

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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MAYOR



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Advisory Opinion No. 2001-2 A

Your Request for Reconsideration of Advisory Opinion No. [number]

The Ethics Commission (Commission) received your Request for Reconsideration (Request) on [date].

The Request asks the Commission to reconsider Advisory Opinion No. [number] (Opinion). Because you do not specify what portion of the Opinion you seek modified, the Commission will treat the Request as one to vacate the Opinion. For the reasons discussed below, the Commission denies the Request.

I. Alleged violation of various ordinances and rules

A. Whether the request for advice sufficiently “set forth the pertinent facts”

You contend that the initial request for an opinion did not set forth sufficient facts upon which the Commission could base its opinion and that this is contrary to § 3-6.6(b), Revised Ordinances of Honolulu (ROH) (the request shall “set forth the pertinent facts”). However, the initial requestor’s letter stated three examples of potential conflicts of interest arising from issues that may involve you and your spouse's financial interest.

In addition, there is no obligation on the part of one who requests an opinion to state all facts relevant to a request. To require such investigation and notice would place more onerous requirements on a party coming before the Commission than that required in a civil court proceeding, contrary to the standard practice in administrative proceedings. See, Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 686, 619 P. 2d 95, 108 (1980).

B. Whether the Commission acted on an appointment

The Request also contends that the Commission did not have the authority to act on your appointment as []. The Commission never acted on your appointment because the requests for advice, and therefore the Commission’s review, focused on whether there were any conflicts of interest should you obtain your city position.

C. Whether the opinion was rendered on a timely basis

ROH § 3-6.5(d) states: “Within 30 days after a request for an opinion, or within 30 days after a hearing on any request shall have been concluded, whichever is later, the commission shall render its opinion in writing.” Because no hearing was requested in this case, you contend the Opinion had to be rendered within 30 days after the request for an opinion was received, or [date].

However, courts “do not always [give] mandatory effect to procedural provisions, though the language may be obligatory in form.” Perry v. Planning Commission of Hawaii County, *supra*, 62 Haw. at 675-76, 619 P.2d at 102. “Seemingly absolute time periods for administrative action . . . are often considered mere guides for the conduct of business with dispatch and orderly procedure.” *Id.* at 676, 619 P.2d at 103. As a general rule, “time periods are characterized as directory, unless time is of the essence of the act required, the [governing] statute contains negative language denying the exercise of authority beyond the period prescribed for action, or a disregard of the relevant provision would injuriously affect public interests or private rights.” *Id.* (Citations omitted); Cudal v. Sunn, 69 Haw. 336, 342, 742 P.2d 352, 355-56 (1987) and State v. Stamonte, 83 Haw. 507, 518, 928 P.2d 1, 12 (1996).

Similar to those in Perry v. Planning Commission of Hawaii County, the facts in this case demonstrate that a directory construction is appropriate. You lost no advantage and no right was destroyed by the time period running beyond 30 days. Your interests were represented by your attorney and others during the course of the case after [date]. No benefit to you or the public was sacrificed because of the timing of the Opinion. In fact, by further investigating the facts and analyzing the case, the Commission was able to better aid you in preventing unintended conflicts of interest.

Furthermore, there are several reasons why it is impractical, if not impossible, for the Commission to render a written opinion within 30 days of the date of the request. First, 30 days is insufficient time in which to follow the required procedures. ROH § 3-6.7(b) ensures that an officer or employee regarding whom an opinion is requested has 15 days in which to respond and ask for a hearing. When no hearing is requested, it is unrealistic to expect a volunteer Commission which traditionally meets about once each month to investigate, evaluate, deliberate and render a written opinion within the remaining 15 days.

Second, the law is unclear as to when an opinion must be issued. On one hand, ROH § 3-6.5(d) appears to require an opinion within 30 days if there is no hearing requested. On the other hand, ROH § 3-6.7(c) permits the Commission, in its discretion, to gather more information that could easily result in the opinion being rendered after the 30-day period. It is evident from the plain reading of ROH § 3-6.7(c) that the Council intended to permit the Commission discretion in determining when it had sufficient information upon which to render an opinion.

Given the conflict in the ordinances, the practical difficulty in meeting a 30-day deadline while also obtaining complete information, and the directory meaning of “shall” under the circumstances of this case, the Opinion is not invalid because it was rendered in [date] instead of [date].

D. Whether the Commission may make recommendations if no violation of the ethics laws is found

Although mentioned as a defect of the Opinion, this issue is not discussed within the Request. Presumably, the argument is that the Commission can only make recommendations to the appointing

authority if the officer or employee has breached the ethics law. This appears to be an overly narrow reading of the law. ROH § 3-6.5(e) reads:

After an opinion has been rendered, the commission shall notify the appointing authority of the officer or employee involved . . . of its decision and shall recommend appropriate disciplinary action against officers or employees found to have violated the standards of conduct established by the revised charter or by ordinance.

The Commission did not find you in violation of any ethics laws, but made recommendations to ensure your compliance with the standards of conduct. No disciplinary measures were recommended. There is nothing in the charter or ordinances that limits the Commission’s authority to render opinions that do not find violations but clarify what acts could be considered violations and make non-disciplinary recommendations consistent with its analysis. ROH § 3-6.3(b) mandates the Commission to render an opinion where conflicts of interest or other unethical conduct is alleged, whether or not violations are found. Furthermore, it is sound policy for the Commission to take the opportunity to clarify complex issues to prevent ethics violations.

II. Due Process

Generally, the Request contends that the process used by the Commission was unfair. First, it claims that the opinion contains “numerous erroneous findings...when none of these matters were referred to in the [initial request].” (Page 4, footnote and citations deleted.) You state that you were not given adequate notice of “the alleged unethical conduct” brought forth by the witnesses other than the initial requestor or given an opportunity to be heard on the issues. Id.

This argument is not persuasive. First, you waived your right to a hearing by not requesting one in your response letter of [date]. Second, after your initial appearance you were offered several opportunities to appear before the Commission, but declined. You also declined to respond to written questions from the Commission that focused on many of the topics of which you now claim you did not receive notice. The Commission cannot be faulted for your decision to withhold relevant information. Third, none of the witnesses alleged “unethical conduct” and the Commission found none. As a result, you have not been harmed by the Commission’s proceedings.

III. Alleged discrimination based on marital status

Next, you suggest that the Commission’s consideration of the fact that you are married constitutes discrimination in employment based upon marital status. One shortcoming of the discrimination contention is that the Commission took no action that resulted in any harm to you or your employment. The recommendations in the Opinion describe the process by which you should follow the the ethics laws and puts no greater burden on you than on any other city officer or employee. There is no no recommendation for discipline in the Opinion.

Assuming for argument's sake that the Opinion caused you some harm, you fail to analyze the statutory exceptions to discrimination claims. First, the Hawai'i anti-discrimination statute, Sec. 378-3, Hawai'i Revised Statutes (HRS), cited in the cases states that the law does not:

- (1) Repeal or affect any law, ordinance, or government rule having the force and effect of law;
- (2) Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of . . . employment; . . .

The Opinion considers the financial and personal relationship between spouses as one factor in determining the likelihood of conflicts of interest. This analysis is based upon ROH § 3-8.1, which defines a financial interest as “an interest held by an individual, the individual’s spouse, . . .” This definition is valid and non-discriminatory under HRS § 378-3(1) and (2).

IV. Concern that material evidence was not considered

You contend that the Commission failed to consider material evidence, such as that transmitted in your [date] letter explaining potential conflicts of interest and changed circumstances. Once again, you attempt to find fault with the Commission’s Opinion for your decision not to submit information or meet with the Commission to discuss issues. One of the cardinal conditions to a request for reconsideration is that the court or agency may only review information that could not have been presented during the course of the case. Sousaris v. Miller, 92 Haw. 505, 993 P.2d 539 (2000). You could have presented this information by answering the written questions or the Commission’s oral queries or by submitting it on your own.

V. Requested relief

For the foregoing reasons, the Commission denies the Request.

You also request that the Commission not publish the public version of the Opinion because the Opinion is erroneous and improper and “will cause irreparable harm to the right of privacy of affected individuals.” (Request, page 7.) You reason that confidentiality cannot be maintained in a public version of the Opinion because of the unique facts in this case.

This request is not appropriate to a motion or request for reconsideration because the Opinion did not address the issue of publication. Therefore, the Commission must deny this part of the Request. However, the Commission will allow you to raise the publication issue as described below.

Within 30 days from the date of this letter, you may request that the Commission not publish or modify the enclosed proposed public version of the Opinion. Your request should be accompanied by citation to the specific language in the proposed public version that you request be modified or withheld and be supported by factual and legal analysis. Your filing should include a discussion regarding the

extent of your reasonable expectation of privacy, and/or waiver thereof, in light of certain factors, such as:

[description of factors]

Should you have any questions regarding this matter, please call the Commission office at 527-5573.

Sincerely,

/S/

LOLINDA D. RAMOS, Chairperson
August 21, 2001

Enclosure