

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091  
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov  
Internet: www.honolulu.gov/ethics



MUFI HANNEMANN  
MAYOR

CHARLES W. TOTTO  
EXECUTIVE DIRECTOR & LEGAL COUNSEL

**Advisory Opinion No. 2009-5**

**I. Summary**

An excluded employee who testifies in a proceeding as part of her official duties is prohibited from retaining a witness fee provided in connection with a subpoena to testify.

**II. Background**

[Name] is [city position] and an excluded employee. In her capacity as [city position] she is often subpoenaed to testify in [types of cases] because of her involvement in [types of investigations] and her knowledge of relevant city policies and procedures. In other words, her testimony involves and arises out of her official city duties. When she is subpoenaed to testify as a witness, in either a deposition or at trial, she is ordinarily provided a witness fee, which is required by law. When [name] receives a witness fee in a matter that is related to her official city duties, she turns it over to the Department of the Corporation Counsel, which deposits it in the city's general fund. [Name and city position] orally requested guidance as to whether [name] and other similarly situated city employees are obligated to turn over the witness fees checks to Corporation Counsel under the ethics laws and, if so, what should be done with the checks.

**III. Question Presented**

Is a city employee who receives a witness fee for testimony that involves or arises out of her official city duties entitled to personally keep the witness fee, particularly if she is actually required to testify in a deposition or at trial?

**IV. Analysis**

This question presented in this case is similar to the one that was presented in a recent case involving the retention of a witness fees by a city employee of the Real Property Assessment Division. In that case, the employee retained the \$44 witness fee that she received in connection with a trial subpoena, even though she was not required to testify because the case was settled before trial. In Advisory Opinion No. 2009-3, we concluded that the retention of the witness fee

constituted a violation of Revised Charter of Honolulu (RCH) § 11-102(d)<sup>1</sup>, because the employee’s obligation to testify was part of her official duties and therefore she could not receive additional compensation for performing a work-related duty.

We reached our conclusion that the employee’s retention of the witness fee constituted a violation of RCH § 11-102(d), even though the court rule and state statute governing the payment of witness fees and the collective bargaining agreement covering the employee were “silent as to what to do with a witness fee when the witness does not actually testify at trial[.]” We found that, “the City’s Standards of Conduct may provide that policy. “

Advisory Opinion No. 2009-3 clearly establishes that a witness fee paid in connection with testimony that a city officer or employee is required to provide as part of his/her official duties constitutes “compensation for such person’s services as an officer or employee of the city” and it therefore cannot be retained under RCH § 11-102(d). Therefore, if the Commission’s decision in Advisory Opinion 2009-3 applies to this case, [name] would be prohibited from retaining the witness fees she receives to testify in matters that are work-related.

There are, however, two possible material distinctions between the situation that is presented in this case and the situation in Advisory Opinion No. 2009-3. First, in this case [name] is often actually required to testify in deposition or at trial. Second, [name] is an excluded employee. In our view, neither of these distinctions is materially relevant to the analysis under RCH § 11-102(d) and therefore Advisory Opinion No. 2009-3 controls the disposition of this case.

**A. RCH § 11-102(d) applies whether or not a city employee or officer actually testifies.**

RCH § 11-102(d) is a conflict of interest provision. It rests on the fundamental principle that city officers and employees are obliged to act in the city’s interests when performing their official duties. That obligation might be compromised if officers or employees were to receive compensation from non-city sources whose interests conflicted with the city’s interests. By prohibiting city officers and employees from receiving compensation from outside sources for performing their official duties, this potential conflict is eliminated. Thus, under RCH § 11-102(d), the analysis focuses on the nature of the work task at issue: if it is encompassed within the officer’s or employee’s official duties – *i.e.*, work for which the officer or employee is entitled to city compensation – additional compensation from an outside source is prohibited. By the same token, if the work is not part of the officer’s or employee’s official duties, RCH § 11-102(d) does not prohibit the employee from receiving compensation from a non-city source, because there is no potential conflict with the officer’s or employee’s official duties.

---

<sup>1</sup> RCH Section 11-102 provides in part:

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 chapter or by ordinance.

This is the analysis that led to the result the Commission reached in Advisory Opinion No. 2009-3. As noted above, the employee who received the witness fee in connection with the trial subpoena did not end up testifying because the case settled just before the trial was to commence. The fact that the witness did not testify, however, was not material to the Commission's decision. The determinative issue was whether the testimony she was subpoenaed to give at trial was related to her official duties. We found that it was. Advisory Opinion No. 2009-3 (Finding of Fact ("FOF") No. 15: "The Commission finds that Respondent's obligation to appear as a witness when subpoenaed constituted part of her official duties as an employee of the City.").

Because the employee's anticipated testimony was directly related to her official duties, she was entitled to receive her regular city compensation in connection with the subpoena, whether she actually testified at trial or not.<sup>2</sup> It was the connection to her official duties and resulting entitlement to city compensation that triggered RCH § 11-102(d). In other words, the fact that the witness did not actually testify was not determinative; the obligation to appear as a witness as part of her official duties was sufficient under RCH § 11-102(d) to prohibit the employee from retaining the witness fee check.<sup>3</sup> *Id.*; Conclusion of Law ("COL") No. 18 ("Respondent's argument that retention of a witness fee cannot be construed as compensation for City services, since it was provided solely as a requirement of a subpoena and not related to her duties as a City employee, is rejected."); COL 20 ("Respondent's retention of the witness fee check therefore constituted receipt of compensation for her services as an employee of the City from a source other than the City in violation of RCH § 11-102(d).").

The same analysis applies here. The dispositive issue is whether [name]'s testimony involves or arises out of her official duties. If it is, she is entitled to compensation for any time that she spends in connection with the subpoena, whether it is spent in preparation for her testimony or actually testifying at trial or in a deposition. And if she is entitled to city compensation, she cannot receive any additional compensation, including a witness fee, from an outside source.

Thus, under the rationale of Advisory Opinion No. 2009-3, the fact [name] actually testifies does not make RCH § 11-102(d) inapplicable; she is still prohibited from personally retaining the witness fee.

**B. RCH § 11-102(d) applies even though [name] is an excluded employee.**

Another possible distinction between Advisory Opinion 2009-3 and the instant case is

---

<sup>2</sup> We specifically found that the employee "did not lose any city compensation or benefits as a result of being subpoenaed." Finding of Fact No. 14.

<sup>3</sup> We deemed the witness fee a form of compensation. Advisory Opinion No. 2009-3, Conclusion of Law No. 18

that [name] is an excluded employee (*i.e.*, she is not included in a bargaining unit and is not subject to a collective bargaining agreement (“CBA”). The city generally treats excluded employees in the same manner as employees who are covered by CBA’s. Hawai`i Revised Statutes (HRS) Chapter 89C (giving mayors and other appropriate authorities the power to make changes in excluded employees’ wages, hours, benefits or other terms and conditions of employment to be consistent with comparable employees within collective bargaining units).

Several CBA’s covering city employees contain provisions that address witness fees. For instance, as the Commission noted in Advisory Opinion No. 2009-03:

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 Employee's salary account.

FOF No. 9.

The provision appears to allow city employees covered by the agreement to retain fees that are paid for serving as a witness in proceedings that involve or arise out of their city employment. The provision, therefore, is in apparent conflict with the Commission’s decision in Advisory Opinion No. 2009-3. As discussed above, under the analysis applied in the advisory opinion, a city employee is prohibited from retaining a witness fee whether he/she testifies or not, as long as the obligation to appear as a witness is part of the employee’s official duties (*i.e.*, because it involves or arises out of the employee’s city employment).

Thus, if the city follows its policy of treating excluded employees the same as their CBA counterparts, the question becomes: What controls, the CBA provisions allowing employees to keep fees for providing testimony as part of their official duties, or the city charter provision that prohibits them from retaining the witness fees? Under *State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter*, 83 Hawai`i 378, 927 P.2d 386 (1996) (hereinafter, “*SHOPO*”), the answer seems to be that the charter provision controls.

In *SHOPO*, the Hawai`i Supreme Court considered a provision in the CBA between the city and SHOPO that made certain disciplinary records of police officers confidential. This

provision was in conflict with the provisions of HRS Chapter 92F, which would treat the records as public records and therefore require their disclosure to the public. Among the issues the Supreme Court had to decide was whether the state law provisions superseded the conflicting CBA provisions. The Court held that, on public policy grounds, the state law controlled and that parties to a collective bargaining agreement cannot agree to negotiate away compliance with applicable state law provisions:

We . . . hold that a public employer is not free to bargain with respect to a proposal which would authorize a violation of a statute.

In the instant case, the confidentiality provision of the CBA purportedly requires the HPD to fail to perform its duty to disclose disciplinary records as mandated by HRS Chapter 92F, notwithstanding that the duty to provide access to government records is not discretionary under the UIPA. With respect to public records statutes, the virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure.

83 Hawai`i at 406, 927 P.2d at 414.

Several years ago, Corporation Counsel provided the Ethics Commission with an opinion that, under *SHOPO*, city charter provisions and ordinances control when they conflict with provisions in a CBA:

[W]e are of the position, based upon the analysis and ruling in *SHOPO*, 83 Hawai`i 378, 927 P.2d 386, that provisions of the SHOPO collective bargaining agreement that conflict with the City Charter and ordinance provisions on Conflict of Interest, RCH Section 11-102(e) and ROH Section 3-8.2(c), respectively, do not supercede the Charter provision and ordinance provisions.

Memorandum to Robin D. Liu, Chair, and Members of the Ethics Commission, dated May 10, 2002, from Diane T. Kawauchi, Deputy Corporation Counsel, regarding Conflict Between the Provisions of a Collective Bargaining Agreement and County Charter and Ordinances.<sup>4</sup>

Thus, under Corporation Counsel's interpretation of *SHOPO*, the witness fees provisions in the CBA would not be enforceable to the extent that they conflict with the provisions of RCH § 11-102(d). That means that [name] would not be able to retain a witness fee, even if there is a provision in a CBA that the city applies to her which provides otherwise.

## **V. Conclusion**

---

<sup>4</sup> The request for an opinion from Corporation Counsel resulted from a request for an advisory opinion that a reserve police officer had submitted to the Ethics Commission. The reserve police officer, who was also an attorney, requested an advisory opinion regarding the propriety, under RCH § 11-102(e), of his serving as legal counsel for a police officer in a grievance proceeding under the SHOPO CBA.

Under the Commission's analysis of RCH §11-102(d) in Advisory Opinion No. 2009-3 and the Corporation Counsel's opinion that conflicting provisions in CBA's cannot supersede the city charter's ethics provisions, an excluded employee such as [name] who testifies in a proceeding as part of her official duties is prohibited from retaining a witness fee provided in connection with her testimony.

As far as what Corporation Counsel should do with witness fees checks that [name] and other city employees and officers turn over, we do not believe that the ethics laws require any particular action. We note, however, that in Advisory Opinion No. 2009-3, we gave the employee the option of turning the money in to the city's general fund. Therefore, continuing the practice of sending the witness fees checks to the general fund is appropriate as far as the Ethics Commission is concerned.

DATED: November 3, 2009

/S/  
LEX SMITH, CHAIRPERSON  
Honolulu Ethics Commission