Summary**

A city employee who retained a witness fee that he received from a non-city source who subpoenaed him to testify at a civil trial violated the city's standards of conduct because his obligation to testify constituted part of his official duties and he therefore was prohibited from receiving any compensation from a non-city source for fulfilling his work-related duties.

**II. Background**

This matter arises out of Respondent's retention of a \$44 witness fee he received in connection with a subpoena compelling him to appear and testify as a witness at a trial. The subpoena was issued by the attorney for the plaintiff. The plaintiff's lawyer paid the \$44 witness fee, which is required by court rule.

At the time he received the subpoena and the witness fee, Respondent was an employee of the City and County of Honolulu, working in the Department of Budget and Fiscal Services. He was subpoenaed as a percipient witness because, as a direct result of his employment with the city, he had information that was relevant to the issues in the case. Respondent's obligation to appear as a witness in the case when subpoenaed constituted part of his official duties as an employee of the city. Plaintiff's attorney also subpoenaed non-city employees to testify at the trial; by court rule, these non-city witnesses also received the \$44 witness fee.

Respondent was not required to testify at the trial because the case settled before the trial commenced. He did not lose any city compensation or benefits as a result of being subpoenaed.

In approximately January 2007, plaintiff's attorney contacted the Ethics Commission's staff and requested that it investigate why a number of witnesses who worked for the city, including Respondent, had not returned the witness fee checks to his firm. The Ethics Commission contacted the witnesses and asked if they had returned, destroyed, or cashed the witness fee checks. Via email dated February 27, 2007, Respondent indicated that he had already cashed the check. Via email dated May 31, 2008, the Ethics Commission staff asked Respondent

to reimburse the plaintiff's attorney for the \$44 witness fee by June 9, 2008 and stated that his failure to do so might constitute a violation of the city's ethics laws.

Respondent subsequently informed the Ethics Commission staff that he did not believe he was obligated to return the witness fee because: (1) he had to postpone a planned trip because he was told that he had to be available for trial; (2) he was not subpoenaed to testify as an expert, but only because of what he might have heard in the RPAD offices; (3) he was subjected to the stress of possibly being questioned in a harassing manner by plaintiff's attorney in court.

A Notice of Possible Violation of the Standards of Conduct (NOPV), dated November 3, 2008 was sent to Respondent by certified mail. The Notice informed Respondent that his retention of the witness fee: (1) may have constituted use of his official position to secure or grant himself special consideration, treatment, advantage, privilege or exemption in violation of Revised Charter of Honolulu (RCH) § 11-104<sup>1</sup>; and (2) may have constituted the receipt of compensation for his services as an employee of the city from a source other than the city in violation of RCH § 11-102(d)<sup>2</sup>.

The NOPV also informed Respondent that, pursuant to ROH § 3-6.7(b)<sup>3</sup>, he was entitled to respond in writing within 15 days and that he could request a hearing before the Ethics Commission. The NOPV also informed Respondent that if he did not make a written request for a hearing before the Ethics Commission within the 15-day period, the Ethics Commission could render an opinion based on the information available to it. ROH § 3-6.7(c)<sup>4</sup>. Respondent did not request a hearing. Accordingly the Ethics Commission may render an advisory opinion based on the information that it has before it. *Id.*

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<sup>1</sup> RCH § 11-104 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.

<sup>2</sup> RCH § 11-102(d) prohibits elected or appointed officers or employees from:

[r]eceiving any compensation for such person's services as an officer or employee of the city from any source other than the city, except as otherwise provided by this charter or by ordinance.

<sup>3</sup> ROH § 3-6.7(b) provides:

Where the employee or officer involved in the request [for an advisory opinion] is not the person making the request, such employee or officer shall have an opportunity to respond in writing within 15 days after receipt of a copy of the request. The response may include a request for a hearing before the commission.

<sup>4</sup> ROH § 3-6.7(c) provides:

Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

### **III. Analysis**

As an employee of the City and County of Honolulu, Respondent was subject to the Standards of Conduct as set forth in Article XI of the Revised Charter of Honolulu during the time period at issue in this matter, and he is subject to the jurisdiction of the Ethics Commission pursuant to RCH § 11-107.

Hawaii Revised Statutes § 607-12 provides, in part:

The fees of witnesses shall be as follows: Every witness attending and testifying, or subpoenaed and attending, upon the trial of any civil cause, in any court, shall be paid the sum of \$4 for each day's attendance in court, and traveling expenses at the rate of 20 cents a mile each way. Every such witness, coming to attend upon court from any island other than that upon which the court is holding session, shall be entitled to \$6 for each day's attendance in addition to the actual round trip cost of plane or ship travel and 20 cents for each mile actually and necessarily traveled on the ground each way.

HRS § 607-12 is silent as to whether a witness fee must be returned if the witness does not actually testify.

Federal Rules of Civil Procedure (FRCP) 45(b)(1) states in relevant part:

Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

FRCP 45 is silent as to whether a witness fee must be returned if the witness does not actually testify.

Respondent is a member of Bargaining Unit 13 and was covered by the above-mentioned HGEA Contract provisions during the period relevant to this matter. Article 39 of the Hawaii Government Employees Association Unit 13 contract (HGEA Contract), in effect during July 1, 2007 – June 30, 2009, provides in relevant part:

A. An employee covered by the terms of this Agreement, if summoned to serve as a witness or juror in any judicial proceedings except those which may involve or arise out of the Employee's outside employment or the Employee's personal business or private affairs shall, if the Employee serves, be entitled to leave of absence with pay.

B. An Employee who serves as a witness or as a juror, and who receives a fee or mileage allowance shall not suffer the loss of such monies or have it offset against the Employees' salary account.

The HGEA Contract is silent as to whether a witness fee must be returned if the witness does not actually testify.

Notwithstanding the fact that HRS § 607-12, FRCP 45(b)(1), and the HGEA Contract are silent as to what to do with a witness fee when the witness does not actually testify at trial, the city's standards of conduct may provide that policy.

RCH § 11-102(d) provides:

No elected or appointed officer or employee shall: . . . (d) Receive any compensation for such person's services as an officer or employee of the city from any source other than the city, except as otherwise provided by this charter or by ordinance.

Respondent's obligation to appear and testify at the trial constituted part of his official duties, for which he was entitled to receive his regular compensation from the city. As a result, pursuant to RCH § 11-102(d), he was prohibited from receiving any compensation from non-city sources related to his fulfilling these work-related duties. The \$44 witness fee, which was a form of compensation for having to appear and testify, was paid by plaintiff's attorneylaw firm, a non-city source. Thus, Respondent's retention of the witness fee check constituted receipt of compensation for his services as an employee of the city from a source other than the city in violation of RCH § 11-102(d).

RCH § 11-104 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.

We conclude that Respondent's retention of the witness fee was not a violation of RCH § 11-104, because the same witness fee was granted to all witnesses regardless of their specific employment.

#### **IV. Recommendation**

Respondent's violation of RCH § 11-102(d) subjects him to potential disciplinary action, as set forth in RCH § 11-106. The Ethics Commission recommends that no disciplinary action be imposed on Respondent if he provides acceptable evidence to the Ethics Commission that he has provided the \$44 amount of the witness fee to the city's general fund or to Mr. Moseley's law firm within three weeks of the date of this recommendation. If no acceptable evidence is provided to the Commission within that time, the Commission will recommend an appropriate discipline for Respondent's violation of RCH § 11-102(d).

Dated: August 19, 2009

/s/  
LEX SMITH  
Chair  
Honolulu Ethics Commission